

Joint Sessional Committee
Commission of Inquiry Scrutiny Committee
Via Email: coir@parliament.tas.gov.au

16 February 2025

Re: Call for Submissions: Matters related to the recommendations made in the Final Report of the Commission of Inquiry into the Tasmanian Government Response to Child Sexual Abuse in Institutional Settings

Dear Committee Members,

I write to provide a very brief response to the call for written Submissions into the implementation of the 191 recommendations made in the Final Report of the Commission of Inquiry (Col). This brief Submission does not address all the Terms of Reference (ToRs), nor all of the 191 recommendations, however, I believe my brief contribution does touch on several of the ToR's, and several of the Recommendations.

I write this Submission in my personal capacity as a Human Rights Consultant, following my retirement in August 2024 from my position of nearly 30 years, as the CEO of Women With Disabilities Australia (WWDA). I have extensive experience and expertise in human rights, particularly in relation to Australia's international human rights obligations. Whilst I retired from my role as CEO of WWDA in August 2024, I remain on a number of national Advisory Boards, including for e.g.: the Commonwealth Ombudsman's National OPCAT Advisory Group; the National Disability Insurance Scheme Quality & Safeguards Commission National Advisory Committee; and the Grattan Institute National Disability Reference Group. I have also provided independent consultancy services in the past to the Tasmanian NPM in relation to its OPCAT obligations, specifically assisting with the development of guidance materials.

This brief Submission addresses a number of issues in relation to the implementation, monitoring and transparent communications regarding the recommendations of the Col Final Report. Given the fact that I only became aware of the call for Submissions in the past few days, my Submission is therefore very brief, and addresses only a select number of issues. I appreciate being provided with a small extension of time to enable me to contribute this Submission for your consideration.

1. Australia's international human rights obligations

It is concerning that the Recommendations of the Final Report of the Commission of Inquiry (Col), do not incorporate Tasmania's obligations under the international human rights treaties to which it is a party. For example, Volume 1 of the Col Final Report '*Volume 1: Summary, recommendations and findings*' makes extensive references to the need for 'training', 'professional development', specialist knowledge acquisition

etc along with a number of recommendations in this context, across a number of government departments and other sectors.

For example, 'Volume 1: Summary, recommendations and findings', states:

*"We make a number of recommendations to ensure institutions provide training and ongoing professional development to their staff so they are equipped to respond to child sexual abuse and harmful sexual behaviours. For example, we recommend a mandatory training certification program for staff and volunteers working with children in schools, and that the Teachers Registration Board be empowered to set requirements for minimum training and professional development for teachers. We also recommend all Department of Health staff be subject to minimum professional development requirements on child sexual abuse, including grooming and professional boundary breaches."*¹

Australia is a signatory to seven core international human rights treaties.² As a party to these treaties, Australia has chosen to be bound by the treaty requirements and has an international obligation to implement the treaty provisions through its laws and policies. Together, the seven international human rights treaties to which Australia is a party – along with their Optional Protocols,³ General Comments,⁴ and recommendations adopted by the bodies monitoring their implementation – provide the framework to delineate the obligations and responsibilities of Governments and other duty-bearers to comprehensively promote the human rights of all persons, including, in the context of this Submission - children.

Critically, implementation of these treaties is not mutually exclusive. They are expected to be viewed and implemented as complementary mechanisms through which to create a holistic framework of rights protection and response for all children. In addition to these seven international human rights treaties, in 2009, Australia also formally endorsed the United Nations Declaration on the Rights of Indigenous Peoples - an international human rights instrument that sets a standard for the protection of Indigenous rights.⁵

The UN Convention on the Rights of the Child (CRC),⁶ was ratified by Australia in 1990, and entered into force into Australia on 16 January 1991. It sets out the specific ways that human rights apply to all children and young people up to the age of 18 years and requires States parties to ensure that all children within their jurisdiction enjoy all the rights enshrined in the Convention without discrimination of any kind. For example, Article 19 of the CRC makes it clear that:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 42 of the CRC explicitly states that:

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

In the context of the implementation of the Col recommendations, I also point the Committee to CRC Articles 25, 30, 34, 37, 39, 40.

Critically, any training and/or professional development of **any** personnel (whether staff or volunteers) involved in the care of children (in the context of the Col) should as a minimum, be required to complete an accredited mandatory training certification program on Australia's international human rights obligations as they pertain to children, specifically the UN Convention on the Rights of the Child.

