**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**Economic Policy Scrutiny Committee**

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# Inquiry into the Northern Territory Civil and Administrative Tribunal Bill 2018

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**August, 2018**

# Contents

# Chair's Preface

This report details the Committee's findings regarding its examination of the Northern Territory Civil and Administrative Tribunal (NTCAT) Amendment Bill 2018.

The primary purpose of this Bill is to provide for the Tribunal to make costs orders and to clarify the circumstances in which it can make a default decision. All submissions received by the Committee expressed concerns about the potential impact of proposed amendment 101A (default decisions). Organisations that made submissions accepted the proposed amendments to section 132 (Tribunal may make costs orders) in principle but all submitters recommended that greater clarification be provided regarding the costs that would be encompassed by the amendment.

The issues raised in the NTCAT Amendment Bill highlight the challenges faced by the Tribunal as it seeks to balance just outcomes with the need to also ensure that proceedings are resolved as quickly as possible. The Committee's recommendations regarding proposed amendment 101A (default decisions) aim to maintain this balance by proposing changes that will not be onerous for either the Tribunal or the parties involved but will also ensure that such decisions are only implemented once evidence has been provided and the Tribunal is satisfied that the respondent is aware of the proceedings.

On behalf of the Committee, I wish to thank all those who made submissions to the inquiry and the Department of Attorney General and Justice for responding to the Committee's questions. I would also like to thank the Department of the Legislative Assembly for the support it provided to the Committee and the Committee Members for their support in the examination of this Bill.

**Tony Sievers MLA**

**Chair**

# Committee Members

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|  | **Tony Sievers MLA**<br>Member for Brennan | |
| | **Party:** | Territory Labor |
| | **Committee Membership** | |
| | Standing: | House, Public Accounts |
| | Sessional: | Economic Policy Scrutiny |
| | Chair: | Economic Policy Scrutiny |
|  | **Jeff Collins MLA**<br>Member for Fong Lim | |
| | **Party:** | Territory Labor |
| | **Committee Membership** | |
| | Standing: | Privileges |
| | Sessional: | Economic Policy Scrutiny |
| | Select: | Northern Territory Harm Reduction Strategy for Addictive Behaviours |
| | Chair: | Northern Territory Harm Reduction Strategy for Addictive Behaviours |
|  | **Gary Higgins MLA**<br>Member for Daly | |
| | **Party:** | Country Liberals |
| | Parliamentary Position: | Leader of the Opposition |
| | **Committee Membership** | |
| | Standing: | House, Standing Orders, Members' Interests |
| | Sessional: | Economic Policy Scrutiny |
| | Select: | Northern Territory Harm Reduction Strategy for Addictive Behaviours |
|  | **Lawrence Costa MLA**<br>Member for Arafura | |
| | **Party:** | Territory Labor |
| | **Committee Membership** | |
| | Sessional: | Economic Policy Scrutiny |
|  | **Gerry Wood MLA**<br>Member for Nelson | |
| | **Party:** | Independent |
| | **Committee Membership** | |
| | Standing: | Privileges, Public Accounts |
| | Sessional: | Economic Policy Scrutiny |
| On 3 July 2018, Member for Arnhem, Ms Selina Uibo MLA was discharged from the Committee and replaced by member for Arafura, Mr Lawrence Costa MLA. | | |

# Committee Secretariat

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# Acknowledgments

The Committee acknowledges the individuals and organisations that have made written submissions to this inquiry and the Department of Attorney-General and Justice for providing comments on concerns raised in submissions.

# Terms of Reference

**Sessional Order 13**

***Establishment of Scrutiny Committees***

(1) Standing Order 178 is suspended.

(2) The Assembly appoints the following scrutiny committees:

(a) The Social Policy Scrutiny Committee

(b) The Economic Policy Scrutiny Committee

(3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

(4) The functions of the scrutiny committees shall be to inquire and report on:

(a) any matter within its subject area referred to it:

(i) by the Assembly;

(ii) by a Minister; or

(iii) on its own motion.

