

Attorney-General  
Minister for Justice  
Minister for Corrections and Rehabilitation  
Minister for Workplace Safety and Consumer Affairs  
Minister for the Arts



Level 10 15 Murray Street HOBART TAS 7000 Australia  
GPO Box 123 HOBART TAS 7001 Australia  
Ph: +61 3 6165 7739  
Email [Minister.Archer@dpac.tas.gov.au](mailto:Minister.Archer@dpac.tas.gov.au)

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Committee Secretary  
Senate Legal and Constitutional Affairs References Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary

I provide this submission on behalf of the Tasmanian Government to the Legal and Constitutional Affairs References Committee's (the Committee's) Inquiry into current and proposed sexual consent laws in Australia.

As the Committee would be aware, save for particular Commonwealth offences, the states are solely responsible for their own sexual assault and other criminal laws.<sup>[1]</sup>

*The Standing Council of Attorneys-General Work Plan and Working Group*

As the Committee's Discussion Paper notes, in August 2022 the then Meeting of Attorneys-General, now the Standing Council of Attorneys-General (SCAG) endorsed the five-year *Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027* (the Work Plan).

Like all Australian jurisdictions, Tasmania is represented on an officials' level Working Group to advance the Work Plan. As part of this Work Plan, jurisdictions will seek to take collective and individual action to improve the experiences of victim-survivors of sexual assault in the criminal justice system. A priority area is strengthening legal frameworks to ensure victim-survivors have improved justice outcomes and protections, wherever necessary and appropriate, across Australia.

Of particular relevance to this Inquiry is Priority 1.1: *Review the criminal offences and legal definitions (including consent) relating to sexual offending in the context of the unique characteristics of each jurisdiction's legislative framework and criminal justice system and, if necessary, consider progressing and*

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<sup>[1]</sup> For instance, the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* Parts III – VI, 3 noted: "All Australian states and territories have a range of offences relevant to child sexual abuse. While there are some differences between them, they generally criminalise similar conduct. The differences between states and territories may seem anomalous but they reflect the fact that much of the criminal law in Australia that is relevant to child sexual abuse is regulated by the states and territories and not the Commonwealth. However, there are also Commonwealth child sexual abuse offences which are particularly relevant to online grooming".

implementing appropriate reforms. I note the timeframe for this is short to medium term (one to three years).

The Work Plan also notes significant relevant reforms made by jurisdictions across Australia in recent years, and an openness to review relevant criminal offences and legal definitions, such as those relating to consent, where these are not already agreed.

There is considerable overlap between the Terms of the Reference for the Committee's Inquiry and the work of the SCAG Working Group. Jurisdictions with legislative responsibility for sexual consent and related laws are heavily invested in the Working Group and I commend its Work Plan to the Committee.

#### The Tasmanian Government's Family and Sexual Violence Action Plan

Tasmania's Third Family and Sexual Violence Action Plan 2022-2027: Survivors at the Centre<sup>[2]</sup> (the Action Plan) is a coordinated, whole-of-government response to family and sexual violence.

Released in November 2022, it will be implemented through a coordinated and collaborative effort between Government agencies and non-government and community partners.

Action 30 is implementing legislative reform to strengthen legal responses to family and sexual violence. This continues Action 8 of our previous Action Plan. Other relevant actions include:

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18: providing legal assistance to people experiencing family and sexual violence;

19: strengthening the Victims of Crime Service;

20: perpetrator programs to support behaviour change and stop re-offending;

21: mandated behaviour change programs, e.g. for family violence orders; for sex offenders; and

22: strengthening specialist police prosecution.

#### Current Inquiry of potential relevance

The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (the Commission of Inquiry) was established in March 2021 under the Commissions of Inquiry Act 1995 (Tas). The Commission of Inquiry has been conducted independent of the Tasmanian Government and is the equivalent to a Royal Commission. The Commission of Inquiry's Final Report to the Government is due by 1 May 2023. The Terms of Reference are broad and ask the Commission of Inquiry to consider how the Tasmanian Government has responded to and what the Tasmanian Government should do to make various improvements regarding child sexual abuse in institutional contexts.

In doing so, the Commission of Inquiry is required to have regard to legal, policy, practice and system changes that have improved, over time, and government institutions' ability to better protect against and respond to child sexual abuse in institutional contexts. Some of the hearings' evidence from experts has included how Tasmanian consent and related provisions work.

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<sup>[2]</sup> <https://www.safefromviolence.tas.gov.au/our-plan/safe-homes,-families,-communities-governance>

Public hearings were conducted for nine weeks during May and September 2022.

