North Australian Aboriginal Justice Agency

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Northern Territory Civil and Administrative Tribunal Amendment Bill 2018

Economic Policy Scrutiny Committee – Legislative Assembly of the Northern Territory

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About NAAJA

The North Australian Aboriginal Justice Agency (NAAJA) provides high quality, culturally appropriate legal aid services for Aboriginal people across the Northern Territory in the areas of criminal, civil and family law, prison support and through-care services. NAAJA is active in systemic advocacy and law reform in areas impacting on Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Top End to provide legal advice and advocacy.

In our civil practice, NAAJA has represented our clients in the following jurisdictions at the Northern Territory Civil and Administrative Tribunal (the **Tribunal**):

- Adult guardianship
- Victims of Crime Compensation Appeals;
- Residential Tenancy matters;
- Discrimination; and
- Small claims.

This submission is made based on our authority led by an Aboriginal board and consistent with our meaningful commitment to cultural competency (as set out in the Cultural Competency Framework 2017 – 2020), particularly as it relates to highlighting the vulnerabilities of Territorians in relation to access to justice and the proposed reforms.

The Policy Context

Our clients face a number of difficulties in gaining access to the justice system due to a number of particular vulnerabilities. Those significant vulnerabilities include trauma,

homelessness, mental and physical illness, domestic violence, sole parenthood, old age, remoteness, literacy and limited proficiency in English.

These vulnerabilities create significant barriers for our clients to access the Tribunal, even when it has otherwise been designed to be accessible. These vulnerabilities can make it incredibly difficult for our clients to:

1. know who to contact with respect to a specific legal issue,
2. make and prioritise appointments with legal services given the other difficulties they face in their lives;
3. prepare applications, responses, evidence and other documents in preparation of a hearing; and
4. attend and give evidence at a hearing.

The significant underfunding of Aboriginal Legal Services and broad, unmet legal need is acknowledged in the Law Council of Australia's Justice Project and in the 2014 Productivity Commission Inquiry into Access to Justice Arrangements, where $200m additional for funding for legal aid services was recommended alongside contributions from State and Territory governments (particularly as increased and unmet legal need is often the result of reforms at the State and Territory level).Scope of this Submission

Given the vulnerabilities of our clients, and how these vulnerabilities impact access to justice, the main concern of these submissions is ensuring the Northern Territory Civil and Administrative Tribunal Amendment Bill 2018 (the **Bill**) does not reduce the level of accessibility to the Tribunal and just outcomes.

For the reasons outlined in the paragraphs below, NAAJA submits that:

1. To ensure appropriate access to justice, the Tribunal should not be empowered to make default decisions;

2. If ultimately it is decided that the Tribunal should have the power to make default decisions, the Bill should be amended to ensure:

    a. that the Tribunal should exercise that discretion to make default decisions in accordance with the common law principles with respect to default judgements;
    b. That greater clarity is given with respect to when a party fails to respond to an application; and
    c. That robust but reasonable service occurs and is demonstrated as prerequisite conditions to a default decision being made; and

3. Consideration is given to ensure application and service fees are relevant to a consideration when the Tribunal exercises its discretion to award costs award but is not necessarily the default.

Default decisions

Proposed paragraph 80(1)(a)

While NAAJA opposes the Tribunal being empowered to make default decisions (for the reasons outlined below), if it was decided that the Tribunal could make default decisions, we strongly support the inclusion of proposed paragraph 80(1)(a). We believe that this would be a necessary safeguard to avoid potential injustice that a default decision could create.

Proposed Section 101A

NAAJA opposes the Tribunal being empowered to make default decisions.

The major tension of empowering a decision making body to award default judgements is that on one hand, it allows an efficiency in resolving a matter that otherwise does not appear to be contested, but on the other hand, has the potential to lead to unjust outcomes where an award is made purely on the basis that the other party has not contested the application.

Our major concerns are that a default judgement:

1. May allow an applicant to obtain an order against a respondent without the need to produce any evidence; and
2. Creates a large risk that our clients would be subject to judgements and orders that could not otherwise be sustained.

This is particularly concerning for our clients and the residents of the Northern Territory more generally because they are subject to significant vulnerabilities that act as barriers to responding to legal matters, as outlined in the paragraphs above. We submit that allowing for default decisions would disproportionately lead to unjust outcomes for our clients.

It is further noted that neither the New South Wales nor Victorian Civil and Administrative Tribunals have the power to make default judgements[1] presumably to avoid the above mentioned injustice. We submit that as the Northern Territory has a higher proportion of its population subject to the vulnerabilities as outlined in the paragraph above, then there is a greater policy justification not to allow the Tribunal to make default decisions. In addition, the language issues and limited literacy and proficiency in English as well as access to service issues across our geography and population reflect additional challenges. It would therefore appear that allowing for default decisions would be a regressive step in furthering the stated objects of the Act, especially the objects that provide the Tribunal must:

- be accessible to the public by being easy to find and easy to access; and

[1] Please note that while the *Civil and Administrative Tribunal 2013* (NSW) does empower the Rule Committee to make rules as to the circumstances in which a default decision of the Tribunal may be obtained (see paragraph 5 of Schedule 7 of that Act), the Rule Committee has not actually made a rule to that effect and the Civil and *Administrative Tribunal Act 1998* (Vic) and its subordinate legislation does not contain explicit provisions for default judgement.

- be responsive to parties, especially to people with special needs

We submit that it is in the balance of justice that an applicant should have their evidence considered by a Tribunal member, if only at an ex-parte hearing, to avoid the risk that a default judgement would lead to an unjust decision.

It is therefore our position that the Tribunal should not be empowered to make default decisions.