(b) any bill referred to it by the Assembly;

(c) in relation to any bill referred by the Assembly:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:

(A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(B) is consistent with principles of natural justice; and

(C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(F) provides appropriate protection against self-incrimination; and

(G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:

(A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(C) authorises the amendment of an Act only by another Act.

(5) The Committee will elect a Government Member as Chair.

(6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2018

# Recommendations

**Recommendation 1**

The Committee recommends that the Legislative Assembly pass the Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 with the proposed amendments set out in Recommendations 2 and 3.

**Recommendation 2**

The Committee recommends that the Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 be amended to require an applicant to submit an affidavit of service before a default decision can be made.

**Recommendation 3**

The Committee recommends that the Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 be amended to require an applicant in a default decision proceeding to submit an affidavit setting out the evidence in support of the claim.

**Recommendation 4**

The Committee recommends that the process for providing the affidavits in Recommendations 2 and 3 should be as part of an application to the Tribunal for a default judgement.

# 1 Introduction

## Introduction of the Bill

1.1 The Northern Territory Civil and Administrative Tribunal Bill 2018 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 10 May 2018. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by 14 August, 2018.[1]

## Conduct of the Inquiry

1.2 On 11 May 2018 the Committee called for submissions by 6 June 2018. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter, email subscription service and letters to identified stakeholders.

1.3 The Committee received three submissions and sought advice from the Department of Attorney-General and Justice in relation to issues raised in the submissions.

1.4 On receipt of the response from the Department, the Committee invited the organisations that had made submissions to comment on the Department's response, of which two made a further submission.

## Outcome of Committee's Consideration

1.5 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals; and

(iv) whether the bill has sufficient regard to the institution of Parliament.

1.6 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the proposed amendments set out in Recommendations 2, 3 and 4.

**Recommendation 1**

**The Committee recommends that the Legislative Assembly pass the Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 with the proposed amendments set out in Recommendations 2, 3 and 4.**

[1] Fyles, Hon Natasha MLA, Attorney-General and Minister for Justice, Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 (Serial 54), *Explanatory Speech*, Northern Territory Legislative Assembly, 10 May 2018, http://www.territorystories.nt.gov.au/jspui/bitstream/10070/299045/5/Minutes%20of%20Proceedings%20for%20Meeting%2058%20on%20Thursday%2010%20May%202018.pdf

## Report Structure

1.7 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.

1.8 Chapter 3 considers the main issues raised in evidence received.

# 2 Provisions of the Bill

## Background to the Bill

2.1 NTCAT was established in October 2014. Prior to this there were more than 35 'ad hoc' review bodies, with this leading to inconsistencies in the way in which reviews of decisions by government agencies were made. The *Northern Territory Civil and Administrative Tribunal Act* (NTCAT Act), which commenced on 6 October 2014, established the tribunal but did not confer any jurisdiction on it. In order for NTCAT to have jurisdiction on a matter, separate provision must be made in legislation, with this involving amendments to current laws to enable NTCAT to take over the responsibilities of existing tribunals. This has resulted in an extensive legislative program which will encompass the amendment of over a 100 Acts.[2]

2.2 One of the key amendments proposed in this Bill (s.132) has been put forward as a result of issues arising from the transferral of jurisdiction to NTCAT. Prior to 1 May 2016 the recovery of debts under $25,000 was under the jurisdiction of the Local Court, governed by the *Local Court Act 1989* (as amended) and the *Small Claims Ordinance 1974* (as amended) and associated court rules. On 1 May 2016 the Country Liberal Party Government instituted reforms to the way in which small claims were dealt with and transferred jurisdiction for the recovery of debts under $25,000 to NTCAT. Under the repealed legislation it was generally accepted that the court could make costs orders regarding disbursements such as search and lodgement fees. Since jurisdiction has been transferred to NTCAT this is no longer the case, as the basic rule concerning costs under the NTCAT Act 'is that parties pay their own costs rather than costs being paid by the losing party'[3].