In relation to children in detention (such as those in Ashley Youth Detention Centre (AYDC)), the juvenile justice system, and children in out-of-home care, it should be made a mandatory requirement that any and all personnel (not just front line workers) complete an accredited mandatory training certification program not only on the CRC, but also any such training should incorporate:

- CRC General comment No. 13 (2011) 'The right of the child to freedom from all forms of violence';⁷
- CRC General Comment No. 12 (2009) 'The right of the child to be heard'⁸
- the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁹
- the UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT);¹⁰
- the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)¹¹
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules').¹²

It is concerning that the Tasmanian Government's Progress Reports in relation to implementation of the Col recommendations, do not appear to include any information as to whether and/or how these international human rights treaties and standards to which Tasmania is a party, are being incorporated in the practical implementation of the recommendations.

It must be stated that operationalising these international human rights treaties and standards is not an optional exercise for the Tasmanian Government. As Australia is a party to these international human rights standards, it is incumbent on the Tasmanian Government (in the context of implementation of the Col recommendations) to understand its obligations are due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations.

2. Implementation of the Convention on the Rights of the Child (CRC)

In September 2019, the Committee on the Rights of the Child¹³ reviewed Australia's implementation of the Convention on the Rights of the Child. In its Concluding Observations of Australia,¹⁴ the Committee on the Rights of the Child expressed its regret that previous recommendations to Australia had not been implemented. In relation to the administration of child justice, the Committee expressed its serious concern about the very low age of criminal responsibility; the enduring overrepresentation of Indigenous children and their parents and carers in the justice system; the continuing overrepresentation of children with

disability in the justice system; children in detention subjected to verbal abuse and racist remarks, deliberately denied access to water, restrained in ways that are potentially dangerous and excessively subjected to isolation; the high number of children in detention, both on remand and after sentencing; children in detention not being separated from adults; the continuing existence of mandatory minimum sentences applicable to children in the Northern Territory and Western Australia; and children's lack of awareness about their rights and how to report abuses.

In relation to family environment and alternative care, the Committee was seriously concerned about the fact that, despite 25 enquiries conducted since 2012, the child protection systems still do not have sufficient human, technical and financial resources and are still unable to provide adequate professional support to children. The Committee noted that this results in: an excessive reliance on the police and the criminal justice system when dealing with children's behavioural problems and an insufficient reliance on appropriate therapeutic services; badly trained and poorly supported staff; and children of different ages, experiences and backgrounds, in particular child offenders and child victims of abuse, being placed together. The Committee further expressed concern about the persistently high number of children in alternative care; the continuing overrepresentation of Indigenous children in alternative care, often outside their communities; children with disability being more at risk of maltreatment in institutions; children in alternative care having limited access to mental health and therapeutic services.

The Committee recommended that Australia bring its child justice system fully into line with the Convention by: raising the minimum age of criminal responsibility to an upper age of 14 years; immediately implement the 2018 recommendations of the Australian Law Reform Commission to reduce the high rate of incarceration among Indigenous peoples; explicitly prohibit the use of isolation and force, including physical restraints, as a means of coercion or to discipline children under supervision, promptly investigate all cases of abuse and maltreatment of children in detention and adequately sanction the perpetrators; actively promote non-judicial measures, such as diversion, mediation and counselling, and wherever possible, the use of non-custodial sentences such as probation or community service; if detention is unavoidable, ensure that children are detained in separate facilities; repeal mandatory minimum sentences for children in the Northern Territory and Western Australia; ensure that children with disability are not detained indefinitely without conviction and that their detention undergoes regular judicial review; and provide children in conflict with the law with information about their rights and how to report abuses.

The Committee also recalled its previous recommendations, urging Australia to: strongly invest in measures to prevent removal of children from their families; to limit removal, when it is deemed necessary, to the shortest time possible; and to ensure that children, their families and communities participate in decision-making in order to guarantee an individualised and community-sensitive approach; ensure adequate human, technical and financial resources to child protection services and proper training to those working with and for children in alternative care; enhance preventive measures in order to avoid children drifting from care into crime; strongly invest in measures developed and implemented by Indigenous children and communities to prevent their placement in out-of-home care, provide them with adequate support while in alternative care and facilitate their reintegration into their families and communities; provide adequate training to child protection carers on the rights and needs of children with disability to prevent their maltreatment and abuse; and ensure that children in alternative care have access to the mental health and therapeutic services necessary for healing and rehabilitation.

Further, the Committee recommended that Australia strengthen its measures to raise awareness of the harmful effects of child marriage on the physical well-being and mental health of girls; and to enact legislation explicitly prohibiting coerced sterilisation of all children or unnecessary medical or surgical

treatment, guaranteeing the bodily integrity and autonomy of intersex children and providing adequate support and counselling to families of intersex children.

