29 May 2020

Ms K Bourne
Deputy Secretary
Department of Justice
GPO Box 825
HOBART TAS 7001

By email: Secretary@justice.tas.gov.au; Kristy.Bourne@justice.tas.gov.au

Dear Kristy,

RE: TASMANIAN CIVIL AND ADMINISTRATIVE TRIBUNAL BILL 2020

At the outset of this submission, I confirm previous statements on behalf of the Tasmanian Bar ("the Bar"), that the Government is to be congratulated on activating a policy to introduce a single civil and administrative tribunal.

The Bar is generally in favour of the establishment of a single administrative tribunal to create efficiencies and improve the administration of justice. However, there are a number of aspects of the *Tasmanian Civil and Administrative Tribunal Bill 2020* that require further consideration and amendment before the Bill is put before Parliament. The Bar's concerns are set out below and we request a response to the matters raised and welcome further consultation.

Section 6 – When person appointed for a particular proceeding completes term of office

This provision appears to contemplate an appointment of a person who is not already a President, Deputy President or other type of member (including supplementary) to hear and determine a particular proceeding. Is this the case, or does the provision relate to supplementary members who are appointed under subdivision 3 of Part 3 of the Bill?

An example of an appointment for a particular proceeding may be where particular expertise is required and/or all available appointments have a conflict. Please clarify what purpose this provision is intended to achieve.

The Tasmanian Bar
(A member of the Australian Bar Association and the Law Council of Australia)

c/- Malthouse Chambers
119 Hampden Road, Battery Point TAS 7004
DX 160, Hobart
Ph: 03-6223 3844 Fax: 03-6223 5466
Email: admin@tasmanianbar.com.au
Website: www.tasmanianbar.com.au
ABN: 16 938 209 241

More generally, there is ample capacity to appoint various types of members to the Tribunal and the sheer number of appointments contemplated by the Bill seems to be contrary to the benefits sought to be achieved through amalgamation into a single tribunal.

Section 9 – Tribunal to operate throughout the State

What is the purpose of enabling the Tribunal to sit outside the State? If the Tribunal does not have jurisdiction to determine matters between persons resident in different States,[1] why would it need to sit outside of Tasmania? If there is no good purpose of sitting outside of the State, then part of this provision is unnecessary and requires amendment to ensure the Tribunal is efficient and cost-effective. Taking evidence from an interstate witness by phone or video does not involve the Tribunal "sitting" outside of Tasmania and provision for this can be made in the procedural provisions of the Act, Rules or Regulations.

Section 10 – Main objectives of Tribunal

Subsection 10(1)(c) is a general and imprecise statement and does not fit well with the different functions that will be undertaken by various divisions of the Tribunal. For example, the GAB and MHT do not have any role in "resolving" applications, they determine them. What is meant by "high quality processes" is vague and unhelpful. This provision needs to be amended in our view.

Subsection 10(2) is unusual and conveys a lack of independence and need to be influenced by other agencies and bodies. As an independent statutory Tribunal with the objectives in section 10(1), section 10(2) is inappropriate and creates a perception of bias which must be avoided.

Section 11 – **Membership of Tribunal**

The President and Deputy President are distinct statutory appointments and not general members of the Tribunal as defined in section 3 of the Bill. Their positions, terms of appointment and functions are provided for elsewhere in the Bill. As this section is to make provision for the constitution of the Tribunal, it is preferable that it be expressed as follows –

The Tribunal comprises of the following:

a. the President;

b. each Deputy President;

c. the senior members; and

d. the ordinary members.

Section 12 - President

Subsection 12(3) is problematic as it necessarily confines the persons able to be appointed as President to persons already appointed as a Magistrate. This limitation will fail to ensure that

[1] *Burns v Corbett* [2018] HCA 15

the field of potential candidates for the position is sufficiently wide to attract a highly suitable and experienced person with Tribunal and administrative law expertise and experience to hold the position of President.

The Bar has been advised that the provision as expressed does not meet the policy intention of the Justice Department or the Attorney General and the provision will be amended. We look forward to consultation on the amended terms.

