

Our Ref:
Reply to: Hobart Office

Melinda Horan
Department of Police, Fire and Emergency Management
GPO Box 308
Hobart
Tasmania 7001

By email to [REDACTED] Redacted [REDACTED]

1 March 2024

Dear Ms Horan

Tasmania Legal Aid Submission: Community Protection (Offender Reporting) Amendment Bill 2023

TLA welcomes the opportunity to provide a submission to the Department of Tasmania Police on the draft *Community Protection (Offender Reporting) Amendment Bill 2023* (the Bill).

TLA also welcomes all opportunities to participate in stakeholder consultations on this and any future proposals to implement recommendations.

About Tasmania Legal Aid (TLA)

We are an independent statutory body established to sustainably provide legal services in Tasmania in an effective, efficient and economical manner.

TLA provides legal services to help Tasmanians understand their rights, navigate the system to resolve their legal issues, and get the assistance they need. We support and advocate for Tasmanians experiencing hardship, vulnerability and marginalisation and work with our clients, staff, service partners and community to improve the legal system.

We provide many services that involve children including providing legal representation for:

1. families in parenting disputes before the Federal Circuit and Family Court of Australia ('Family Law Courts') and in Child Safety matters in the Magistrates Court,
2. children as Independent Children's Lawyers in Family Law Court matters and as Separate Representatives in Child Safety matters in the Magistrates Court,

3. people affected by family violence through our Safe at Home and Family Advocacy and Support Services,
4. adults and children involved in criminal law matters in the Magistrates Court, the Supreme Court and the Youth Justice Court.

Aspects of the Bill that TLA supports

We consider that generally the aims of the Bill make positive changes to the existing legislation.

We emphasize that underlying policies, processes and compliance mechanisms to support the amendments are key to protecting the community in practice and must be implemented and funded adequately.

Our submission regarding the Bill

Family law proceedings

Issue:

There is currently no clear legislative requirement in the Bill for the Commissioner to provide information from the Register or information about who has recently been charged with reportable offence to Child Safety Services as the State agency responsible for the care and protection of at-risk children. Child Safety Services appear to have access to the Register as an entity prescribed in the Regulations, although it is unclear how this works and whether it would be sufficient to avoid problems arising in the case study described above.

In the context of family law proceedings and the safety of children, TLA welcomes changes to the law which provide for information disclosure about people around children, where those people may pose a risk of harm and there are appropriate checks and balances concerning the distribution of that information.

Risks potentially arise from people on the Register or charged with a reportable offence who:

- Live with a child;
- May be left unsupervised with a child; or
- Exercise any parental responsibility over a child.

Risk information may be shared:

- Proactively: on the initiative of the Commissioner or an agency with access to the Register and information about who has been charged with reportable offence, such as Tasmania Police or Child Safety; or
- Reactively: only in response to a request for information, and – perhaps even more restrictively – only in response to a subpoena process.

The reactive sharing of information is in our view insufficient to adequately safeguard children from sexual abuse.

Case study

Case study - deidentified

Frank was on the Register and in a relationship with Betty who was unaware of his registration status. Frank lived with Betty and Betty's young daughter, Mary. Betty and Mary were involved in Family Law proceedings with Mary's father, Liam, over a two-year period while living with Frank. Police investigating other offending found out that Frank was living with Betty and Mary. The information regarding Frank's registration status was not passed on to Child Safety Services by Police. Child Safety Services did not have direct access to the Register and could not act themselves or inform Betty, Liam or the Family Law Courts of the potential risk of sexual abuse of Mary.

His Honour Judge Turnbull in a decision in Division 2 of the Family Court on 21 December 2022 specifically referred this issue to the Commission of Inquiry and requested that it be considered whether Child Safety Services should have unfettered access to the Register, and whether Tasmania Police have adequate processes to ensure that Child Safety Services are immediately furnished with any and all information regarding children living with a person who is on the Register.

Recommendation: that consideration be given to ensuring proactive notification by the Commissioner to Child Safety Services of all new entries on the Register and that a process is implemented to monitor compliance.

Effective provision of information to Courts

There is currently no legislative requirement for or mechanism for the Commissioner to provide information from the Register directly to the Family Law Courts or Magistrates Courts in matters involving children.

TLA believes the amendments in the Bill will go some way to assist Courts to make decisions in the best interests of children, including considerations of safety. However, to be more effective the Bill should be amended to provide for proactive sharing of information from the Sex Offenders Register, and about people charged with reportable offences, with the Family Law Courts to facilitate parenting orders with full information about any alleged offenders, and with the Magistrates Court for safe orders for the care and protection of children under the *Children, Young Persons and Their Families Act 1997*.

Recommendation: Inclusion of an additional provision to permit and facilitate the direct sharing of information from the Commissioner to the Family Law Courts and Magistrates Courts.

Notifications to parents/guardians/carers

An additional issue in the above case study was that neither Tasmania Police nor the Commissioner informed either parent that the mother's new partner was listed on the Register.