2.3 In presenting the Bill, the Attorney-General and Minister for Justice commented that NTCAT considers the basic rule to prevent it from making costs orders based on whether or not a party has been successful. This has resulted in commercial agents raising concerns about the economic viability of collecting smaller debts due to a lack of certainty about their ability to recover disbursements, an uncertainty they did not have when these matters came under the jurisdiction of the Local Court. Although NTCAT has instituted a procedural rule to enable costs to be awarded where 'a failure to make a costs order or an order for out of pocket expenses would substantially deprive the successful party of relief' this is not considered to be the ideal approach and the President of NTCAT has sought a legislative amendment to deal with the issue more appropriately.[4]

2.4 Proposed amendment s.101A default decisions, has been sought by the President of NTCAT in order to clarify the circumstances in which a default decision can be made. Currently, NTCAT deals with matters where a party has not responded to a claim for a debt or fixed sum of money in accordance with NTCAT Rule 6(5):

[2] Northern Territory Civil and Administrative Tribunal, *History*, http://ntcat.nt.gov.au/about.shtml
[3] Fyles, *Explanatory Speech*, 2018, p.2
[4] Fyles, *Explanatory Speech*, 2018, p.4

If a person served with an initiating application does not file a response to it, the Tribunal may proceed on the basis that the person does not oppose the relief or remedy sought in the initiating application.

## Purpose and Overview of the Bill

2.5 In presenting the Bill, the Attorney-General and Minister for Justice noted that the primary purpose of the Bill is to provide for the NTCAT to make costs orders and to clarify the circumstances in which it can make a default decision.[5] As highlighted in the Explanatory Statement, the amendments in the Bill aim to provide that:

a) One of the grounds for the Northern Territory Civil and Administrative Tribunal (NTCAT) reopening a matter under section 80 of the Act is that a default decision was made under section 101A;

b) NTCAT can make a decision against a party who has not responded to an application for the recovery of a debt (new section 101A);

c) There is an expectation that a successful party can recover application fees, service fees and search fees that are necessary and reasonable for the conduct of a matter;

d) The seal of NTCAT can be affixed electronically; and

e) New section 101A of the Act does not apply to proceedings commenced prior to the commencement of that section.[6]

[5] Fyles, *Explanatory Speech*, 2018

[6] *Explanatory Statement*, Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 (Serial 54), p.1, https://parliament.nt.gov.au/__data/assets/pdf_file/0006/502359/Serial-54-Explanatory-Statement-NT-CAT.pdf

# 3 Examination of the Bill

## Introduction

3.1 Submissions varied in the extent to which they supported the Bill, however, all organisations that provided a submission recommended that changes be made before the Bill was passed.

3.2 Key issues raised in submissions related to s.101A – Default decisions and s.132 – Tribunal may make costs orders.

3.3 The Law Society NT (Law Society) supported the provisions for default judgements (s.101A) provided certain amendments are made.[7] The Darwin Community Legal Service (DCLS) proposed caution in passing the Bill as it considered that it didn't have 'sufficient regard to the rights and liberties of individuals', and proposed that a social impact assessment be commissioned to explore potential impacts on human rights before the Bill proceeds further.[8] Both the DCLS and the North Australian Aboriginal Justice Agency (NAAJA) emphasised the potential for the Bill to have a negative impact on disadvantaged groups. NAAJA opposed the tribunal being empowered to make default decisions but suggested amendments in the event that the Bill is passed.[9]

## Default Decisions

3.4 Under proposed s.101A, NTCAT would be able to make a decision against a party who does not respond to an action for the recovery of a debt or a fixed sum. Based on the Explanatory Statement, the effect of this section is to allow NTCAT to make the decision on the basis of the papers alone. It would not require the applicant to provide evidence of the debt nor would it require either party to attend the hearing.[10]

3.5 All submissions considered that default decisions should not be allowed unless the applicant is required to provide:

- Evidence of the debt;
- Evidence that documents have been served.