Concluding Observations and recommendations from the UN treaty body monitoring Committees, constitute an authoritative guide for legislative, policy, program and service development, and are an important accountability mechanism. States Parties are expected to implement the recommendations, in order to fulfil their obligations under the particular human rights treaty and also to accelerate its implementation. It is recognised that a States Parties domestic laws and policies to implement a treaty's provisions "*should not depart from the views and recommendations of United Nations committees and officials without sound and compelling policy reasons*".¹⁵

3. Tasmania's implementation of UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

It is critical to note here, that the right to be free from torture and ill-treatment is one of the few absolute and non-derogable human rights, a matter of *jus cogens*,¹⁶ a peremptory norm of customary international law, and as such is binding on all States, irrespective of whether they have ratified specific treaties.¹⁷ A State cannot justify its non-compliance with the absolute prohibition of torture, under any circumstances.

Recommendation 12.39 of the Col Final Report states that the Tasmanian Government should:

- a) *appoint the Commission for Children and Young People (Recommendation 18.6) as an additional National Preventive Mechanism under the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), with expertise in child rights, child trauma, the prevention and identification of child abuse, the needs of Aboriginal children and young people and the needs of children and young people with disability, and with power to inspect places where children and young people are detained*
- b) *resource Tasmanian National Preventive Mechanisms sufficiently to allow them to effectively fulfil their functions under OPCAT.*

Whilst Tasmania is to be commended for establishing its National Preventive Mechanism (NPM) and enacting the OPCAT Implementation Act 2021 (Tas), it is deeply concerning that the Tasmanian Government has not, and does not intend to, adequately resource the Tasmanian NPM to enable it to fulfill even its most basic obligations.

The OPCAT mandate is deliberately broad, incorporating any setting or space where a person is deprived of their liberty. This mandate therefore includes many settings in Tasmania, including (for e.g.), but not restricted to: prisons; detention centres; aged care homes (including dementia wards and settings); disability settings (such as group homes, respite centres, day care facilities, and other closed settings); hospitals, and other facilities. One of the most important functions of an NPM is **prevention** of torture and other cruel, inhuman or degrading treatment or punishment.

The Tasmanian Government has already had to provide compensation to victims survivors of Ashley Youth Detention Centre (AYDC) to the tune of \$75 million. This successful class action alone should demonstrate the critical need for the Tasmanian NPM to be properly resourced to undertake its mandate. Without a well-resourced NPM it is conceivable that further class actions could arise in the future. Prevention of all forms of mistreatment, protection of human rights, implementation of Tasmania's human rights obligations (under the international human rights treaties to which it is a party) are urgent. A lack of resources cannot

be used as a reason for the Tasmanian government to abdicate its responsibilities under the human rights instruments to which it is a party. All jurisdictions have budgetary constraints -this is hardly a revelation nor unique to Tasmania. However, governments of the day have the ability to prioritise where and how resources are allocated.

In November 2024, the Tasmanian NPM published its Annual Report 'Preventing torture and ill-treatment in Tasmania'.¹⁸ This comprehensive report makes 12 recommendations to the Tasmanian Government, to successfully advance the implementation of the Tasmanian NPM and ensure appropriate Parliamentary scrutiny of its activities. Recommendation 10 specifically reflects the broad mandate of OPCAT and the NPM by acknowledging the need to include disability and aged care settings in its work. For example, Recommendation 10 states:

That the Tasmanian NPM be appropriately resourced to exercise its functions at disability support and aged residential care places of deprivation of liberty assessed as having a heightened risk of torture or ill-treatment.

The Report provides a very detailed, costed budget over four financial years, based on the 12 recommendations provided in the report (including for e.g.: Recommendation 4: *That the Commissioner for Children and Young People and the Custodial Inspector be specifically resourced to contribute to the delivery of the Tasmanian NPM*). The total proposed budget in the Report identifies the funding required for the Tasmanian NPM to give effect to its mandate. It also gives effect to Recommendation 12.39 of the *Col Final Report*; and Recommendations 8.2, 11.7, 11.11, 11.16 of the *Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*.¹⁹ The proposed budget in the Tasmanian NPM Annual Report is around \$4 million per annum.

It is therefore deeply concerning that the Tasmanian Government has only allocated **\$300,000** per year for the entirety of the work of the Tasmanian NPM. This \$300,000 per annum is inclusive of staff.

For the Tasmanian Government to provide only \$300,000 per annum for the totality of the Tasmanian NPM, sends a very concerning message. Tasmanians have a right to be concerned that the current Government appears to be prioritising sporting infrastructure (for example) over the prevention of torture and/or ill-treatment of some of our most excluded and marginalised persons.

In this context, I strongly urge the Committee to recommend that the Tasmanian Government provide additional resourcing to the Tasmanian NPM as a matter of urgency.