### Tasmanian legislation

The Tasmanian Government is committed to strong and robust laws reflecting current best practice to protect victim-survivors and promote their effective participation in the criminal justice system, and to ensure that perpetrators are appropriately held to account. Below are examples in six recent Acts and two current bills introduced in Tasmania.<sup>[3]</sup>

Many of these respond to the recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse* in its Criminal Justice Report. In November 2022, our Government published its Fifth [and final] Annual Progress Report and Action Plan 2023<sup>[4]</sup> regarding implementation of those recommendations.

The *Family Violence Reforms Act 2018* amended the offence then called 'maintaining a sexual relationship...' to state that it is not necessary for each member of the jury to be satisfied that the requisite unlawful sexual acts were committed on the same three occasions. It also created a new crime of persistent family violence (which covers certain serious sexual offences).

The Evidence Amendment Act 2020 gave sexual crime victim-survivors the choice to allow the publication of their identity. It aligned Tasmania with approaches in some other states and still ensures privacy for those who do not wish to self-identify or cannot consent to doing so.

The Criminal Code Amendment (Sexual Abuse Terminology) Act 2020 removed outdated wording to ensure the gravity of sexual crimes against children is properly reflected, identified and recorded. Our Government conducted a thorough review of Tasmania's sexual crimes and undertook extensive analysis and consultation. Reforms included:

- amending the wording of "Maintaining a sexual relationship with a young person under the age of 17 years" to "Persistent sexual abuse of a child [or young person]";
- renaming Tasmania's *Criminal Code Act 1924* (the Criminal Code) chapter containing the majority of Tasmania's sex-related crimes from "Crimes Against Morality" to "Sexual Crimes"; and
- replacing references to "sexual intercourse" to "penetrative sexual abuse".

This did not affect offence elements or the substantial jurisprudence developed around them.

The Evidence (Children and Special Witnesses) Amendment Bill 2020 established a legislative framework for witness intermediaries in Tasmanian courts. A three-year pilot scheme commenced in March 2021, providing intermediary services to Tasmanian courts and police. It applies to alleged child victims and witnesses of sexual and homicide-related crimes and adults in those cohorts with a communication need. An evaluation framework is being developed but anecdotal evidence is that it has been well received.

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<sup>[3]</sup> Bills and related materials can be accessed at <https://www.parliament.tas.gov.au/Bills/MainBill.html>. For consequent Acts visit <https://www.legislation.tas.gov.au/browse/asmade>

<sup>[4]</sup> [https://www.justice.tas.gov.au/\\_\\_data/assets/pdf\\_file/0010/686800/Fifth-Annual-Report-and-Action-Plan-2023.pdf](https://www.justice.tas.gov.au/__data/assets/pdf_file/0010/686800/Fifth-Annual-Report-and-Action-Plan-2023.pdf)

The *Dangerous Criminals and High Risk Offenders Act 2021* updated the legislative framework for indefinite detention of dangerous criminals. It also created a second-tier scheme for post-sentence community supervision of high-risk serious sexual and violent offenders.

The Criminal Code Amendment Bill 2022 amended the Criminal Code definition of consent to make plain there is no "free agreement" if a person says or does anything to communicate that a condom must be used, and the other person intentionally does not use, tampers with, or removes it before or during sexual intercourse (known as 'stealthing').

The amendment also created a new standalone offence expressly criminalising non-fatal choking, suffocation or strangulation.

The Justice Miscellaneous (Royal Commission Amendments) Bill 2022, passed by the Tasmanian House of Assembly in November 2022 and currently before the Legislative Council, will, if passed:

- extend the ability to admit audio-visual recordings of police interviews as all/part of the evidence-in-chief of adult victims or special witnesses in sexual or family violence offence proceedings;
- amend the *Victims of Crime Assistance Act 1976* to remove the compensation claim application limitation period, including for child sexual abuse; and
- introduce the new crimes of 'Penetrative abuse of a child [or young person] by a person in authority' and 'failure to protect a child'.

The Sentencing Amendment (Mandatory Sentencing) Bill 2022, introduced into the House of Assembly in June 2022, would create mandatory minimum sentences for specified sexual offences against children in certain circumstances.

#### *Key aspects of Tasmania's definition of consent as it applies to sexual offending*

Tasmania has been a leader in affirmative consent models and other reforms. We believe current Tasmanian consent laws are working well (including what constitutes consent, communication of it, the excuse of mistaken belief as to the existence of consent for certain sexual offences, and jury directions).

Section 2A of the Criminal Code was introduced in 2004. It states "consent" means free agreement. A person does not freely agree to a sexual act without saying or doing something to communicate consent (section 2A(2)(a)). This requires some positive evidence of agreement. Consent is thus differentiated from submission, silence, passivity or a mere absence of dissent; it is evaluated according to standards of mutuality and reciprocity. Section 2A applies to the entire Criminal Code, not just the sexual offences chapter.