### *Requirements for Evidence of Debt*

3.6 The Law Society NT does not support the amendment as outlined in s.101A unless ancillary changes are made and '… recommends the amendment include a requirement for some evidence of the debt to be lodged or provided by the applicant…'.[11] It notes that this is not the case at present and without such a

[7] Law Society NT, Submission No. 1, p.1
[8] Darwin Community Legal Service (DCLS), Submission No. 2, p.1
[9] North Australian Aboriginal Justice Agency (NAAJA), Submission No. 3, p.3
[10] *Explanatory Statement*, Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 (Serial 54)
[11] Law Society NT, Submission No. 1, p.1

requirement the proposed amendment could result in NTCAT making '… a decision by default simply on the basis of information provided in the initial application'.[12]

3.7 The Law Society further recommended that Queensland's legislation on default decisions be reviewed for examples of how safeguards could be incorporated into the Bill to ensure default decisions are based on evidence. The *Queensland Civil and Administrative Tribunal (QCAT) Act 2009* (s.50, 50A, 51), QCAT Rules 7 and 10, and prescribed application forms, require the applicant to include detailed information about the dispute, such as: agreements made with the respondent; how the amount owed was calculated; and relevant documents and evidence such as contracts and invoices.

3.8 The DCLS expressed concerns about the 'standard of proof that is required before an applicant can succeed through a default decision' and considers that:

> … there ought to be a short review of the evidence in the substantive matter before orders can be made and reasons should be given for all decisions made, in order to maintain high standards of decision-making and to facilitate reviews of default judgments.[13]

3.9 NAAJA commented that while the power to make a default decision would improve efficiency in resolving matters that do not appear to be contested, it also has the potential to lead to unjust outcomes. NAAJA considered that s.101A(2), which requires the application to set out the claim 'in terms that are reasonably clear',[14] does not provide individuals with adequate protection, and noted that proposed s.101A:

a) May allow an applicant to obtain an order against a respondent without the need to produce any evidence; and

b) Creates a large risk that our clients would be subject to judgements and orders that could not otherwise be sustained.[15]

3.10 The Committee sought advice from the Department regarding the concerns raised above and whether any thought had been given to incorporating provisions similar to those contained in the Queensland legislation. In relation to evidence, the Department's response focused on the purpose of the initiating application. It advised that:

> The concern described involves a basic misconception as to the role of an initiating application.
>
> The initiating application performs the same role as a statement of claim in a court proceeding. It identifies the facts asserted in support of a claim and the relief that is sought. An initiating process (whether in a Court or NTCAT) should never include a requirement for evidence or a 'standard of proof'.
>
> The default decision power proposed is no different in substance from the default judgment power that Courts have for many years exercised (and at an administrative level) in relation to debts and liquidated claims.[16]

[12] Law Society NT, Submission No. 1, p.1
[13] DCLS, Submission No. 2, p.2
[14] Northern Territory Civil and Administrative Tribunal Amendment Bill 2018, s.101A(2), p.2
[15] NAAJA, Submission No. 3, p.4
[16] Department of Attorney-General and Justice, *Written responses to questions from the Committee*, 2 July 2018, p.4

3.11 The Department's view that 'an initiating process (whether in a Court or NTCAT) should never include a requirement for evidence' does not obviate the need for evidence to be provided but simply registers the view that it is not usual practice to require evidence to be included in an initiating application. The Law Society contested this and stated that such a view:

> … does not align with the position in other jurisdictions, in particular Queensland. In this regard we refer the committee to QCAT and the prescribed application form for minor civil debts and the prescribed form for a decision by default.[17]

3.12 The Committee notes that the view that evidence "should never"' be included in an initiating process is inconsistent with QCAT's requirements as expressed through the prescribed application forms referred to above, which state that relevant documents and evidence should be attached to the applications e.g. contracts, invoices, agreements about interest etc.[18,19]

3.13 In response to whether any consideration had been given to incorporating provisions similar to those contained in the Queensland legislation the Department advised that:

> Neither section 33(2) of the QCAT Act, nor Rules 7 and 10 of the QCAT Rules, have anything to do with default decisions (let alone the 'evidence used' in default decisions). That is:
>
> - Section 33(2) merely provides that the application must "state the reasons for the application",
> - Rule 7 merely states operational matters such as the need for the application to be in the "approved form" and that it must contain an address for service; and
> - Rule 10, in relation to debts, merely states that the application must contain a statement of the amount claimed (including interest), the filing fees, how the amount is worked out and how it came to be owing.
>
> In any case, for NTCAT the equivalent requirements (relating to initiating process) exist by virtue of the combined operation of NTCAT Rule 3 and the approved form for an initiating application (which incorporates requirements for stating the grounds of an application).[20]

