

Your Ref:
Our Ref: 957

22 August 2024

Department of Justice
Office of the Secretary
GPO Box 825
HOBART TAS 7001
By email: haveyoursay@justice.tas.gov.au

Dear Secretary,

RE: Submission – Tasmanian Civil and Administrative Tribunal (Additional Jurisdictions) Bill 2024 – Consultation Draft

Thank you for the opportunity to comment on the Consultation Draft of the Tasmanian Civil and Administrative Tribunal (Additional Jurisdictions) Bill 2024 (the Bill). I note that Commissioner McLean previously provided submissions in respect of other Bills in relation to the Tasmanian Civil and Administrative Tribunal (TasCAT or the Tribunal) on 5 February 2021¹ and 2 June 2020.²

I note that the Final Report of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse within Institutional Settings (Col) made several recommendations with relevance to TasCAT. Some effort is made through the Bill to implement part of Recommendation 18.13 in relation to the *Registration to Work with Vulnerable People Act 2013*, by including provisions concerning the qualifications and expertise of Tribunal members allocated to sit on proceedings arising under that legislation within TasCAT. I note that the Bill does not seek to implement recommendations 9.36 (expanding jurisdiction to include review of decisions of the Department for Education, Children and Young People (DECYP) in exercising its custody or guardianship powers), 17.7 (create a right of review on the

¹ CCYP, Submission on Tasmanian Civil and Administrative Tribunal Amendment Bill 2020, 5 February 2021, (URL: <https://childcomm.tas.gov.au/wp-content/uploads/2022/07/2021-02-05-Comment-Tasmanian-Civil-and-Administrative-Tribunal-Bill-2021.pdf>).

² CCYP, Submission on Establishment of a Tasmanian Civil and Administrative Tribunal, 2 June 2020, (URL: <https://childcomm.tas.gov.au/wp-content/uploads/2022/07/2020-06-02-Comment-Tasmanian-Civil-and-Administrative-Tribunal-Bill-2020.pdf>).



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merits in relation to a decision of the Criminal Injuries Compensation Commissioners) or 17.8(2)(f) of the Col (relevant to review of Right to Information decisions).

As is noted in the material accompanying the Consultation Draft, the Bill mainly:

- transfers jurisdiction for certain administrative appeals, which currently lie to the Administrative Appeals Division of the Magistrates Court, to the Tasmanian Civil and Administrative Tribunal (TasCAT);
- transfers jurisdiction from the Property Agents Tribunal to TasCAT; and
- makes various miscellaneous amendments to improve TasCAT's procedures and make the Tribunal more efficient.³

With respect to the procedural matter noted in the final bullet point, the Bill overhauls the way that TasCAT groups matters into streams and inserts important procedural provisions governing review proceedings⁴.

In this regard, the Bill creates a number of new streams and omits some existing ones.⁵ All other existing streams are otherwise preserved.⁶ Relevantly, a new stream called the Community, Children and Families Stream will sit within the TasCAT's existing Protective Division⁷, which is the Division where TasCAT allocates matters "*that require expertise in particularly sensitive areas*".⁸ The legislation allocated to this stream in the Protective Division is listed in Schedule 3 of the *Tasmanian Civil and Administrative Tribunal Act 2020* and currently comprises:

- (a) the *Corrections Act 1997*;
- (b) the *Criminal Justice (Mental Impairment) Act 1999*;
- (c) the *Disability Services Act 2011*;
- (d) the *Guardianship and Administration Act 1995*;
- (e) the *Mental Health Act 2013*;
- (f) the *Powers of Attorney Act 2000*;

³ Department of Justice, *Community Consultations – Tasmanian Civil and Administrative Tribunal (Additional Jurisdictions) Bill 2024 – Have your say*, 19 July 2024 (URL: [Tasmanian Civil and Administrative Tribunal \(Additional Jurisdictions\) Bill 2024 \(justice.tas.gov.au\)](https://www.justice.tas.gov.au)).

⁴ See the proposed Part 7, Division 3 and Part 8, Division 1A of the Act.

⁵ The Bill creates a new Administrative Stream, a new Occupational and Disciplinary Stream and a new Community, Children and Families Stream, while omitting the previous Forestry and Practices Stream and the Health Practitioners Stream.

⁶ The existing streams being preserved are the Anti-Discrimination Stream, the Civil and Consumer Stream, the Guardianship Stream, the Mental Health Stream, the Personal Compensation Stream, and the Resource and Planning Stream.

⁷ Under s.59(1) of the Act, there are two extant Divisions established by the TasCAT Act: the General Division and the Protective Division.

