

DRAFT SECOND READING SPEECH

HON ELISE ARCHER MP

Validation Bill 2021

check Hansard for delivery

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

The Validation Bill 2021 provides for validation of technical matters arising with the appointment of statutory officers and decisions of the Mental Health Tribunal, the Guardianship and Administration Board, the Workers Rehabilitation and Compensation Tribunal, the Legal Profession Disciplinary Tribunal and the Tasmanian Industrial Commission.

The Bill also addresses issues associated with the transitional arrangements of the *Justices of the Peace Act 2018*, and makes a number of amendments to the *Industrial Relations Act 1984* to resolve issues regarding the appointment of members to the Tasmanian Industrial Commission.

Validation in relation to the Acts Interpretation Act 1931

The Bill includes amendments to retrospectively validate the appointment and performance or exercise of powers, authorities, functions and duties of certain persons appointed to a relevant statutory body.

These are persons who continued to perform functions and duties after the expiry of their term of appointment under the mistaken understanding of the Government and the relevant bodies that their power to do so had been extended by the relevant Act or the *Acts Interpretation Act 1931*.

Consequently, the Bill also validates the constitution and decisions of the relevant statutory body affected by such an issue.

Section 21(3) of the Acts Interpretation Act allows a person, after expiry of a fixed term appointment, to continue to exercise the powers, authorities, functions, and duties conferred or imposed on the office, for up to 6 months where they have not been reappointed and no other person has been appointed in their stead. This extension does not apply where the appointing Act includes an express contrary intent.

It was recently identified that the enactment legislation for the Mental Health Tribunal, the Guardianship and Administration Board, the Workers Rehabilitation and Compensation Tribunal and the Tasmanian Industrial Commission, include provisions which are now interpreted as meaning the extension under section 21(3) did not apply.

Whilst the existing legislation for the relevant statutory bodies includes provisions that validate decisions where there are technical defects or irregularities, these do not apply to the absence of an extension of appointment, or an acting appointment, under the AIA.

As has been noted with previous statutory appointment validation legislation, there are common law doctrines, such as the “de facto public officer doctrine” that could be relied upon to support any decision made by an invalidly appointed person.

In short, this doctrine essentially provides that if a statutory officer acts in a legally recognised role to which they and others believe they have been properly appointed to, their exercise of power will remain valid despite any errors or irregularities in their appointment process.

However this doctrine also requires action to be taken to remedy the defect once the problem is known.

Accordingly, the amendments have been drafted to retrospectively validate these matters to remove any doubt or uncertainty as to the validity of any decisions or actions made by these persons.

It is important to note that this Bill does not intend to call into question the professionalism or expertise of any of the statutory officers or members of a Board, Commission or Tribunal who have made the decisions that are now potentially impacted.

The Bill simply puts beyond doubt any issues of invalidity associated with these appointments and decisions.

It should be further noted that these validation amendments are not related to the commencement of the Tasmanian Civil and Administrative Tribunal (TasCAT), which is due to be established later this year following the passage of the Stage 2 enacting legislation. This Bill, which was released for public consultation in early 2021, will set out the transitional arrangements allowing all current Tribunal and Board members to be transferred to TasCAT from its commencement date.

Validation of the Legal Profession Disciplinary Tribunal

This Bill includes amendments to the *Legal Profession Act 2007* to retrospectively validate the appointment of any member of the Disciplinary Tribunal, and therefore any actions or decisions of the member, who was appointed prior to 22 June 2021. The Bill also validates the constitution of the Tribunal where this issue arises.

The Bill addresses an error which has become apparent regarding the appointment of the Legal Profession Disciplinary Tribunal in March 2019.

The Disciplinary Tribunal is formed under section 610 of the *Legal Profession Act 2007*, which provides that the 15 member Tribunal consists of 10 legal practitioners and 5 lay persons, appointed by the Judges of the Supreme Court.

However, the instrument of appointment for the Disciplinary Tribunal dated 1 March 2019 incorrectly appointed 11 legal practitioners and 4 lay persons. A fifth lay person was appointed later in March 2019.

One of the appointed legal practitioners retired in June 2021, and a fresh instrument of appointment has been made correctly appointing the required 10 legal practitioners and 5 lay persons until February 2022. This instrument, dated 22 June 2021, ensures any future decisions of the Disciplinary Tribunal are valid.

However, the amendments are required to remove any doubt as to the validity of the decisions made by the Disciplinary Tribunal in the intervening period.

Validation of Justices of the Peace

The *Justices of the Peace Act 2018* commenced by proclamation on the 1 July 2019, which enacted changes to contemporise the framework for Tasmanian Justices of the Peace, who do excellent, invaluable work in our communities.

Broadly, the reforms introduced a new and more comprehensive framework for the appointment and regulation of the conduct of Justices of the Peace in Tasmania.

The new Act importantly included transitional arrangements to allow Justices of the Peace (JPs) to continue in their role, who had previously been appointed to the office under the repealed *Justices Act 1959*.