3.14 The Law Society disputed these assertions and commented that:

> QCAT's initiating application requires the person to provide as much information as possible and to attach evidence where possible. NTCAT's initiating process only requires a summary which is limited to one page. A quick comparison between QCAT's forms and NTCAT's forms should be all that is required to show the inadequacy in the proposed amendments.
>
> and
>
> DAGJ refers to QCAT Rule 10 as *merely* requiring a statement as to the amount claimed and how it came to be owing. However, the requirements for an application for a decision by default are dealt with by QCAT Rules 60 and 60A and when read in conjunction with Rule 10 it becomes clear that evidence of the basis of the claim is required.[21]

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[17] Law Society NT, Submission 1a, 12 July 2018, p.2
[18] *Queensland Civil and Administrative Tribunal Act 2009* (section 33), *Form Number 3 (version 4)*
[19] *Queensland Civil and Administrative Tribunal Act 2009* (Rule 60), *Form Number 6 (version 4)*
[20] Department of Attorney-General and Justice, *Written responses to questions from the Committee*, 2 July 2018, p.4
[21] Law Society NT, Submission 1a, p.2

3.15 The Committee notes that QCAT seeks evidence twice before giving a default judgement. As noted above, applicants are informed that they should include evidence in their initiating application. Also, decisions by default require an additional application (s 50 QCAT Act) which must include both an affidavit about how the initiating application was given to the respondent and an affidavit about the debt stating how much is still owing (either QCAT rule 60 (2) or rule 62(2)).

3.16 Ultimately, the core of the issue is not so much at what stage of the process evidence should be provided but whether there is a need for evidence to be provided in cases that are heard under proposed s.101A. In this regard, all submitters were in agreement that evidence should be required. DCLS, in particular, critiqued the view that the proposed default decision power is no different from that which Courts have exercised for many years in relation to debts and liquidated claims and commented that:

> It is important to emphasise that NTCAT is a Tribunal, not a Court, and it was established as a Tribunal for the specific purpose of dispensing accessible justice. Its processes and powers are different because its objectives are different, and it does not and should not have the functions and powers of a Court.[22]

DCLS further commented that if the Act is amended to enable a default decision making power it will be critical to ensure that fundamental underpinning principles of administrative law, those of natural justice and procedural fairness, are incorporated. In this respect it recommended that any amendment should provide for substantiation of the debt.

3.17 In addition to the views put forward in submissions, it is useful to examine current NTCAT practices in relation to uncontested claims. Although NTCAT does not conduct default judgements in relation to small claims (under $25,000), it has devised a pathway to deal with the following:

- Complex/lengthy matters where a response to the application is not filed;
- Simple/short matters such as straightforward debt recovery (e.g. failure to pay local council rates or electricity bill).[23]

The NTCAT publication *New arrangements for small claims matters* specifies that in both of the above circumstances the applicant is required to provide NTCAT with evidence they will rely on at the hearing. In complex/lengthy matters where a response to the application is not filed, NTCAT makes orders for an uncontested hearing which include a requirement for the applicant to file evidence of the debt with NTCAT. In simple short matters the steps are as follows: step 1, applicant submits an initiating application; step 2, NTCAT returns initiating application with orders from NTCAT attached; step 3, '… applicant serves the Initiating Application, together with the orders and the evidence they will rely on at the hearing.[24]

[22] DCLS, Submission 2a, p.2
[23] Northern Territory Civil and Administrative Tribunal, *New arrangements for small claims matters*, http://ntcat.nt.gov.au/documents/NTCAT%20Small%20Claims%20Factsheet.pdf
[24] Northern Territory Civil and Administrative Tribunal, *New arrangements for small claims matters*, p.5

## Proof that Documents have been Served

3.18 A fundamental rationale for introducing a default decision provision is that the failure to respond to an application for the recovery of a debt, or other fixed sum of money, indicates that the money is owed and the claim uncontested. However, this view is challenged in all three submissions. The core concern is that current provisions for service of documents do not provide sufficient assurance that the respondent has received the documents, thereby creating a risk that default decisions may be implemented against individuals who are not aware of proceedings against them.

