COMMUNITY
LEGAL CENTRES
TASMANIA

1 May 2023

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001
attn: Acting Director, Strategic Legislation and Policy

***via email:*** haveyoursay@justice.tas.gov.au

To Bruce Paterson,
**Re: *Justice and Related Legislation (Further Miscellaneous Amendments) Bill 2023***

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to respond to the *Justice and Related Legislation (Further Miscellaneous Amendments) Bill 2023* ('the Bill').[1] Our submission is limited to the proposed amendments to the *Criminal Code Act 1924* (Tas), the *Dangerous Criminals and High Risk Offenders Act 2021* (Tas) and the *Ombudsman Act 1978* (Tas).

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

***Criminal Code Act 1924* (Tas)**
As the Act currently stands, parties to a trial in the Supreme Court must apply for a trial within three months of being committed to trial:

> ***361AA. Trial by judge alone***
> *(1) Despite section 361, a party to proceedings in respect of a crime may apply to the court for an order to have the trial in respect of the crime be determined by a single judge in place of a trial by jury.*
> *(2) An application for an order under subsection (1) in respect of a crime –*
> *(a) may only be made within the 3-month period immediately after the accused person, in respect of the crime, has been committed to trial for the crime; and*
> ...

The proposed amendment (set out below) is welcomed because it provides the parties with more time to make a decision about a judge alone trial:

[1] CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our submission.

*(2) An application for an order under subsection (1) in respect of a crime –*
*may only be made within the 3-month period immediately after the accused person, in respect of the crime, has ~~been committed to trial for the crime~~ first appeared before the Supreme Court in respect of the crime; and*

However, requiring a decision about a judge alone trial to be made within three months of the accused having first appeared before the Supreme Court continues to place unnecessary pressures on both the prosecution and the defence. In many cases, the prosecution's brief of evidence may not be finalised and as a result an accused may not fully understand the case against them. As well, in cases involving a co-accused there may not be consensus amongst the parties of trial by judge alone.

We also note the significant delays in Tasmania's Supreme Court. For example, according to the most recent *Report on Government Services*, Tasmania has the second highest percentage of criminal cases not finalised within twelve months of any Supreme Court in Australia, as well as the largest number of criminal cases not finalised within two years of any jurisdiction in Australia.[2] As Alan Blow, the Chief Justice of the Supreme Court has observed "the backlog problem remains very serious".[3]

Finally, we would note that there have only been two reported decisions in the Supreme Court in which a successful application for a judge alone trial was heard. Both cases relied on psychiatric evidence and were ultimately concerned with the accused's mental state.[4] Anecdotally, we are aware that specialist psychiatric reports for Supreme Court trials are difficult to obtain and psychiatrists are not readily available to provide evidence under oath.

For all of these reasons, we strongly recommend the adoption of the New South Wales model which provides that the parties must make an application to be tried "not less than 28 days before the date fixed for the trial".[5] We strongly believe that adoption of the NSW model will provide the parties with greater flexibility as to when the decision is made but at the same time minimise the risk of the parties applying for a judge-alone trial once the identity of the trial judge is known.

***Dangerous Criminals and High Risk Offenders Act 2021* (Tas)**

Currently, the Director of Public Prosecutions is able to apply to the Supreme Court for an order that a person is a High Risk Offender. When an application is made, the Supreme Court may order that a report prepared by a psychiatrist, psychologist or medical practitioner is required. Given the disproportionately high number of persons with

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[2] According to the most recent Productivity Commission report, 44 per cent of all criminal cases in the Tasmanian Supreme Court are not finalised within 12 months. The percentages in other Australian jurisdictions range from 49.4 per cent in Western Australia to 10.6 per cent in Queensland: Productivity Commission, *Report on Government Services 2022*, Table 7A.20. As found at https://www.pc.gov.au/ongoing/report-on-government-services/2022/justice/courts (accessed 27 April 2023).

[3] Supreme Court of Tasmania, Annual Report 2021-22 at 2.

[4] *Tasmania v Smyth* [2022] TASSC 50; *Tasmania v Lang* [2022] TASSC 61.

[5] Section 132A of the *Criminal Procedure Act 1986* (NSW).

cognitive and/or psychiatric impairment in prison[6] and the concomitant increased risk of indefinite detention, it is imperative that comprehensive medical, psychiatric and psychological evaluations are carried out and provided to the Supreme Court before an order is made declaring a person a High Risk Offender. We therefore strongly recommend that the Supreme Court 'must' rather than 'may' order a report prepared by a psychiatrist, psychologist or medical practitioner.

We are also concerned that the Supreme Court is only required to consider the risk of re-offending and the willingness and degree of engagement undertaken by the person in the preparation of the report:

> ***36. Matters to be considered in determining whether to make HRO order***
> *(1) The safety of the community must be the paramount consideration of the Supreme Court in determining whether or not to make an HRO order in relation to an offender.*
> *(2) In determining whether or not to make an HRO order in relation to an offender, the Supreme Court must have regard to the following matters:*
> ...
> *(b) the report, provided to the Court, of any other assessment prepared by a psychiatrist, psychologist or medical practitioner as to –*
>
> *(i) the likelihood of the offender committing a further serious offence; and*
>
> *(ii) the willingness of the offender to participate in any such assessment; and*
>
> *(iii) the level of the offender's participation in the assessment;*

No-one should be imprisoned indefinitely. At a minimum, as well as the factors noted above, the author of the assessment report should be required to address whether there are less restrictive options -including the identification of appropriate supports in the community- that could be imposed instead of indefinite detention.

***Ombudsman Act 1978* (Tas)**

Section 20A(1) of the Act provides that the Ombudsman may make preliminary inquiries in the consideration of a complaint:

> ***20A Ombudsman may make preliminary inquiries***
> *(1) The Ombudsman may make any preliminary inquiries that he or she considers necessary for the purpose of ascertaining if a complaint should be investigated.*
> ...

The proposed amendment will clarify that the Ombudsman may conduct preliminary inquiries both for the purposes of a complaint and an own motion matter:

> *(1) The Ombudsman may make any preliminary inquiries that he or she considers necessary for the purpose of ascertaining if an investigation should be carried out on the Ombudsman's own motion or a complaint should be investigated.*

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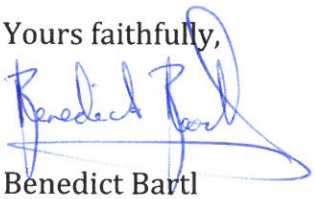
[6] See for example, New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion* (Report No. 135) at xvi.

We support the proposed amendment because it will broaden the powers of the Ombudsman. Rather than being reliant on an individual or body aggrieved by an administrative action making a complaint to the Ombudsman[7] the proposed amendment will allow the Ombudsman to undertake preliminary inquiries into an own motion. However, preliminary inquiries may lead to the Ombudsman determining that having regard to all the circumstances of the case, the continuation of the investigation is unnecessary or unjustifiable. We therefore recommend that section 21 of the Act is also broadened to allow the Ombudsman to discontinue an own motion investigation after making preliminary inquiries.

If you have any queries, or would like to discuss our submission further, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer
**Community Legal Centres Tasmania**

[7] Section 14 of the *Ombudsman Act 1978* (Tas).