

COMMUNITY LEGAL CENTRES TASMANIA

21 August 2024

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

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

To the Department of Justice,

Re: *Tasmanian Civil and Administrative Tribunal (Additional Jurisdictions) Bill 2024*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Tasmanian Civil and Administrative Tribunal (Additional Jurisdictions) Bill 2024* ('the Bill'). We support the Government's intention to make various miscellaneous amendments to improve TasCAT's procedures and make the Tribunal more efficient.¹

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.

- Tribunal to apply Government policy to application for review

Section 75 of the *Tasmanian Civil and Administrative Tribunal Act 2020* provides that the purpose of a reviewable decision is "to produce the correct or preferable decision". To assist the Tribunal in arriving at the correct or preferable decision, the Bill proposes to include a new section 75A requiring the Tribunal to take into account Government policy in its hearing of reviewable decisions. The proposed section 75A is modelled on section 27 of the *Magistrates Court (Administrative Appeals Division) Act 2001* which grants a right of review in a limited range of circumstances including a refusal to grant a firearms licence, the issuing of a dog kennel licence or an assessment of land value.

For a number of reasons, we believe the proposed section 75A should be removed. First, it is well-established in case law that Government policy will ordinarily be taken into account. In the case of *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*² Brennan J found:

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

² [1979] AATA 179.

When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied . . . cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny.

Codifying the uncontroversial common law position will provide clarity, particularly for non-lawyers, however it is questionable whether it is necessary, given that it is simply a restatement of the already existing law. A more worrying concern is that the proposed section 75B is not limited to the small number of reviewable decisions over which the *Magistrates Court (Administrative Appeals Division) Act 2001* has jurisdiction. Rather, as the provision is currently drafted, it will apply to all of TasCAT's current review jurisdiction. This is particularly concerning in a planning context because whilst the State Government is able to make planning policy, its policies have no statutory effect. We are concerned that the inclusion of the proposed section 75B will be used to override local government decision-making.

We therefore recommend that the proposed section 75B of the Act be removed. However, in the event that the draft provision is retained, we recommend that its jurisdiction be limited to those reviewable decisions currently found in the *Magistrates Court (Administrative Appeals Division) Act 2001*. We also recommend that the definition of 'government policy' is limited to policies certified by the relevant Minister and that the applicant could reasonably have been expected to be aware of the policy as is the case in Victoria.³

Written decisions

Section 78 of the Act provides that in determining a review of a reviewable decision the Tribunal can affirm or vary the decision or send the matter back to the decision-maker for reconsideration.⁴ However, there is no requirement that the decision be in writing. Whilst a written decision ('a statement of reasons') will be provided in circumstances where a party is intending to appeal,⁵ we strongly believe that all decisions (including a right of appeal) should be in writing because they provide both clarity and certainty. Appeals are also less likely to be instigated if the Tribunal has a history of making similar decisions that have been made publicly available.

Whilst the Act expressly provides that parties to Guardianship stream proceedings can request a statement of reasons, it is of concern that other streams including Anti-Discrimination, Civil and Consumer, Health Practitioners, Mental Health, Personal Compensation and Resource and Planning do not include a similar provision. We therefore welcome the proposed amendment set out in section 86A of the Bill which will clarify that interested persons of all Tribunal streams can request a written decision.

³ Section 57 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

⁴ Section 78 of the *Tasmanian Civil and Administrative Tribunal Act 2020*.

⁵ Section 137(2) of the *Tasmanian Civil and Administrative Tribunal Act 2020*.

Internal Appeals

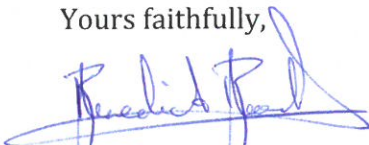
An outstanding issue that is not addressed in this Bill is the introduction of internal review. As the Act currently stands, appeals from TasCAT decisions must be made to the Supreme Court which costs around \$1100.00⁶ and the appellant is faced with the daunting risk of having to pay costs in the event that they lose. An alternative to a Supreme Court appeal that we believe should be considered is the ability to appeal TasCAT decisions internally. As the Department of Justice *A Single Tribunal for Tasmania* discussion paper noted in 2015:⁷

An internal right of appeal affords parties to a dispute a cost-effective option of review of a decision; it can enable the Tribunal to correct any defects in the original decision making without the expense and time of requiring Supreme Court review, and ensures consistency in its own decision making; and its provisions can be drafted to prevent unnecessary or unmeritorious litigation and ensuring appropriate finality in decision making.

Most States and Territories in Australia provide for an internal appeal⁸ which assures a low-cost alternative to the Supreme Court as well as providing a source of binding precedent on the Tribunal. We strongly recommend that the outstanding issue of internal review is considered as part of the next TasCAT Bill.

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

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

⁶ Supreme Court of Tasmania, 'Filing Fees'. As found at <https://www.supremecourt.tas.gov.au/the-court/fees/filing-fees/> (accessed 21 August 2024).

⁷ Department of Justice, *A Single Tribunal For Tasmania* (Discussion Paper: September 2015) at 117.

⁸ Part 8 of the *ACT Civil and Administrative Tribunal Act 2008*; Part 6 of the *Civil and Administrative Tribunal Act 2013* (NSW); *Queensland Civil and Administrative Tribunal Act 2009*; Part 5 of the *Northern Territory Civil and Administrative Tribunal Act 2014*; Part 5 of the *South Australian Civil and Administrative Tribunal Act 2013*; Part 5 of the *State Administrative Tribunal Act 2004* (WA).