

**DRAFT SECOND READING SPEECH**

**HON ELISE ARCHER MP**

*Legal Profession Amendment Bill 2022*

*\*check Hansard for delivery\**

Mr Speaker, I move that the Bill now be read a second time.

This Bill continues our Government's work to resolve technical legal issues arising for Tasmania's boards and tribunals as a result of the High Court's decision in *Burns v Corbett* [2018] HCA 15.

The Bill will amend the *Legal Profession Act 2007* (the Legal Profession Act) to resolve the issue as it has arisen for the Legal Profession Board of Tasmania and Disciplinary Tribunal under the legal practitioner complaints and discipline framework.

To briefly summarise, the issue arising out of *Burns v Corbett* is that in circumstances where a legal dispute involves matters of the kind referred to in section 75 or 76 of the Constitution of the Commonwealth, notably in this instance 'federal diversity jurisdiction', that matter *cannot* be entertained by a tribunal, board or other subordinate body.

Federal diversity jurisdiction arises where the legal dispute is between natural persons resident in different States, or between a State and a natural person resident in another State.

Mr Speaker, section 417 of the Legal Profession Act provides that its purposes are:

- (a) to provide a nationally consistent scheme for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;
- (b) to promote and enforce the professional standards, competence and honesty of the legal profession; and
- (c) to provide a means of redress for complaints about lawyers.

Complaints are made under the Legal Profession Act to the Legal Profession Board (the Board), following which they may be dealt with by the Board itself, the Legal Profession Disciplinary Tribunal (Disciplinary Tribunal), or the Supreme Court of Tasmania (Supreme Court).

Generally, it is the case that matters capable of amounting to unsatisfactory professional conduct are dealt with by the Board itself, while matters capable of amounting to professional misconduct – considered to be more serious – are dealt with by the Disciplinary Tribunal or Supreme Court.

Mr Speaker, the Legal Profession Act also provides a mechanism for a complainant, or a practitioner who is the subject of a complaint, to appeal a determination of the Board to the Disciplinary Tribunal or the Supreme Court.

Federal diversity jurisdiction may apply if the Board or Disciplinary Tribunal exercises judicial power in the determination of a complaint, in circumstances where the complainant and legal practitioner are residents of different Australian states.

Tasmania's legal profession operates within a national legal services market, so it is not uncommon that legal practitioners and their clients are based in different states. For example, the person making the complaint may be a resident of Victoria, while the legal practitioner about whom the complaint is made may be based here in Tasmania.

In these circumstances, and in accordance with the decision in *Burns v Corbett*, the Board and Disciplinary Tribunal are unable to exercise judicial power in respect of the matter, and currently have no option under the Legal Profession Act except to dismiss it for want of jurisdiction.

This Bill will resolve this issue by creating a new pathway for these matters to proceed.

To be clear, this is not an issue that may be cured by simply conferring jurisdiction upon a tribunal, board or other subordinate body through legislation. This is an original jurisdiction of the High Court. The only body, other than the High Court, that may exercise such jurisdiction is the court of a state that is vested with federal jurisdiction. In Tasmania, that is the Supreme Court and the Magistrates Court.

Mr Speaker, this is a similar situation to that which our Government addressed last year through the legislation enabling commencement of the Tasmanian Civil and Administrative Tribunal (TASCAT), under Part 9 of the *Tasmanian Civil and Administrative Tribunal Act 2020* (the TASCAT Act). Of course, the amendments in

this Bill are being progressed separately to the TASCAT amendments because the Board and Disciplinary Tribunal are not part of TASCAT.

The amendments in this Bill also take a different approach to those made for TASCAT. The intention in this Bill is to resolve the federal jurisdiction issue while preserving, to the greatest extent possible, the existing legal profession complaints and disciplinary framework. Different provisions are also required because the TASCAT Act creates the jurisdiction in the Magistrates Court, while the appropriate jurisdiction for the Legal Profession Act is, and remains, the Supreme Court.

Mr Speaker, the new section 464A inserted by the Bill provides the pathway for complaints to proceed under the existing framework where the Board or Disciplinary Tribunal considers that federal diversity jurisdiction applies, or where there is some doubt as to its application in proceedings.

For complaints being heard by the Board where federal diversity jurisdiction issues arise, the Board will be able to dismiss the original complaint and then make a fresh complaint itself in relation to the same conduct, and the Disciplinary Tribunal can hear and determine the matter. For example, the Board rather than the interstate resident would be the party, and subsequently, no federal diversity jurisdiction issue arises for the Disciplinary Tribunal.

For complaints being heard by the Disciplinary Tribunal, the amendments will clarify the process by which it dismisses the complaint, and an application can then be made for the complaint to be heard and determined by the Supreme Court, which has jurisdiction in relation to matters involving federal diversity jurisdiction.

The differing approaches reflect variances in the complaints processes provided under the Legal Profession Act for the Board and Disciplinary Tribunal, and the identified circumstances under which federal diversity jurisdiction may arise. In preparing these amendments, the Department has aimed to preserve the existing complaints framework to the greatest extent possible.

