

COMMUNITY LEGAL CENTRES TASMANIA

6 November 2018

Review of the Judicial Review Act 2000 (Tas)
Tasmanian Law Reform Institute
Private Bag 89
HOBART TAS 7001
attn: Dylan Richards

via email: law.reform@utas.edu.au

Dear Dylan,

Re: Review of the Judicial Review Act 2000 (Tas) Issue Paper

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the Tasmania Law Reform Institute's Review of the *Judicial Review Act 2000* (Tas) Issues Paper.

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.

Our submission focuses on Part 5 of the Issues Paper, and in particular the issue of decisions made under an enactment. We strongly believe that the scope of judicial review should be broadened to encapsulate the nature of the decision rather than be limited to the legal source of the power.

- ***The failings of judicial review***

The intent of the *Judicial Review Act 2000* (Tas) (the JRA) is to ensure consistency in government decision-making and the accountability of officials and others exercising decision-making powers. However, the ability of statutory judicial review to oversee government decision-making has been eroded through common law jurisprudence¹ and societal change including the significant outsourcing of work to private and not-for-profit organisations to deliver core government services.

This transfer of government power means that private bodies are involved in decision-making that involves the exercise of public powers and functions and

¹ *Griffith University v Tang* (2005) 221 CLR 99.

which significantly affect individuals' rights and interests but where there is no recourse to judicial review. Additionally, many decisions are authorised by sources other than statute – for instance, contract law or 'soft' law instruments such as guidelines and policies, which are not subject to judicial review. As a result, consumers or recipients of the service or benefit are disadvantaged with no contractual remedy available if the service provider treats them unfairly or wrongly denies them the service or benefit. As the Issues Paper observes, some Tasmanian examples of the current failings of judicial review include:

- The Full Court of the Supreme Court's decision that public housing tenants are unable to challenge their arbitrary eviction even in circumstances where it will lead to homelessness for themselves and their families;² and
- A Supreme Court decision that persons charged with serious indictable offences are incapable of choosing their own defence lawyer.³

- ***Reinvigorating Judicial Review***

It is a matter of fact that the High Court's decision in *Griffith University v Tang*⁴ has significantly impacted on the ability of individuals to hold government decision-makers and those exercising public functions to account. As Porter J in the Full Court of the Supreme Court of Tasmania decision of *King v Director of Housing*⁵ noted in *obiter dictum*, the plurality's decision in *Tang* 'may be unduly restrictive and impose limits on statutory judicial review'.⁶

We strongly believe that rather than focusing on the source of the power the legal test should focus on whether the powers or functions being exercised can be seen as having a public function.⁷ In our opinion, if the public function test was adopted in Tasmania it would allow for review of decisions made pursuant to legislation but would also permit review of decisions where it was considered that there was a public duty or public power being exercised.

An excellent example of the importance of broadening the test to include a public function is Tasmania's more than 13,450 social housing properties.⁸ Currently, the residents of these properties are exempt from seeking judicial review even when

² *King v Director of Housing* [2013] TASFC 9.

³ *Smillie v Legal Aid Commission of Tasmania* [2014] TASSC 19.

⁴ *Griffith University v Tang* (2005) 221 CLR 99 at 133 per Kirby J.

⁵ *King v Director of Housing* [2013] TASFC 9.

⁶ *King v Director of Housing* [2013] TASFC 9 at para. 65.

⁷ *R v Panel on Take-Overs and Mergers; Ex parte Datafin plc* [1987] QB 815 at 836 per Donaldson MR; at 847 per Lloyd LJ.

⁸ In Tasmania the State Government currently provides 7,166 public housing properties. There are also 6,076 community housing properties managed by organisations such as Centacare Evolve, Housing Choices Tasmania, Community Housing Ltd and Mission Australia. Finally, there are 298 homes provided through Indigenous Housing. As found at Shelter Tasmania, What is social housing? As found at <http://www.shelertas.org.au/community-housing/social-housing-in-tasmania/> (Accessed 1 November 2018).

they have been served a 'no grounds' eviction and are being evicted into homelessness.⁹

Some guidance on the likely breadth of a public function test is highlighted in Victoria's *Charter of Human Rights and Responsibilities Act 2006* (the Charter) which requires public authorities to give proper consideration to, and act compatibly with, the human rights set out in the Charter. Relevantly, the Charter defines public authorities as including entities whose "functions are or include functions of a public nature".¹⁰ Section 4(2) of the Charter then goes on to list a non-exhaustive list of factors that may establish whether the function is of a public nature:¹¹

In determining if a function is of a public nature the factors that may be taken into account include

- (a) that the function is conferred on the entity by or under a statutory provision;
- (b) that the function is connected to or generally identified with functions of government;
- (c) that the function is of a regulatory nature;
- (d) that the entity is publicly funded to perform the function;
- (e) that the entity that performs the function is a company (within the meaning of the *Corporations Act*) all of the shares in which are held by or on behalf of the State.

This non-exhaustive list of public nature functions has ensured that the reach of Victoria's Charter extends to private or not-for-profit bodies such as community housing providers.¹²

In summary, we strongly recommend JRA reform so that the scope of judicial review is not limited to the legal source of the power but rather is broadened to encapsulate the nature of the decision.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl

Policy Officer

Community Legal Centres Tasmania

⁹ *King v Director of Housing* [2013] TASFC 9.

¹⁰ Section 4 of the *Charter of Human Rights and Responsibilities Act 2006* also lists a number of public authorities as being bound by the Charter including public officials, entities established by statute with public functions, Victoria Police, local Councils, Ministers, courts and tribunals and members of Parliamentary Committees when acting in an administrative capacity.

¹¹ Also see section 40A of the *Human Rights Act 2004 (ACT)*.

¹² *Goode v Common Equity Housing Limited (Human Rights)* [2016] VCAT 93.