

COMMUNITY LEGAL CENTRES TASMANIA

29 May 2020

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001
attn: Senior Projects Officer

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

To Bradley Wagg,

Re: *Tasmanian Civil and Administrative Tribunal Bill 2020*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment to the Tasmanian Government on the *Tasmanian Civil and Administrative Tribunal Bill 2020* ('the Bill').¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located through 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.

We are supportive of the Tasmanian Government's intention to introduce a Tasmanian Civil and Administrative Tribunal (TasCAT) that encompasses many of the existing Tribunals and Boards operating in Tasmania. In our opinion, the establishment of TasCAT has the potential to improve access to justice, expediate hearings and ensure cost efficiencies for both the Government and parties to the proceedings.²

Importantly, we have no issues with the Bill and its focus on the establishment of TasCAT and the process by which members and staff are appointed. We are also pleased that future Bills will address costs, diversity proceedings and alternative dispute resolution. However, one significant issue that we want to raise with you at this early stage is the expansion of TasCAT's jurisdiction.

¹ CLC Tas would like to acknowledge Bridget Wallbank who assisted in the preparation of this response.

² See, for example clause 10 of the *Tasmanian Civil and Administrative Tribunal Bill 2020*.

- **Clarifying the jurisdiction of TasCAT**

The recent High Court decision of *Burns v Corbett*³ has significant ramifications for the jurisdiction of TasCAT, because of the limits it places on the power of State Tribunals across Australia. The effect of the decision is that without enshrining appropriate safeguards, TasCAT will be unable to exercise judicial power in relation to federal matters involving residents of different States, the Commonwealth, and the State of Tasmania and a resident of another State.

By way of background, Gary Burns who resided in New South Wales filed complaints against two Queensland residents with the Anti-Discrimination Board of New South Wales. The complaints were founded on allegations by Mr Burns that each respondent had made statements which vilified homosexual's contrary to the *Anti-Discrimination Act 1977* (NSW).⁴ The respondents argued that the New South Wales Civil and Administrative Tribunal (NCAT) did not have jurisdiction to determine the disputes.

The matter was ultimately heard by the High Court which held that NCAT could not hear and determine disputes arising between residents of different States. The High Court's ruling was based on section 75(iv) of the Constitution which notes that jurisdiction for matters "between States, or between residents of different States, or between a State and a resident of another State" is vested only in courts such as the High Court, Federal Courts and Supreme Courts. The High Court also ruled that the decision was not limited to residents of different States but rather the entire class of matters listed in ss 75 and 76 of the Constitution including matters in which the Commonwealth is a party, in which the State of Tasmania and a resident of another State are parties or in which a party seeks to rely on Commonwealth legislation.⁵

Effect of the Burns v Corbett decision on the establishment of TasCAT

The establishment of TasCAT will bring together many of Tasmania's Tribunal's and Boards, including some that are likely to have a proportionately high number of matters involving residents of different States, the Commonwealth, the State of Tasmania and a resident of another State or in which a party seeks to rely on Commonwealth legislation. These Tribunals include the Anti-Discrimination Tribunal, the Resource Management and Planning Appeal Tribunal and the Workers Rehabilitation and Compensation Tribunal.

A number of cases have already been handed down which limit the ability of Tasmanian Tribunals to hear cases. For example, in *The State of Tasmania (Department of Health & Human Services) v M*⁶ the Workers Rehabilitation and Compensation Tribunal held that it did not have jurisdiction to hear the case because it involved the State of Tasmania and a resident of another State. Or, in *Commonwealth v Anti-Discrimination Tribunal*⁷ in which a complaint of discrimination was dismissed because the case involved the Commonwealth of Australia. Or, the recent case of *Cawthorn and Paraquad Association of Tasmania Incorporated v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd* in

³ *Burns v Corbett; Burns v Gaynor; Attorney-General for New South Wales v Burns; Attorney-General for New South Wales v Burns; New South Wales v Burns* [2018] HCA 15.

⁴ *Burns v Corbett* [2018] HCA 15, 6.

⁵ *Burns v Corbett* [2018] HCA 15, 119-120.

⁶ *The State of Tasmania (Department of Health & Human Services) v M; M v The State of Tasmania (Department of Health & Human Services)* (Ref Nos 920/2017 & 1045/2017) [2018] TASWRCT 24.

⁷ [2008] FCAFC 104.

which a complaint of discrimination was dismissed because a federal defence had been raised.⁸

As it stands, Part 4 of the proposed Bill covers the jurisdiction of the Tribunal with clause 48(1) noting that ‘the Tribunal has the jurisdiction conferred on it by or under this or any other Act’. As well, clause 48(2) notes that if an application, referral or appeal is able to be made to the Tribunal by way of a provision of the Act, or a claim be brought before the Tribunal, the Act will have jurisdiction to hear and make a decision on the matter.