3.19 Current provisions for service of documents are included in NTCAT Rule 3. Provisions from the Rule that are of particular relevance to the issues raised are set out below:

> **3 Service of documents**
>
> (4) The Tribunal may require a person to provide evidence of the steps taken to serve a document
>
> (5) For the Act and these Rules, a document is served on a person if the person required to serve it:
>
> a) brings the document to the person's attention; or
>
> b) serves the document in a way allowed by section 25 of the Interpretation Act or section 109X of the Corporations Act 2001 (Cth); or
>
> c) serves the document in a way directed by the Tribunal.
>
> (6) The Tribunal may refuse to take action in a proceeding if it is not satisfied that a person has been served with a document in accordance with this rule.[25]

3.20 Current provisions do not require personal service and this was regarded as problematic by both the Law Society[26] and DCLS[27] due to a lack of certainty that documents served by email or post have actually been received. Both organisations highlighted the particular vulnerability of residents in remote areas, with DCLS commenting that:

> The minimalist requirements for service mean that all [that] is required is for documents to be sent to or left at the community office. The defendant might not live there anymore, might be in a regional town seeking medical treatment, might have moved for family reasons, or might not know it is at the community office. Further, they may not be aware of outstanding payments in the first place. [28]

3.21 DCLS also expressed concerns that a failure to respond to an application may be due to served documents not being received, or to a lack of understanding of the process, rather than to a deliberate decision not to engage in the process, and commented that:

> The matters that come to DCLS do not indicate a conscious refusal to appear, but rather a lack of understanding of the process or a lack of communication of service. We suggest that the problem of non-appearance may be better addressed by reviewing the requirements for service to be effected in fact, and

[25] Northern Territory Civil and Administrative Tribunal Rules, 2016
[26] Law Society NT, Submission 1, p.2
[27] DCLS Submission 2, p.2
[28] DCLS Submission 2a, p.2

> for communications to be appropriately tailored to enhance a defendant's understanding of the process.[29]

3.22 The Committee sought clarification from the Department regarding the evidence the Tribunal requires as proof that documents have been served and was advised that:

> NTCAT cannot proceed in a respondent's absence unless it is satisfied, having regard to the evidence, that the applicant has complied with Rule 3(5).
>
> An applicant may choose to prove service by means of documentary or oral evidence (or both).
>
> Once again, the situation for proof of service as regards the proposed default decision power is no different from what already applies in undefended NTCAT proceedings.[30]

3.23 DCLS and the Law Society refuted this and noted that the NTCAT Rules regarding service use the term 'may' rather than 'must' (see 3.19 above) with respect to the actions the Tribunal can take, indicating that the Tribunal has the discretion to take action, whether or not it is satisfied that service has taken place.

3.24 NAAJA recommended that a prerequisite for a default judgement should be a requirement that the applicant provide a statement of service, similar to the affidavit or declaration required in Rule 11.02 of the *Local Court (Civil Procedures) Rules* while the Law Society and DCLS suggested that the QCAT provisions would be a useful model to consider.

3.25 All submissions considered that if s.101A were to be passed it would be important to update existing rules on service to ensure that default decisions are not implemented unless proof of service has been provided.

### ***Committee's Comments***

3.26 The Committee acknowledges the concerns expressed by submitters but considers that existing legislation covering service of documents, used by courts and tribunals across the NT, are adequate. In addition, it notes that NTCAT's *Service Guidelines* provide detailed criteria designed to ensure that effective service by post and email can be proved, for example, methods of service include:

- delivering or mailing a document to the party's residential or business address – provided there is proof that the address is current and that the document reached the address (for example by reference to a tracking number);
- emailing or otherwise electronically sending a document to the party – provided there is proof that the transmission was received (e.g. a read receipt or a reply to the email); or

3.27 Although the Committee considers existing legislation for service to be adequate it notes that in a default decision procedure it is particularly important that the Tribunal be satisfied that service has taken place.