⁸ Department of Justice, *Community Consultations – Tasmanian Civil and Administrative Tribunal (Additional Jurisdictions) Bill 2024 – Have your say*, 19 July 2024 (URL: <https://www.justice.tas.gov.au/community-consultation/consultations/tasmanian-civil-and-administrative-tribunal-additional-jurisdictions-bill-2024>).



(g) the *Wills Act 2008*.

The draft Bill (s.233) proposes to add the following Acts (and provisions of Acts) to the legislation administered in this Stream in the Protective Division:

- (a) the *Adoption Act 1988*;
- (b) the *Births, Deaths and Marriages Registration Act 1999*;
- (c) sections 79 and 135 of the *Education Act 2016*;⁹
- (d) the *Registration to Work with Vulnerable People Act 2013*;
- (e) the *Relationships Act 2003*;

I anticipate that future legislative initiatives and/or amendments relating to or affecting children and young people, such as those arising from expected amendments to the *Children, Young Persons and Their Families Act 1997*, will be allocated to the Community, Children and Families stream of the Protective Division.

Otherwise, the Bill proposes a great many other changes to bring approximately 60 pieces of legislation within TasCAT's jurisdiction. While I reserve the right to make comment about those amendments should it be necessary in the future, for the moment, I assess that the transfer of these jurisdictions from the Magistrates Court (Administrative Appeals Division) to TasCAT is consistent with the innovations implemented by all other mainland states in their respective Civil and Administrative Tribunals. As such, the transfer of these jurisdictions to TasCAT appears to be largely uncontroversial and I do not propose to comment on them at this time.

Having said that, I do wish to comment briefly on the situation involving the *Education Act 2016* and some of the procedural anomalies in the draft Bill as they relate to reviewable decisions under that Act.

As a preliminary matter, it is worthwhile laying the foundation for this submission by acknowledging a key feature of the legislation that establishes and regulates administrative review in Australian jurisdictions. I am advised that, characteristically, administrative review is administered by a mechanism that usually involves two pieces of legislation.

Firstly, there is the generic legislation which in this state is the *Tasmanian Civil and Administrative Tribunal Act 2020* (TasCAT Act). The TasCAT Act establishes the Tribunal, its personnel, certain generic procedures, who may be parties to proceedings, the powers of the Tribunal and other operating features, including the conduct of reviews and appeal processes.

Secondly, each subject-matter jurisdiction (eg education) will involve a separate piece of legislation that grants jurisdiction to the Tribunal to entertain certain administrative decisions made by delegated departmental officers (which it will expressly define as

⁹ Reviewable decisions made under s.198 of the *Education Act 2016* are administered under a separate stream within TasCAT (the new Administrative Stream).



reviewable decisions) and conventionally this legislation will define or describe those persons who have standing to apply for review, as well as dealing with any other specific matters that are particular to the subject-matter in question. This subject-matter legislation is identified and described as the *relevant Act* in s.3 of the TasCAT Act as meaning any of the pieces of subject-matter legislation listed in Schedule 1 or any other Act that confers jurisdiction on the Tribunal.¹⁰ For example, in matters concerning state education in Tasmania, the *relevant Act* is the *Education Act 2016*.¹¹

In dealing with matters concerning review rights and reviewable decisions in the area of state education, this means that it is necessary to have regard to both pieces of legislation. Importantly, in respect of any issue where there is a conflict or inconsistency between the provisions of a *relevant Act* and the TasCAT Act 2020, (or any Tribunal Regulations or Rules), I understand that it is the provision in the *relevant Act* that prevails (in this case, the *Education Act 2016*). This is dealt with by a conflict resolution provision in s.7A of the TasCAT Act 2020, which states:

7A. *Inconsistency with relevant Act*

If there is an inconsistency between a provision of a relevant Act and a provision of this Act, the regulations or the Tribunal rules, the provision of the relevant Act prevails to the extent of the inconsistency.

Comment

As with the nearly 60 other pieces of legislation, the Bill proposes to transfer jurisdiction for the review of reviewable decisions made under the *Education Act 2016* from the Magistrates Court (Administrative Appeals Division) to TasCAT.

There are three classes of *reviewable decision* in the *Education Act 2016*:

- (a) Sub-sections 79(a)–(e) deal with five reviewable decisions that involve determinations by the Registrar of Education (under s.218) relating to approved home education programs (ie refusal to approve, imposition or variation of a condition, refusal to approve a proposed amendment, amendment and revocation of an approval or existing or proposed home education programs).
- (b) Section 135 deals with three reviewable decisions delegated to the Secretary that involve (a) a combined expulsion and prohibition decision (prohibition refers to future re-enrolment), (b) a refusal to conduct an internal review of an expulsion and prohibition decision and (c) a decision to confirm an original expulsion and prohibition decision following an internal review.