It is clear from the Long Title to the Bill that it is limited to the establishment of the Tribunal and the appointment of members and staff to the Tribunal. As well, the Department of Justice website clarifies that future Bills will expand TasCAT’s jurisdiction.⁹ Nevertheless, we strongly recommend that any future Bill ensures that the limitations placed on Tasmanian Tribunals as a result of the *Burns v Corbett* precedent are removed.

We believe the best option available is that which has been adopted in New South Wales and South Australia, where federal matters that come before a Tribunal are referred to a state court.¹⁰ Section 34B(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) for example providing as follows:

34B Applications or appeals involving Federal jurisdiction may be made to authorised court

(1) A person with standing to make an original application or external appeal may, with the leave of an authorised court, make the application or appeal to the court instead of the Tribunal.

(2) The authorised court may grant leave for the application or appeal to be made to the court only if it is satisfied that—

(a) the application or appeal was first made with the Tribunal, and

(b) the determination of the application or appeal by the Tribunal would involve an exercise of federal jurisdiction,¹¹ and

(c) the Tribunal would otherwise have had original jurisdiction or external appellate jurisdiction enabling it to determine the application or appeal, and

(d) substituted proceedings on the application or appeal would be within the jurisdictional limit of the court. (emphasis added)

Alternatively, section 38B of the *South Australian Civil and Administrative Tribunal Act 2013* provides:

⁸ [2019] TASADT 10.

⁹ Department of Justice, ‘Tasmanian Civil and Administrative Tribunal Bill 2020’. As found at <https://www.justice.tas.gov.au/community-consultation/consultations/tasmanian-civil-and-administrative-tribunal-bill-2020> (Accessed 23 May 2020).

¹⁰ Section 34B of the *Civil and Administrative Tribunal Act 2013* (NSW); section 38B of the *South Australian Civil and Administrative Tribunal Act 2013* (SA).

¹¹ Federal jurisdiction is defined in section 34A of the *Civil and Administrative Tribunal Act 2013* (NSW) as “jurisdiction of a kind referred to in section 75 or 76 of the Commonwealth Constitution”.

38B Transfer of applications involving federal diversity jurisdiction to Magistrates Court

(1) If a person has standing to make an application to the Tribunal in the exercise of its original jurisdiction under section 33 or its review jurisdiction under section 34, the application may be determined by the Magistrates Court in accordance with this Part instead of the Tribunal.

(2) If, following an application made to the Tribunal in the manner and form required under this Act for the kind of application concerned, the Tribunal considers that—

(a) it does not have, or there is some doubt as to whether it has, jurisdiction to determine the application because its determination may involve the exercise of federal diversity jurisdiction; and

(b) the Tribunal would otherwise have had jurisdiction enabling it to determine the application,

then the Tribunal may order that proceedings on the application be transferred to the Magistrates Court.

(3) A proceeding transferred to the Magistrates Court under subsection (2) is a "transferred proceeding".

(4) If proceedings are transferred to the Magistrates Court under this Part—

(a) the application made to the Tribunal will be taken to be duly made as an application to the Court; and

(b) the proceedings may be continued and completed as if steps taken in the proceedings prior to the transfer had been taken in the Court.

(5) The fee payable in respect of the application is the relevant fee (if any) payable to the Tribunal under this Act.

(6) A party to the transferred proceeding is not required to pay any fees in relation to the transfer of the proceedings to the Magistrates Court unless the Court determines that additional fees are payable under the Magistrates Court Act 1991 because of a substantial alteration in the nature of the claims in the proceedings.

(7) An order made by the Tribunal under subsection (2) may not be the subject of review or appeal under Part 5 of this Act.

(8) The Magistrates Court may remit the transferred proceeding to the Tribunal for determination if the Court is satisfied that the Tribunal has jurisdiction to determine the matter.

(9) If the Magistrates Court remits the transferred proceeding to the Tribunal, the Court may make such orders that it considers appropriate to facilitate the determination of the proceedings by the Tribunal.

(10) The Tribunal must determine transferred proceeding that are remitted to it in accordance with any orders made by the Magistrates Court.

Procedurally, the jurisdictional issue could be dealt with by the President of TasCAT given that they will be both a Magistrate and a member of the Tribunal. This may be the most expeditious means of resolving the matter.¹²

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

¹² Clause 12 of the *Tasmanian Civil and Administrative Tribunal Bill 2020*.