Section 44C of the Act provides a discretion to disclose but we question whether it should be 'must' disclose with a possible exception for lower classes of offences. It is unclear why, given there is immunity from consequences why this notification provision is discretionary where protection of children is relevant.

We support the amendment to include parents etc. being able to apply for information but as above note the discretion element is concerning.

Recommendation: consideration be given to including an information sharing process that requires (both) parents, guardians and carers to be notified of relevant charges and entries onto the register.

Synergy with Commonwealth legislation

The expansion of information sharing contemplated by the Bill appears to support the aims of the *Commonwealth Family Law Amendment (Information Sharing) Act 1975* which will commence on 6 May 2024, promoting sharing information about risk of child abuse, neglect and family violence in family law matters.

Recommendation: the Bill be examined for consistency with the Commonwealth Act and that processes are linked between State and Commonwealth entities: for example, reciprocal Commonwealth and State provisions ensuring that Register information and information about people charged with reportable offences is requested and included in reports about risk from Tasmania Police and Child Safety Services to the Family Law Courts.

Information Sharing to address family violence needs to be shared with adults

Legislation and practices which address sexual offending are very important in the context of preventing and responding to family violence, because of the high frequency of sexually coercive behaviours and sexual offending in the context of family violence.¹

Many victims of family, domestic and sexual violence (FDSV) have children in their care and want to protect those children from being subjected or exposed to sexual offending or other forms of family violence, which may occur with the offenders' subsequent partners, and to themselves avoid problematic subsequent partners.

Historically, a criticism of the response to family violence overall was that it left the victim of the behaviour to take all the actions to reduce future risk, and a criticism of organisational

¹ For example: The 2021–22 PSS estimated 2.8 million Australians (14% of the population) experienced sexual violence (occurrence, attempt and/or threat of sexual assault) since the age of 15. It is estimated that of all Australian adults: 13% (2.5 million) had experienced sexual violence by a male; and 1.8% (353,000) had experienced sexual violence by a female (ABS 2023b). <https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary>

responses to FDSV was that a lack of proactive information-sharing specifically to address known risks led to more adults and children suffering harm.

Recommendation: The Bill should include better provisions for proactive information-sharing to protect adults at risk of family violence offending by people on the Register or charged with a reportable offence.

Notification of Offending

The current provisions of s15F of the Bill make it an offence for 'the person to whom that information is disclosed' to disclose the information to 'any other person' – we consider that this is too restrictive and may cause uncertainty, or issues, where the person needs to inform their manager to seek internal or external guidance as to how to manage the response or comply with employer obligations such as Workplace Health and Safety legislation.

Recommendation: consideration be given to amending the Bill to provide for disclosure to enable businesses and organisations to use information internally to manage and respond to notifications.

Community Protection Offender Register

We question whether sections 44D and 45 are phrased too widely. For example, a prescribed entity may have information which is on the Register, but was also obtained from another source. The drafting of the current section suggests that disclosure of any information would be an offence. Taken to an extreme, the person reporting's name would be on the Register: are entities then prohibited from using the person's name at all? A second question is whether the information ought be available in proceedings which include the protection of adults and children, such as proceedings for care and protection, proceedings under the *Family Law Act 1975*, and proceedings concerning Family Violence Orders and Restraint Orders.

Recommendation: consideration be given to amendments to address these questions.

Image-based abuse –include as relevant offending

We question whether the Act and Bill are sufficient to address the following issue that we are aware of.

At present, sections 13A, B and C of the *Police Offences Act 1935* are included as a Class 1 offence, specifically address the situation where a person takes images without consent of another person's genital area. However, in family violence situations it is more common for the images to have been taken with consent, but to then be distributed, or threats made to distribute, without consent.²

² Sometimes called 'revenge porn', or – more properly – image-based abuse: <https://www.esafety.gov.au/key-topics/image-based-abuse>

People who are threatened with or have distributed intimate images without consent could suffer similar harms to those who have the images taken without consent.

Some regard the behaviour as being caught by the stalking and bullying provisions of the *Criminal Code Act 1924*:

- (1) A person who, with intent to cause another person physical or mental harm, including self-harm, or extreme humiliation or to be apprehensive or fearful, pursues a course of conduct made up of one or more of the following actions:

...

(ea) making threats to the other person or a third person;

...

(f) sending offensive material to the other person or a third person or leaving offensive material where it is likely to be found by, given to or brought to the attention of the other person or a third person;

(g) publishing or transmitting offensive material by electronic or any other means in such a way that the offensive material is likely to be found by, or brought to the attention of, the other person or a third person;

(h) using the internet or any other form of electronic communication in a way that could reasonably be expected to cause the other person to be apprehensive or fearful;

...