Specifically, the new Act provides that those JPs who were appointed under the old framework were taken to have been appointed under the *Justices of the Peace Act* if they notified the Secretary of the Department of Justice (the Secretary) of certain matters. The transitional arrangements also stipulated that if these JPs did not notify the Secretary by the commencement date, their appointment would be terminated.

Issues have been recently identified regarding the awareness by a number of JPs about the legislative reforms and the transitional arrangements, including the notification requirements. While the appointments of those JPs who failed to notify the Secretary were terminated on commencement day, certain JPs appear to have been unaware of this change and continued to exercise their functions.

This occurred in instances where despite the Department of Justice forwarding correspondence to all JPs on the database at the time to inform them of the legislative changes and transitional arrangements, as well as through communications via the three Justice of the Peace associations, the JP either failed to return the documentation to the Department that was forwarded to them to indicate their preference to remain a JP, or where they did not receive said paperwork due to incorrect or not current contact information held by the Department.

The *Justices of the Peace Act* does include provisions that allow for validity of actions of a JP where there is a defect or irregularity in their appointment. However, this provision only applies to appointed JPs, and not previous JPs who had their appointments terminated.

The Bill, therefore, includes amendments to the *Justices of the Peace Act* to validate the appointments, and any actions of JPs, who were previously appointed under the *Justices Act* and have continued to carry out the functions of a JP.

This retrospectively applies between the date of the commencement of the *Justices of the Peace Act* and the date of commencement of this Act.

Any affected JP who wishes to continue in their role, and who meets the eligibility criteria in the *Justices of the Peace Act*, can be appointed under the current legislation in the usual way.

The Department has taken steps to update the JP Register to ensure all contact details are correct or have been updated, as well as contact all impacted JPs and previous JPs to ensure that they are aware of these arrangements and the new requirements.

Additional validation issues relating to the appointment of members of the Tasmanian Industrial Commission

This Bill also responds to issues arising with the appointment of members to the Tasmanian Industrial Commission under the *Industrial Relations Act 1984*.

These issues are largely associated with the new appointment processes and the role of 'Additional Commissioners' introduced in 2012 by the *State Service Amendment Act 2012*. This change was made following a review that recommended "Additional Commissioners" be appointed by the Minister for shorter periods, to assist in meeting varying workloads or to undertake specific tasks when required. The appointment terms of these Commissioners are to be defined by the Minister.

These Commissioners are distinct from the President and Deputy President of the Commission, who are by appointment of the Governor for a longer period, of up to seven (7) years.

It has recently been identified that following the 2012 amendments, Commissioners have inadvertently been appointed by the Governor, which is not in alignment with the Act requirements.

It has also recently been identified that the Act's references to the appointment of members of the Commonwealth and interstate industrial bodies to the Commission are inconsistent and may have led to technical issues or invalidity in some appointments.

The Bill seeks to rectify these issues and ensure the validity of all actions and decisions made by the Commission, by including retrospective amendments to the *Industrial Relations Act* to provide that any person purported to be appointed as a member of the Commission, by either the Governor or the Minister, prior to the commencement day is to have been validly appointed as a Commissioner.

It further provides that the powers and functions of those Commissioners and the constitution of the Commission, including the Full Bench, were not affected by the potential invalidity of any appointment.

The amendments in the Bill address any doubt regarding the administrative processes for appointment of Commissioners, including the terms of appointments in line with processes introduced in 2012.

The amendments are retrospective to ensure that all Commissioners appointed immediately prior to the 2012 amendments continued to hold those appointments, and therefore the functions exercised by those Commissioners are validated.

In addition to these matters, the Bill also makes minor technical amendments under the *Industrial Relations Act 1984*. These minor technical amendments do not substantially change the operation of the Tasmanian Industrial Commission or the *Industrial Relations Act*.

The amendments in the Bill relating to the number of members of the Commission address an anomaly in the current *Industrial Relations Act* which suggests that the Commission may be constituted only by the President and Deputy President, and that the role of other Commissioners is effectively optional.

In fact, the Full Bench requires at least three Commissioners under section 14 in order to function, so at least one additional Commissioner is required.

Further, in recognition of the original intent in 2012 for additional Commissioners to be appointed to the Tasmanian Industrial Commission for shorter periods, the Bill amends section 6 of the *Industrial Relations Act* to provide that Commissioners, other than the President and Deputy President, may be appointed for a period of up to three (3) years as specified in the instrument of appointment.

This reflects current practice for appointments of additional Commissioners. The President and Deputy President retain the appointment periods of up to seven (7) years.

The Bill also provides that the current appointments to the Tasmanian Industrial Commission continue after commencement of the *Validation Act 2021*.

The Bill also repeals section 10A and references to “Additional Commissioners”, as the term and provision are no longer relevant, as the appointment of all Commissioners will be defined in the amended section 5.

In summary, the technical amendments in the Bill clarifies that:

- all Commissioners are to be appointed by the Governor;
- the Commission is to be constituted by at least three members;
- members of the Commonwealth, or another State or Territory’s Industrial Commission or similar body, may be appointed to the Commission;
- the President and Deputy President may be appointed for up to seven (7) years; and
- any Commissioner, other than the President and Deputy President, may be appointed for up to three (3) years.

Mr Speaker, I commend the Bill to the House.