In closing, I thank you for providing me with the opportunity to contribute to this important Commission of Inquiry Scrutiny Committee process.

Please contact me via phone on 0497 354 678 if you require any further information.

With kind regards

A handwritten signature in black ink, appearing to be 'G. F.', followed by a long horizontal line that ends in a small upward hook.

Carolyn Frohmader

Finalist, 100 Women of Influence Awards 2015
Australian Human Rights Award (Individual) 2013
State Finalist Australian of the Year 2010 (Tas)
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¹ Col Final Report 'Volume 1: Summary, recommendations and findings' P19.

² Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 13 March 1976); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 2 (entered into force 3 January 1976); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

³ Human rights treaties are often followed by "Optional Protocols" which may either provide for procedures with regard to the treaty or address a substantive area related to the treaty. Optional Protocols to human rights treaties are treaties in their own right, and are open to signature, accession or ratification by countries who are party to the main treaty. Optional protocols include an inquiry procedure, as well as a complaints procedure. An inquiry procedure enables the treaty body to conduct inquiries into serious and systematic abuses of human rights in countries that become States parties to the Optional Protocol. This allows widespread violations to be investigated where individuals or groups may be unable to make communications (for practical reasons or because of fear of reprisals) and is important where individual communications fail to reflect the systemic nature of widespread violations of human rights.

⁴ See 'Human Rights Treaty Bodies - General Comments', Office of the High Commissioner of Human Rights (Web Page) <<https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx>>. The Committees publish their interpretation of the content of human rights provisions, known as General Comments, on thematic issues or methods of work. These cover a wide range of subjects, from the comprehensive interpretation of substantive provisions, such as the right to life or the right to adequate food, to general guidance on the information that should be submitted in State reports relating to specific articles of the treaties.

⁵ <https://www.ohchr.org/en/indigenous-peoples/un-declaration-rights-indigenous-peoples>

⁶ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

⁷ <https://www.refworld.org/legal/general/crc/2011/en/82269>

⁸ <https://www.refworld.org/legal/general/crc/2009/en/70207>

⁹ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>

¹⁰ <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-against-torture-and-other-cruel>

¹¹ https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-book.pdf

¹² <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/beijingrules.pdf>

¹³ <https://www.ohchr.org/en/treaty-bodies/crc>

¹⁴ Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Australia, 1 November 2019, UN Doc. CRC/C/AUS/CO/5-6.

¹⁵ Emeritus Professor Ivan Shearer, cited in The Senate Community Affairs References Committee (July 2013) Involuntary or coerced sterilisation of people with disabilities in Australia; Commonwealth of Australia.

¹⁶ "Jus cogens, the literal meaning of which is "compelling law," is the technical term given to those norms of general international law that are argued as hierarchically superior. These are a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances. The doctrine of international jus cogens was developed under a strong influence of natural law concepts, which maintain that states cannot be absolutely free in establishing their contractual relations. States were obliged to respect certain fundamental principles deeply rooted in the international community. The power of a state to make treaties is subdued when it confronts a super- customary norm of jus cogens. In other words, jus cogens are rules, which correspond to the fundamental norm of international public policy and in which cannot be altered unless a subsequent norm of the same standard is established. This means that the position of the rules of jus cogens is hierarchically superior compared to other ordinary rules of international law." Taken from: Hossain, K. (2005) The concept of Jus cogens and the obligation under the UN charter. Santa Clara Journal of International Law, Vol. 3, pp.72-98. as detailed in Prosecutor v. Furundzija "The jus cogens nature of the prohibition against torture

articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. States are obliged not only to prohibit and punish torture, but also prevent its occurrence and consequently, are bound to put in place all those measures that may pre-empt the perpetration of torture. See: international human rights law not only prohibits torture (as well as any inhuman and degrading treatment) but also prohibits (a) the failure to adopt the national measures necessary for implementing the prohibition and (b) the maintenance in force or passage of laws which are contrary to the prohibition. See international criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija*, case iT- 95-17/1-T; Judgement, 10 December 1998.

¹⁷ Méndez, Juan. e, (2013) Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN General Assembly; UN.Doc a/hrc/22/53; See also: Sifris, r. (2010) Conceptualising involuntary Sterilisation as 'Severe Pain or Suffering for the Purposes of Torture discourse. Netherlands Quarterly of Human Rights, Vol.28/4, pp.523-547.

¹⁸ Preventing torture and ill-treatment in Tasmania: Supplementary report to the Tasmanian Government focusing on health and social care and update on the implementation of the Tasmanian National Preventive Mechanism under the OPCAT Implementation Act 2021; 2024 Annual Report.

¹⁹ <https://disability.royalcommission.gov.au/publications/final-report>