A non-exhaustive list of scenarios where free agreement is deemed to be absent is provided in section 2A(2). The Tasmania Law Reform Institute has commented:<sup>[5]</sup>

*A positive consent standard allows the prosecution to rely on an absence of affirmative signals of consent as evidence that the victim was not consenting..*

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[5] Tasmania Law Reform Institute, [Consensual Assault](https://www.utas.edu.au/__data/assets/pdf_file/0013/1102630/Consensual-Assault.pdf), Final Report No 25 (2018) 2.3.1-2.3.2. Available at: [https://www.utas.edu.au/\\_\\_data/assets/pdf\\_file/0013/1102630/Consensual-Assault.pdf](https://www.utas.edu.au/__data/assets/pdf_file/0013/1102630/Consensual-Assault.pdf)

...the insistence on affirmative consent has been particularly significant in the law of rape and sexual assault. Previously, proof of absence of consent relied on proof that the victim lacked the capacity to consent or that submission was procured by force, or by the fraud of the accused in a very restricted sense. In other circumstances, coerced sex went unpunished. Section 2A(2) of the Code confirms that consent is to be understood as a positive state of mind by setting out examples of situations where it is presumed there is no consent. Included in the list are the traditional, common law derived categories of force, fraud and mistake but these vitiating circumstances have been supplemented to reinforce and strengthen the notion of free agreement, and to ensure that 'absence of consent is not limited to cases where rational choice is impossible but is extended to circumstances where choice is affected in other ways.'<sup>[6]</sup> These might include where consent is induced as a result of a power imbalance in a relationship or where one party is economically dependent on the other.

The final sentence above reflects the legislative scenario where the person agrees or submits because he or she is overcome by the nature or position of another person (this might also include where the accused is a parent, employer or carer). Another is where the person is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required.

In sexual offence trials, absence of consent, when relevant, is a question of fact for the jury. However, it is not an element of several Tasmanian child sex offences. This means the prosecution does not have to prove absence of consent beyond reasonable doubt in order to convict (contrast this with rape - the Crown must prove it beyond reasonable doubt).

Examples are sections 124 ('Penetrative sexual abuse of child or young person under 17'), 125B ('Indecent act with child or young person under 17') and 127 ('Indecent assault, in so far as it relates to a complainant under 17') of the Criminal Code. In terms of proving them, consent is only relevant in the context of a limited 'similar age' defence (eg. a child 15 or older and an accused not more than five years older; a child 12 or older and an accused not more than three years older).

Section 335 of the Criminal Code lists offences open as alternative convictions to an indicted charge of rape. These include penetrative sexual abuse of a child or young person and indecent assault. This means that if a jury cannot be satisfied beyond reasonable doubt about lack of consent on a rape count, they can convict an accused of an alternative offence if its elements are made out.

Also relevant to consent (either directly or because if engaged, they may make consent a live issue) are two Criminal Code 'excuse' provisions which can relieve an accused of criminal culpability. The Criminal Code limits how these can apply to an accused person.

The first is section 14A - Mistake as to consent in [four] certain sexual offences.<sup>[7]</sup> The accused's mistaken belief must be honest and reasonable. The provision restricts this by deeming a belief to be neither honest nor reasonable if (1) the accused was in a state of self-induced intoxication and would not have made the mistake if not in that state, (2) was reckless as to consent, or (3) "did not take

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<sup>[6]</sup> Citing Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General).

<sup>[7]</sup> Sections 124 (Penetrative sexual abuse of child or young person), 125B (Indecent act with child or young person), 127 (Indecent assault) and 185 (rape). Consent is only relevant to sections 124, 125B and, insofar as the complainant is under 17, 127 if the 'similar age' defence and associated age difference range is applicable in the particular case.

reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain" consent.

The second is section 14B - Mistake as to age of victim in relation to certain sexual offences. This can be relevant to consent (it is limited to five child sexual offences).<sup>[8]</sup> An accused person may claim an honest and reasonable mistake as to age regarding a complainant who the accused mistakenly thought to be aged 13-16, so as to then seek to apply the 'similar age' defence present in those offence provisions. To do so, the accused would need to have been, at the time of the offence, of an age that placed him or her within the limited age difference range. However, section 14B can never apply if the complainant was actually under 13.

Further, section 14B(3) deems any mistaken belief to be neither honest nor reasonable if (1) the accused did not take all reasonable steps to ascertain the age of the person, or (2) was in a state of self-induced intoxication and would not have made the mistake if not in that state.