Subsections 12(4), 12(5), 12(6), 12(7) and 12(9) are all confusing and the policy purpose for including them is not apparent. This ambiguity may relate to the manner in which subsection 12(3) is currently expressed. The Bar requests that an explanation be provided if the provisions are to be retained. We note that legislation establishing other Tribunals have far simpler provisions relating to the term of appointment of the President and capacity for renewal of terms.

Section 13 – Salary and Allowances of President

The terms of this provision suggest that the President of TasCAT will hold a dual appointment as a Magistrate, but nowhere in the Bill is there any provision that governs how the dual appointments are to be discharged. The Bar requests information about the purpose of a dual appointment style President and how the functions of each appointment are to be practically discharged and remunerated.

Section 14 – When person ceases to be President

This provision will likely need some modification in view of what the Bar have been advised concerning section 12(3) of the Bill.

Section 20 – Effect on tenure

The purpose of this provision is plain in the context of subsection 12(3) as it is presently drawn but when amended, the terms of this provision may need to be also amended.

Division 3 Deputy Presidents, Acting Deputy Presidents and Supplementary Deputy Presidents

There is no limit to the number of Deputy Presidents appointed at any one time within the Tribunal and persons can be appointed as Supplementary Deputy Presidents even if there is no vacancy. This is particularly concerning as it provides no clarity about the hierarchical structure of the Tribunal. Further, it creates a risk of lack of cohesion and collegiality in leadership because the lines of authority are so broad and unclear.

The cost of having so many Deputy Presidents whether actual, Acting or Supplementary is very concerning as it seems contrary to the underlying purpose of gaining efficiencies and having a single administrative tribunal to achieve this.

Under the current provisions, the Bill appears to merely bring together the existing Tribunals constituted by the Acts in Schedule 1 of the Bill, rather than creating a genuine single “Super-

Tribunal". In the Bar's view, that will not achieve efficiencies and improvement to the administration of justice which amalgamation seeks to achieve.

Division 4 – Other members

There is potential benefit in provisions that facilitate the appointment of suitable person to sit as senior members and members to hear and determine matters before the Tribunal as and when required. The provisions seem to provide flexibility and a process to ensure that persons can be selected and recommended for appointment on merit to conduct the work of the Tribunal. However, within the context of the other provisions in the Bill and lack of specifics about the overall number of persons to be appointed to the Tribunal, the problems identified above relating to Division 3 are compounded, something which in the Bar's view is highly undesirable.

Section 41 and 46 - State Service Employment and Other Staff of Tribunal

These provisions enable and permit the work of the Tribunal to be in part discharged by persons who are also State Service employees or officers. In the Bar's view, this is undesirable. The functions of senior members, members and supplementary members are those concerning decision making in respect of which various State Agencies are a party. Having a Tribunal which is constituted in part by employees or officers of the State involves indirect if not direct conflict of interest and at very least a perception of bias. This is highly undesirable and contrary to the stated objectives in section 10 of the Bill.

While the Bar is aware that employees and officers of the State currently serve on various Tribunals in the State, this is not to be condoned or encouraged in our view. It undermines the true independence of the Tribunal and integrity in decision making.

Section 47 - Designated Officers

This provision and the definition of Officers of the Tribunal, contemplate that the "Officers" have a purpose and function, however, except to the extent that a Registrar is defined as a class of officer and has specified functions under Division 5 of Part 3 of the Bill, there are no provisions in the Bill that attribute a purpose or function to them. What other officers are intended by this provision and what are their potential functions? Noting that the objective of the amalgamation is to achieve efficiencies and cost savings, the inclusion of a general enabling provision which gives the Registrar unlimited ability to appoint officers without limit seems contradictory.

If the provision is to enable flexibility in allocation of duties to staff of the Tribunal and potential career paths, the provision should be expressed otherwise than it is in the Bar's view.

Jurisdiction – section 48

This provision is fundamental to the valid establishment of the single tribunal. The Bar understands that it is intended that TasCAT have jurisdiction over everything that is currently heard and determined under all the statutes referred to in Schedule 1 of the Bill, but there is

no provision to this effect. Section 48 does not achieve this because the other Acts do not currently confer any jurisdiction on TasCAT.

Is it intended to pass contemporaneous amendments to each of the Acts referred to in schedule 1 to achieve what is required? Alternatively, section 48 could be expressed to include a general conferral provision by reference to Schedule 1.