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[29] DCLS Submission 2a, p.1

[30] Department of Attorney-General and Justice, Written responses to questions from the Committee, 2 July 2018, p.2

3.28 The Committee is mindful of the need to keep the process as simple as possible. To achieve this, it considers that the minimum evidence to be required should be affidavits affirming the relevant details of the claim and the fact of service. This does not require significant paperwork but would make any applicant who made a false claim liable to a penalty.

3.29 The Committee notes that the scheme in the Bill does not require any further paperwork for a default judgement after the initiating application has been submitted, although some further paperwork would be needed if the Tribunal was to satisfy itself of service. It appears to the Committee that the most convenient means of ensuring evidence of both service of the application and the substance of the claim is to add a step to the default decision process that requires an applicant to apply for a default judgement after the period for responding has elapsed and at that point provide affidavits evidencing the service of the application and the substance of the claim, including the debt continuing at that point in time.

**Recommendation 2**

**The Committee recommends that the Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 be amended to require an applicant to submit an affidavit of service before a default decision can be made.**

**Recommendation 3**

**The Committee recommends that the Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 be amended to require an applicant in a default decision proceeding to submit an affidavit setting out the evidence in support of the claim.**

**Recommendation 4**

**The Committee recommends that the process for providing the affidavits in Recommendations 2 and 3 should be as part of an application to the Tribunal for a default judgement.**

## Section 132 amended (Tribunal may make costs orders)

3.30 Under the NTCAT Act, the basic rule in relation to costs is that parties bear their own costs rather than these being paid by the losing party.[31] NTCAT regards this as preventing it from making costs orders based on whether or not a party was successful. To provide greater flexibility around this issue NTCAT introduced an interim procedural rule, Rule 10(2)(b), which provides that, when making a costs order, NTCAT must take into account the following:

> whether the failure to make a costs order for the out-of-pocket expenses reasonably incurred by a successful party would substantially deprive that party of relief.[32]

[31] *Northern Territory Civil and Administrative Tribunal Act*, s.131
[32] Northern Territory Civil and Administrative Tribunal Rules 2016, Rule 10(2)(b)

3.31 The effect of proposed new section 132(2)(b)(ba) will be to require NTCAT, when it is determining whether to make a costs order, to consider the expectation that the successful party should be able to recover:

- Costs paid under the Act (e.g. fees paid under sections 85(5), 94(2) or 18); and
- Fees paid for activities necessary to make an application under the Act or to respond to an application. These fees would include fees payable for the service of documents and the conduct of searches.[33]

3.32 Views on this clause varied but, in general, the organisations that made submissions accepted the amendment, albeit with suggestions for improvement, mainly relating to greater clarification regarding the costs that will be encompassed by the amendment.

3.33 NAAJA considered it reasonable for the Tribunal to make costs orders, but suggested that exceptions should be made for adults under guardianship and for tenants who have been evicted. NAAJA also expressed concerns that the use of the word "expectation" could be interpreted to suggest that the awarding of costs is the default position and suggested that a note should be included in the explanatory memorandum that this section means that the Tribunal will consider the awarding of costs but there should be no presumption that such costs are to be awarded.[34]

3.34 DCLS had concerns that the implementation of s.132 could reduce the accessibility of NTCAT as a forum for dispute resolution, as disadvantaged groups may be unwilling to take on the increased level of risk in relation to costs and charges.[35] DCLS considered that greater certainty and consistency of application could be achieved if the costs encompassed by these orders were further clarified. It suggested that legislative guidance be provided regarding what is considered to be a reasonable cost; that there be a requirement that the cost be proportionate and unavoidable; and that specific provisions be inserted in the Rules outlining prescribed amounts and the kind of disbursements allowed.[36]

3.35 The Law Society considered that proposed costs amendments could be improved 'by adding a specific provision dealing with reasonably incurred disbursements of a kind prescribed by the Rules (and for amounts prescribed by the Rules)'.[37] It commented that the proposed amendment does not give the Tribunal the power to regulate these matters and that this would, potentially, enable debt collectors to seek reimbursement for costs beyond what was reasonably necessary.