### Differences between jurisdictions

Given the unique characteristics of each jurisdiction's legislative framework, national consistency may not necessarily achieve the best outcomes, or be a realistic practical option.

Various law reform commissions have noted fundamental differences in the criminal law legislative frameworks across Australia. One key difference is whether a jurisdiction's criminal law is codified or remains guided by the common law.<sup>[9]</sup> That said, the Australian Law Reform Commission has supported a consistent statutory definition of consent, and consistent age of consent, across jurisdictions (25.84/1149).

There are also fundamental differences between jurisdictions in terms of penalty frameworks, such as system-wide maximum penalty schemes applying to all crimes, case law and sentencing Acts. These cover issues such as aggravating factors, use of pleas of guilty, sentencing multiple counts, mandatory sentencing and parole schemes.

Like most Tasmanian Criminal Code offences, sexual offences carry a maximum penalty of 21 years' imprisonment. The sentence is as the judge "shall think fit in the circumstances of each particular case" (Criminal Code, section 389(3)).

In terms of serious child sex offence sentencing, in November 2018 the Tasmanian Sentencing Advisory Council analysis<sup>[10]</sup> showed "a decided upward trend" in Supreme Court sentences and Court of Criminal Appeal indications signaling scope to impose longer sentences.

<sup>[8]</sup> Sections 124 (Penetrative sexual abuse of child or young person), 125B (Indecent act with child or young person), 125C (Procuring child or young person for sexual abuse), 125D (Communications with intent to procure child or young person) and 127 (Indecent assault – or attempts thereof).

<sup>[9]</sup> See, for instance, Australian Law Reform Commission (Report 114) and New South Wales Law Reform Commission (Report 128) 2010, *Family Violence – A National Legal Response* Vol. 1, 25.1-25.13, 25.25, 25.123-25.166 ([https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114\\_WholeReport.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114_WholeReport.pdf)); Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* Report No 78 (2020) 2.44-2.67, 4.126, 5.22 ([https://www.qld.gov.au/\\_\\_data/assets/pdf\\_file/0010/654958/qlrc-report-78-final-web.pdf](https://www.qld.gov.au/__data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf)); Law Reform Commission of Western Australia Project 113 *Sexual Offences Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact*, December 2022, 4.41 (<https://www.wa.gov.au/system/files/2022-12/LRC-Project-113-Discussion-Paper-Vol-1.pdf>).

<sup>[10]</sup> *Sentencing for Serious Sex Offences Against Children: Research Paper 3*, v. This built on 2015 and 2016 reports and compared 1 January 2015- 30 September 18 data with 1 January 2008 – 31 December 2014 data ([https://www.sentencingcouncil.tas.gov.au/\\_\\_data/assets/pdf\\_file/0009/453456/Accessible-version-Research-Paper-3-Sentencing-for-serious-sex-offences-against-children.pdf](https://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0009/453456/Accessible-version-Research-Paper-3-Sentencing-for-serious-sex-offences-against-children.pdf)).

These differences do not mean that outcomes across jurisdictions will necessarily vary or that one state's 'quality' of justice differs from another's.

It does mean that altering consent and sexual offence laws across jurisdictions in the pursuit of high-level national uniformity risks creating a different standard for those sexual offences as against the remainder of the criminal law in each home jurisdiction.

It is important to note that offence elements and definitions cannot be assessed in a vacuum. As described above, the consent and age requirements of sexual offences are intertwined with other fundamental parts of the law.

Taken together, the linkage of Tasmania's consent definition with the various offence and criminal responsibility provisions across the rest of the Criminal Code should ensure fair trials, limit the application of (inherently limited) potential legal defences by requiring assessment of the reasonableness of an accused's belief, and counter harmful, wrong stereotypes about consent, victim response and relational power dynamics. In appropriate circumstances, these aspects can protect young people from prosecution or conviction for freely-agreed sexual activity.

In Tasmania's case, this is achieved through (at minimum) the inter-relationship of provisions in Criminal Code Chapters I (Interpretation), IV (Criminal responsibility), XIV (Sexual crimes), XXXIX (Powers of conviction upon particular indictments) and XLIII (Punishments). These are required to work together not to create complexity, but to ensure that the Criminal Code operates holistically and reliably for all complainants and accused persons, in relation to all Tasmanian indictable criminal offences.

Finally, I would like to thank the Committee for conducting this important Inquiry. While I consider Tasmania's consent laws are among the best in the nation, we are always looking for ways to further strengthen our laws and ensure they remain contemporary and reflect best practice.

Thank you for considering the above. I trust this information assists the Committee in its deliberations, and I look forward to the Report.

Hon Elise Archer M  
**Attorney-General**  
**Minister for Justice**