Mr Speaker, I will now look at the clauses in the Bill in sequence.

Clauses 4, 5, 6 and 7 of the Bill make changes to the complaints provisions within Chapter 4 of the Legal Profession Act. These amendments support the more substantial provisions inserted into the Legal Profession Act to deal with federal diversity jurisdiction.

Clause 4 amends section 450 of the Legal Profession Act to enable the Board to apply to the Disciplinary Tribunal to hear and determine any matter that the Board

considers is capable of amounting to either unsatisfactory professional conduct or professional misconduct, or both. Under the current provisions, the Board is unable to make an application where the matter is considered capable of amounting to unsatisfactory professional conduct alone.

Clause 5 amends section 457 of the Legal Profession Act so that the notice requirements in that section will include a decision made by the Board pursuant to the new section 464A(2)(a), which I will outline shortly.

Clause 6 also serves to capture a decision of the Board made under the new section 464A(2)(a). It ensures that, where the Board dismisses a complaint pursuant to that section, an application can be made under section 458(1) of the Legal Profession Act to have the matter determined by the Disciplinary Tribunal or the Supreme Court.

Under the current provisions in section 462 of the Legal Profession Act, the Board is only required to notify an Australian practitioner of a complaint about them where that complaint has been 'received' by the Board. This would not extend to circumstances where the Board itself makes the complaint.

Clause 7 amends section 462 of the Legal Profession Act to address this, ensuring a legal practitioner is always notified when a complaint is made, regardless of how the complaint is initiated.

Mr Speaker, clause 8 of the Bill inserts a new section 464A into the Legal Profession Act, providing a mechanism for dealing with matters involving federal diversity jurisdiction. Subsections (1), (2) and (3) set out the process applying to complaints that have been made to the Board, while subsections (4) through (7) deal with applications that come before the Disciplinary Tribunal.

Where a complaint has been made to the Board, and the Board considers that the matter is capable of amounting to unsatisfactory professional conduct, subsection (1) provides for the Board to also consider whether it may not have jurisdiction to determine the matter because it involves the exercise of federal diversity jurisdiction.

Under subsection (2), if the Board considers there is some doubt about whether it has jurisdiction, it may exercise its discretion to dismiss the complaint. The Board *must* dismiss the complaint if it considers that it does not have jurisdiction to make a determination.

If the Board dismisses the complaint, and an application is not made within 21 days for the Disciplinary Tribunal or Supreme Court to determine the matter pursuant

to section 458(1) of the Legal Profession Act, the Board then has 60 days within which it may, of its own motion, make a complaint in relation to the matter and apply for the Disciplinary Tribunal to hear and determine the complaint.

Subsection (3) of the new section 464A provides that the Board's complaint is taken to have been made at the time that the original complaint in relation to the matter was made to the Board. This means that the lapse in time since the original complaint was made will not trigger the time limits for dealing with a complaint contained within section 428 of the Legal Profession Act.

Where an application is made to the Disciplinary Tribunal under section 458 or section 464 of the Legal Profession Act, subsection (4) of the new section 464A provides for the Disciplinary Tribunal to consider whether it has jurisdiction to determine the matter.

Mr Speaker, comparable to the provisions relating to the Board, under subsection (5) the Disciplinary Tribunal may exercise its discretion to dismiss the complaint if it considers there is some doubt about whether it has jurisdiction to make a determination, and it *must* dismiss the complaint if it considers that it does not have jurisdiction, due to the matter involving the exercise of federal diversity jurisdiction.

If the Disciplinary Tribunal dismisses the complaint, subsection (6) provides that the written notice of the decision issued pursuant to section 482 of the Legal Profession Act must also state that an application may be made to the Supreme Court, under section 486 of the Legal Profession Act, to hear and determine a complaint in relation to the matter to which the dismissed complaint related.

Where an application is made to the Supreme Court in accordance with section 486 of the Legal Profession Act, subsection (7) of the new section 464A specifies the day on which the complaint is taken to have been made. This subsection serves a similar purpose to subsection (3), to ensure that the time limitations within section 428 of the Legal Profession Act are not activated by the delay between the original complaint being made and an application being made to the Supreme Court.

Mr Speaker, targeted consultation was undertaken with the legal profession on a draft version of this Bill, and I sincerely thank those stakeholders who provided their views and comments in response to the draft Bill.

The High Court's decision in *Burns v Corbett* has had significant ramifications for state tribunals across Australia.

I am pleased that this Bill will address these issues in relation to the functions of the Legal Profession Board of Tasmania and the Disciplinary Tribunal, ensuring there is

an appropriate pathway for resolving matters that may involve federal diversity jurisdiction.

Our Government continues to ensure that our legislation remains contemporary and fit-for-purpose. This Bill provides an appropriate response to the decision in *Burns v Corbett* and ensures that our legal profession bodies remain appropriately empowered to resolve complaints.

Mr Speaker, I commend the Bill to the House.