If necessary work is not undertaken now and before tabling of the Bill, to determine what other legislative amendments are needed to give TasCAT the "tools" it needs at law to operate as intended, true operation as an amalgamated Tribunal will be years away. This is highly undesirable.

Sections 51 and 52 – Functions and Powers of Division Heads, delegation and assignment

The structure of the Tribunal overall is unnecessarily complex in the Bar's view taking into account the smaller volume of work and size of the individual tribunals to be amalgamated. In any event, the delegations and assignments that are permissible under section 51 and 52 ought to be expressed to be required to be made in writing. This is to ensure that evidence is available to establish that a person who received the delegation had the necessary power to discharge the relevant function. In our experience, delegation/authorisation provisions in statutes commonly are expressed to require that these be given in writing.

Sections 56, 57 – Rules of the Tribunal

These provisions provide for the mechanical workings of the Tribunal in carrying out its functions and are essential but need in the Bar's view to be more prescriptive. There are no particular provisions in the Bill about the procedure of the Tribunal. For example, how it takes evidence, power to administer oaths, issue summons, make orders for inspections etc. These provisions are commonly found in the statutes which establish the Tribunals referred to in Schedule 1 of the Bill, but will not apply to TasCAT.

The Bar is of the opinion that further consideration needs to be given to this aspect of the Bill and the required provisions should not be deferred or left to a Rules Committee or practice directions.

Section 59 – Appointments before the Establishment Day

It can be inferred from this section that all existing appointments to the various tribunals referred to in schedule 1, will or may be duplicate appointments to TasCAT once the Bill passes both houses of Parliament and the proclamation relating to commencement of the Act is made. That being the case, what is proposed in relation to correlating existing terms of appointment with new terms of appointment of the same persons? Further, what is contemplated in relation to rationalising the structure of TasCAT to serve the true volume of work once expected efficiencies are achieved?

Section 60 – Regulations

Section 60 of the Bill enables the making of Regulations for savings or transitional arrangements but these arrangements are important and need to be given priority, not left to

subsequent development of Regulations at an unknown point in time. Furthermore, upon the commencement of the Act, there will need to be consequential amendments to effect the repeal of some of the provisions in the statutes referred to in schedule 1. The Bar considers that the savings and transitional arrangement provisions and consequential amendments should be contemplated now and included in the Bill or at least well ahead of the commencement day.

Schedules 2 and 3 of the Bill

These schedules provide for the two divisions of the Tribunal – General and Protective. The provisions within the schedules provide an inference as to the identity of the persons who will be appointed division heads or alternatively acknowledge that particular Ministers should be consulted about appointments. In the case of the latter, noting that the funding for all functions under the *Workers Rehabilitation and Compensation Act 1988* are provided for by the Workers Rehabilitation and Compensation Fund, why is the Workcover Board and the Minister responsible for the *Workers Rehabilitation and Compensation Act 1988* not consulted about appointments?

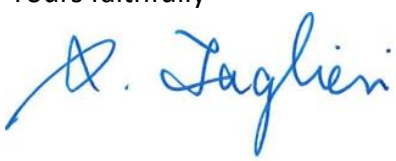
The Bar is of the view that all decision making about establishment of the Tribunal should be transparent, fair and merits based. To that end, will there be disclosure about the source of funding for the General Division and the Protective Divisions?

Implications of *Burns v Corbett* [2018] HCA 15

Since the High Court delivered its decision in this matter, the Bar is aware of specific challenges to the jurisdiction of a number of Tribunals relating to cases where the parties are not all within the State or Federal jurisdiction is otherwise invoked.

In relation to some of the Tribunals, the High Court decision will continue to prevent disputes being determined or determinations and reviews being made in a significant number of cases. The Bar is of the view that this is contrary to the interests of justice and ought to be addressed at this time as there is opportunity to do so. The Bar enquires whether advice has been obtained from the Solicitor General about whether the single tribunal model reflected in the Bill will be fit for all purposes required. If this sort of advice has been obtained, we request a summary of the advice for consideration.

Yours faithfully



Sandra Taglieri SC
President, Tasmanian Bar