3.36 The Committee requested a response from the Department regarding the following points arising from submissions:

- The extent to which this amendment might reduce the accessibility of NTCAT as a forum for dispute resolution (DCLS);

[33] Explanatory Statement, Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 (Serial 54), p.2.
[34] NAAJA, Submission 3, p.7
[35] DCLS, Submission 2, p.1
[36] DCLS, Submission 2a, p.2
[37] Law Society NT, Submission 1, p2.

- Whether the amendment would allow NTCAT the discretion to make exceptions for groups such as adults under guardianship orders and tenants who have been evicted (NAAJA); and
- The effect on the operation of the legislation of the inclusion of a note in the Explanatory Memorandum clarifying that the awarding of costs would be considered by the Tribunal but would not be guaranteed (NAAJA).

3.37 In relation to concerns about accessibility the Department advised that:

> The alteration effected by proposed section 132 applies only to certain (unavoidable) out of pocket expenses incurred by a successful party. It has no application, for example, to the costs of retaining legal representation (which will continue to be subject to the usual rule that parties bear their own costs).
>
> As to the NTCAT's objects, including accessibility, it is difficult to see how an expectation for recoverability of unavoidable expenses associated with taking proceedings in NTCAT has any negative impact on those objects. It may just as well be asked whether the non-recoverability of filing fees (and like expenses) by a successful party is a barrier to accessibility.

3.38 Regarding whether NTCAT would be able to make exceptions for specific groups the Department advised that:

> Costs orders will always remain a matter for NTCAT's discretion.
>
> That said, it is not accepted that either of the exceptions proposed could or should be applied across the board. The mere fact that an adult is under guardianship or that a tenant has been evicted says nothing about the particular circumstances of a matter. (By way of illustration, NTCAT has dealt with many tenancy matters where the defaulting tenant has substantial means but has chosen to stop paying rent because of a change in their employment circumstances).

3.39 In relation to including a note in the Explanatory Memorandum stating that the Tribunal's consideration of costs should not be considered as a guarantee that costs would be awarded, the Department advised that:

> The point of the amendment is to create an exception to the usual rule as to costs in NTCAT proceedings. The effect of the amendment, if passed, will be that fees of the specific nature referred to in section 132(2)(ba) will ordinarily be awarded to the successful party (if they are sought). As already noted, any costs order remains a matter for NTCAT's discretion. A note such as suggested is unnecessary.

### ***Committee's Comments***

3.40 The Committee acknowledges the concerns raised in the submissions but is satisfied by the advice that the costs referred to in this amendment cover unavoidable costs associated with making an application and do not pertain to costs of legal representation. On balance, the Committee considers that it is reasonable to provide for an expectation that a successful party will be able to recover what are, essentially, out-of-pocket costs associated with instituting a proceeding to recover money owed. The Committee notes that access to NTCAT for those who suffer financial disadvantage is currently provided, and will continue to be provided, by existing NTCAT practice, which allows the Registrar to waive payment of a fee in cases where financial hardship is proved.

3.41 The Committee notes the advice that costs will always remain a matter for NTCAT's discretion and considers this to provide adequate protection for specific groups such as those under Adult Guardianship or tenants who have been evicted. It considers that this discretionary power is more likely to result in fair and just decisions for all parties than an across the board approach which may inappropriately benefit parties that have sufficient means.

3.42 The Committee is satisfied with the advice that it is not necessary for the Explanatory Memorandum to include a note stating that the Tribunal's consideration of costs should not be considered as a guarantee that costs would be awarded.

# Appendix A: Submissions Received

### Submissions Received

1. Law Society NT
2. Darwin Community Legal Service
3. North Australian Aboriginal Justice Agency

**Note:** Copies of submissions are available at:
https://parliament.nt.gov.au/committees/EPSC/54-2018#Subs

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