¹⁰ The consultation draft of the TasCAT Bill proposes to extend the list in Schedule 1 to 99 separate pieces of legislation.

¹¹ There is another piece of legislation (not dealt with in this submission) relevant to education matters called the *Education and Care Services National Law (Tasmania)* which deals with the national education and care services quality framework. This, too, contains a number of reviewable decisions dealing with provider and service approvals.



- (c) Section 198(1)(a)–(n) deal with *prescribed determinations* which relate to high level organisational decisions concerning the registration of schools and school subjects.

Of these decisions, I only propose to comment on those matters in paragraph (b) of the above list, namely the transfer to TasCAT of the sub-group of disciplinary decisions contained in s.135 of the *Education Act 2016*. Each of these decisions (*reviewable decisions*) can be particularised as follows:

- (a) A decision to *expel* a student and *prohibit* the student from re-enrolling in a particular school or in any state school;¹²
- (b) A decision to *refuse to conduct* an internal review (or periodic reviews)¹³ of (a) an expulsion decision or (b) a prohibition decision;
- (c) A decision after an internal review to *confirm*¹⁴ (a) an expulsion decision or (b) a prohibition decision.

For the avoidance of doubt, I support the transfer of jurisdiction for review of reviewable decisions made under the *Education Act 2016* from the Magistrates Court (Administrative Appeals Division) to TasCAT.

However, there is a wider range of disciplinary decisions contained in the *Education Act 2016* than simply the three decisions included in s.135. Aside from internal-to-school forms of discipline such as reprimand or detention, the Act also makes provision for:

- (a) Suspension decisions (which comprises both an urgent suspension decision and a non-urgent suspension decision for periods of up to 2 weeks);¹⁵
- (b) Exclusion decisions (which comprise suspension decisions made for a period longer than 2 weeks); and
- (c) Simple expulsion decisions (i.e. without an accompanying prohibition decision).¹⁶

None of these administrative decisions currently appear to be subject to external merits review.¹⁷ I note that the current consultation draft of the TasCAT Bill does not propose any change to this situation.

In my opinion, it is timely to now ask whether children, young people, their parents or guardians should have the statutory right to seek an independent merits review of a wider range of time-limited exclusionary decisions which can nevertheless have

¹² Section 135(1)(a) of the *Education Act 2016*. This two-headed decision is to be distinguished from a simple expulsion decision.

¹³ Section 135(2) of the *Education Act 2016*.

¹⁴ Section 135(1)(b) of the *Education Act 2016*.

¹⁵ Section 132(3)(a) of the *Education Act 2016*.

¹⁶ Section 132(3)(c) of the *Education Act 2016*.

¹⁷ While it is noted that such decisions may be the subject of an investigation by the Ombudsman, the Ombudsman does not engage in merits review of a decision, nor does the Ombudsman stand in the shoes of the original decision-maker or re-make the decision.



serious, unintended and often cumulative effects on the rights and wellbeing of children and young people.

I note that this is not the first time this question has been posed. It was raised, without being comprehensively resolved, in the Australian Law Reform Commission's inquiry that led to Report No. 84: *Seen and Heard: priority for children in the legal process*.¹⁸

In *Seen and Heard*, the ALRC noted:

10.5 *Apart from whatever families may themselves inculcate, one of the more important ways that children first learn about the concept of formal legal processes is through their experiences of school discipline. The way school rules are set and enforced, particularly the processes associated with discipline and exclusion, may affect the way young people react to and interact with authorities and legal processes throughout their adult lives.*

The ALRC further noted that (footnotes omitted):

*Excluding children from school, on a short- or long-term basis, can have a serious effect on their education and life chances.*¹⁹

*A child disrupted from school suffers a number of detriments, including disruption to education and a blow to that child's self-esteem. Expulsion is also likely to be felt as a rejection. The language used by students — 'kicked out of school' or 'thrown out' — is an indication that exclusion is seen and felt as a hostile and aggressive act, and many children give up on the education system after being excluded from school.*²⁰

Furthermore, the ALRC noted that there was “*strong anecdotal evidence to suggest that a substantial proportion of youth offending starts with exclusion from school*”²¹ sufficient for the Inquiry to later conclude that “*research should be conducted nationally to determine the extent to which young people are excluded from school by informal processes and the extent of the connection between school exclusion and criminal behaviour.*”²²

¹⁸ *Seen and Heard: priority for children in the legal process*, Report 84, 1997 ([URL:https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/](https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/)).