In the event that the Committee and the Parliament does proceed with empowering the Tribunal to make default decisions, the following paragraphs outline suggested amendments to the draft Bill.

Default decisions should reflect common law default judgements

The case law relating to default judgements has developed in recognition that a default judgement *may* lead to unjust outcomes due to a party failing to defend an action. This case law has developed critical safeguards to minimise unjust outcomes. The Bill should therefore reflect the common law to with respect to default judgements to enshrine these safeguards.

A critical safeguard to avoid injustice is that a default judgement can only be ordered where the originating process expressly and clearly identifies the basis for which an order should be made, outlining all the facts and circumstances that would entitle the applicant to an award of damages. An entitlement to relief must be disclosed on the applicant's pleadings and an originating process that does not effectively identify the basis cannot be "cured" by amendment or further evidence being tendered to "prop up" the defective originating process[2]. This is a strict requirement that safeguards the respondent as their absence can only be taken as an admission of what was stated in the originating process, and not what may be amended, or supported by further evidence, in the respondent's absence[3].

We submit that this allowing a default decision when the application is "reasonably" clear, water's down this protection.

Another important safeguard is that the Court retains the discretion whether or not to allow a default decision. The Court can, with respect to discretionary decisions, require the applicant to provide further evidence[4] or choose not to award a default judgement where it is clear that the respondent has a defence[5].

We submit that these are important safeguards against the potential injustice of a default judgement and we therefore recommend that the proposed section 101A be amended so that:

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[2] *Noden v Mason* [1926] VLR 41
[3] *Widenhofer v Commonwealth* (1970) 122 CLR 172
[4] *Australian Competition and Consumer Commission v Daeline.net.au Pty LTD* (2007) 161 FCR 513 at [42]
[5] *Widenhofer v Commonwealth* (1970) 122 CLR 172. – in that case a second defendant did not attend the trial in which the first defendant was successful. The Court held that as the plaintiff was unsuccessful against the first defendant on the merits of the case, the Court would not grant a default judgement against the second defendant because that defendant defaulted in attendance.

1. The Tribunal can made a default judgment within the meaning of the unwritten law from time to time;

2. That as a consequence of the above mentioned point, proposed subsection 101A(2) is removed from the Bill;

3. That the explanatory memorandum explicitly states that the Tribunal retains the discretion to award a default judgment; and

4. That the explanatory memorandum explicitly states that the Tribunal should exercise that discretion in accordance with the common law principles with respect to default judgements.

Definition of respond

Proposed Section 101A empowers the Tribunal to make a default decision if a party does not "respond" to an application. There is no definition within the current Act, or the Bill that would define what "respond" means, and no other provisions in either the Bill or the Act relating to procedure that might otherwise inform the meaning of "respond". As drafted, it is not clear whether the legislative intent is that a party is deemed to have failed to respond if the party does not:

1. File a response to the application;
2. comply with an order of the Tribunal prior to a hearing;
3. attend a mention;
4. attend a substantive hearing; or
5. do any other conduct, or a combination of conduct.

We therefore recommend that the Bill is amended to give greater clarity on when a party is deemed to have failed to respond to an application.

In order to ensure that the Tribunal is accessible as possible, and to ensure a respondent's language or literacy is not a factor that would stop a respondent from being considered to have failed to respond to an application, we recommend that a party should only be deemed to have failed to respond if they do not attend a substantive hearing.

Service

We submit that default judgements can only attempt to avoid an unjust outcome if the Tribunal can be reasonably satisfied that service has occurred prior to the hearing of the default judgement. We therefore recommend that a prerequisite of a default judgement is that:

1. Service has occurred in accordance with section 25 of the *Interpretation Act* or section 109X of the *Corporations Act 2001* (Cth); and

2. The applicant provide a statement that complies with requirements similar to those set out in Rule 11.02 of the *Local Court (Civil Procedures) Rules*.

It is noted that recommendation 1 above mirrors sub-rule 3(5)(b) of the *Northern Territory Civil and Administrative Tribunal Rules* (the Rules). This recommendation would not otherwise impact on the other forms of service under rule 3 of the Rules, but we recommend that it is a necessary prerequisite for seeking a default judgment.

Recommendation 2 above is suggested as a means to ensure that the Tribunal can satisfy whether the respondent had sufficient notice of the matter to respond to. We submit that providing such a statement would not be overly burdensome on an applicant who would be seeking a default decision given that this would minimise the risk of an unjust default judgement being made.

Proposed paragraph 32(2)(b)

Generally, NAAJA does not believe that it is unreasonable that the Tribunal can consider to make an order to allow the recovery of costs for applications to the Tribunal. We do, however, believe that there are some exceptions to this position, those being where those applications relate to:

1. Adult guardianship matters;
2. Tenancy evictions.

We believe that in these above mentioned matters, we submit that it would be inappropriate for the unsuccessful parties to have to pay the costs of the applications and service. For persons who become subject to an adult guardianship order, it would be inappropriate that they would be required to pay the cost of fees given that they would have any control over the fact that they may require a guardianship order.

For a person who is evicted from a tenancy, we submit that in either the public or private rental market, a person who has been evicted from a tenancy is likely to use any finances they have to ensure that they can retain another dwelling. In this circumstance, we submit that it would be inappropriate for them also be required to pay the costs of the application and service fee.

While proposed paragraph 32(2)(b) does still appear to allow the Tribunal the direction to decide whether such costs should be awarded, the use of the word “expectation” may be interpreted to suggest that awarding such costs is the default or presumed position for the Tribunal. We suggest that there should be consideration as to whether the use of “expectation” would lead to such an interpretation and amend accordingly or include a note in the explanatory memorandum that wording such costs is a consideration for which the Tribunal will consider, but there is no presumption that such costs are to be awarded.