(j) acting in another way that could reasonably be expected to cause the other person physical or mental harm, including self-harm, or extreme humiliation or to be apprehensive or fearful –

- (2) For the purposes of subsection (1) –

(a) a person pursues a course of conduct if the conduct is sustained or the conduct occurs on more than one occasion; and

(b) if the conduct occurs on more than one occasion, it is immaterial whether the actions that make up the conduct on one of those occasions are the same as, or different from, the actions that make up the conduct on another of those occasions.

- (3) A person who pursues a course of conduct of a kind referred to in subsection (1) and so causes another person physical or mental harm, including self-harm, or extreme humiliation or to be apprehensive or fearful is taken to have the requisite intent under that subsection if at the relevant time the person knew, or ought to have known, that pursuing the course of conduct would, or would be likely to, cause the other person physical or mental harm, including self-harm, or extreme humiliation or to be apprehensive or fearful.

The issues with the use of Stalking and Bullying to cover distribution of intimate images without consent are that these provisions require ‘a course of conduct’ – it is not clear whether sending/posting the images is a single act, or whether their continued ‘availability’ means it’s a course of conduct – and the perceived difficulty of commencing and sustaining prosecutions for Stalking and Bullying.

A solution may be to amend the *Police Offences Act 1935* to include a further subsection D, to create an offence of publishing these images without consent.

Recommendation: consideration be given to how these provisions can be framed so as to include the distribution without consent of genital images initially taken with consent.

Electronic Monitoring

It is noted that the Bill extends the circumstances in which Electronic Monitoring can be ordered. A cautionary note in this regard is that when considering Electronic Monitoring, attention should be paid to the specific circumstances of the offender, prospective victims, terrain and coverage to ensure that the monitoring will be able to address the risks identified. Electronic Monitoring is not suitable in all circumstances, nor does it address all risks.

In addition, there will need to be sufficient availability of devices and staff to apply, monitor, respond and remove them, considering the number of units currently available and the comparative risks and prioritisation of these and other offenders.

For these reasons, we cautiously support the inclusion of Electronic Monitoring, provided that it is underpinned by suitable policies, processes and sufficient resources.

Define 'personal relationship'

Section 16 of the Bill provides for an amendment of Section 17 of the Principal Act as follows:

- (a) by inserting the following paragraph after paragraph (da) in subsection (1):
 - (db) the relationship status of the reportable offender, including the name and address of any person with whom the reportable offender has a personal relationship, or is staying with for more than one night at any premises, and the names and ages of any children of that person;

Whilst it seems that the intention, when read in context of the section as a whole, is to capture intimate sexual relationships, this is not entirely clear. A personal relationship might be interpreted as a personal family connection, a close friendship or companionship without a sexual relationship. The ambiguity may lead to a reportable offender disclosing the name and address of any person they consider they have a personal relationship with.

The reference to 'personal relationship' may be intended in the Bill to have the same meaning as section 6 of the *Relationships Act 2003*:

- 6. Personal relationships
 - For the purposes of this Act, a personal relationship is –
 - (a) a significant relationship; or
 - (b) a caring relationship.

Relf so, it may assist clarity to say so in section 3 of the Act (Interpretation).

Recommendation - 'personal relationship' should be defined by the Bill as an amendment the interpretation section of the Act to avoid ambiguity. Personal Relationship is not currently used in the Act.

Ensuring offenders are aware of the end date for their reporting obligations

Section 23 of the Bill provides for the suspension and extension of reporting obligations.

A reportable offender's obligation to report is suspended if they are in custody. Subsection (2) of the Bill provides for an amendment in the following terms:

- (2) If obligations are suspended under subsection (1)(a) or (b), the period during which a reportable offender's reporting obligations continue is extended by the length of time that the reportable offender is in government custody or outside of Australia, respectively.

If a reportable offender is unaware that their obligations to report are extended by the length of time for which they are in custody or outside Australia, it may lead to an erroneous assumption on their part that their obligation to report has ceased when in fact it has not.

The complexity of working out a completion date can also be compounded by a reportable offender perhaps going into and out of custody a number of times: for example, a person may apply for bail and be successful, but subsequently breach bail or commit new offences and then be returned to custody, or be sentenced to a period of imprisonment.

It may be unclear to people for how long their reporting obligations are extended, as it is dependent on how long they spent in custody. We consider it unlikely that all reportable offenders would be able to accurately make this calculation unaided.

Recommendation: to consider that each time reporting obligations are suspended, the reportable offender must be served with a notice specifying the new, extended date for their reporting obligations.

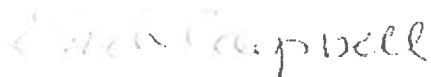
'Animosity' provisions

It is noted that the government made a commitment to redrafting the animosity provisions contained in section 34A and 34B of the Bill after it was released for public consultation.

TLA is interested to review the revised provisions when they have been redrafted.

Thank you again for the opportunity to comment on the draft Bill and TLA welcomes future opportunity for comment or consultations about further amendments or implementation.

Yours sincerely



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