¹⁹ *Ibid.*, para 10.61.

²⁰ *Ibid.*, footnote 1119 to this quotation cites R Ludbrook 'Children's rights in school education' in K Funder (ed) *Citizen Child: Australian Law and Children's Rights* AIFS Melbourne 1996, 109.

²¹ *Ibid.*, para 10.62.

²² *Ibid.*, para 10.64. See also report by Acting Commissioner Daly, *Student Suspensions: A Research Review – Stage One*, November 2013, passim ([URL: https://www.childcomm.tas.gov.au/wp-content/uploads/2013/11/Student-Suspensions_A-Research-Review-November-2013.pdf](https://www.childcomm.tas.gov.au/wp-content/uploads/2013/11/Student-Suspensions_A-Research-Review-November-2013.pdf)).



Finally, the ALRC noted that *“the proposal that decisions to exclude should be reviewable was supported in evidence received during consultations in its Inquiry.”*²³

Given the emphasis on children’s rights in the United Nations Convention on the Rights of the Children, in the *Education Act 2016*, and throughout DECYP’s own policy and procedure documents, it is both perplexing and arguably anomalous that children and young people, and their parents and guardians, are not able to seek external merits review in relation to a wider range of school disciplinary decisions than is currently the case.

Although the ALRC did not elaborate upon its rationale for its final recommendation in great detail, it ultimately concluded that exclusion decisions of longer than 14 days (as well as permanently) should attract rights of review (footnotes omitted):

*10.70 As a matter of best practice a person adversely affected by an administrative decision should be given an opportunity to challenge that decision. This presumption is no less appropriate for students and parents who should be given the opportunity to challenge any decision to exclude a child from a government school for more than 14 days or permanently.*²⁴

Currently, the Australian Capital Territory,²⁵ New South Wales²⁶ and the Northern Territory²⁷ are the only jurisdictions that have vested review rights in children and parents in relation to the lower-level disciplinary decisions like suspension, exclusion and simple expulsion.

I consider that it is an appropriate time to engage in a broad community discussion about what might be the most appropriate review process concerning school disciplinary decisions in Tasmania.

I note also that Recommendation 9.36 of the Col’s Final Report proposed that the Government expand the jurisdiction of TasCAT to include the review of decisions made by DECYP in exercising its custody or guardianship powers – including decisions about where a child should live and arrangements for the child’s care.²⁸ The Col has recommended that the new Commission for Children and Young People, through the new statutory Child Advocate, have the power to apply for a Tribunal review of a decision about the care arrangements for a child on behalf of the child, or on its own initiative (Recommendation 9.36). In addition to considering the expansion of the range of substantive disciplinary decisions that might be the subject of review

²³ Ibid., Chapter 10, “*Children in education*”, footnote 1140.

²⁴ Ibid., para 10.70.

²⁵ See s.36, *Education Act 2004* (ACT) (suspension for not longer than 20 days).

²⁶ See s.107(1)(i), *Education Act 1990* (NSW) (non-attendance direction for more than a total of 20 school days in a 12 month-period).

²⁷ See ss.92(6) and 93(6), *Education Act 2015* (NT) (respectively, a decision to confirm a decision to exclude and a decision not to revoke a decision to expel a student).

²⁸ Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children: Vol 1: Summary, recommendations and findings*, p. 111.



by TasCAT, I consider that it is also appropriate to invite the Government to investigate whether it would be appropriate to also ensure independent advocacy is available to children and young people in out-of-home care to apply to the TasCAT to review departmental decisions relating to school exclusions.

A similar proposal to provide advocacy to children and young people involved in disciplinary proceedings was strongly recommended by the ALRC in its *Seen and Heard* report. It stated:

10.72 In addition, the Inquiry considers that students subject to exclusion should be entitled to an advocate during any interviews related to the disciplinary process and review proceedings. The advocate may be a parent, family friend or community or legal advocate.²⁹

This could be considered alongside the Government's current consideration of the functions and powers to be given to the new Commission for Children and Young People and I would welcome the opportunity to discuss some of the available options with the Government.

Thank you for the opportunity to comment on the Bill.

Yours sincerely

Isabelle Crompton

Acting Commissioner for Children and Young People

cc: The Hon Roger Jaensch, Minister for Children and Youth
The Hon Jo Palmer, Minister for Education
Mr Tim Bullard, Secretary, DECYP

²⁹ *Seen and Heard: priority for children in the legal process*, Report 84, 1997, para 10.72 ([URL:https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/](https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/)).