

NSW Civil and Administrative Tribunal Statutory Review

Legal Aid NSW submission to the
Department of Justice

July 2019



About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships

include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. Our Civil Law Service for Aboriginal Communities delivers advice, casework and education services to specific Aboriginal and Torres Strait Islander communities across New South Wales.

Legal Aid NSW welcomes the opportunity to make a submission to the statutory review of the NSW Civil and Administrative Tribunal. Should you require any further information, please contact:

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1 Introduction

Legal Aid NSW welcomes the opportunity to contribute to the statutory review of the NSW Civil and Administrative Tribunal (**NCAT**). Since the Tribunal was established 5 years ago, we have had considerable experience in helping vulnerable and disadvantaged clients in proceedings before NCAT. We provide advice, assistance and representation, primarily in proceedings in the Guardianship Division, the Consumer and Commercial Division, and the Administrative and Equal Opportunity Division. We also have representatives on the Divisional Consultative Forums. In 2016, Legal Aid NSW established a specialist service to assist clients with appeals in tenancy matters and we also currently operate a duty service for certain matters in the Administrative and Equal Opportunity Division.

NCAT is a critical forum for many of our vulnerable clients to access justice. It is crucial that the Tribunal is accessible and responsive, and that its decisions are timely, fair, consistent and are of a high quality. Legal Aid NSW supports the policy objectives of the *Civil and Administrative Tribunal Act 2013*, and generally we believe the terms of the Act remain appropriate for securing those objectives. However, we highlight a number of issues below that have been identified through our work with clients and our experience in the Tribunal.

All case studies in this submission have been de-identified by changing names, rare characteristics and unique combinations of identifying factors.

2 Enabling the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible

2.1 Greater assistance for self-represented parties

The provision of timely, accessible and comprehensive information to self-represented parties is essential to avoid unnecessary delays and to enable the Tribunal to fairly resolve issues in dispute. The guides available to parties in the Guardianship Division are very helpful. The Tribunal should consider providing similar guides for other complex matters where parties are typically self-represented.

A single guide to the working with children check jurisdiction: It would be helpful to have a single guide to this jurisdiction that collates all information specific to working with children check applications, as well as general information about relevant Tribunal processes (e.g. stays of decision, extensions of time). This information is currently

divided between jurisdiction-specific factsheets and general practice directions and guidelines.

While this would mean that there is duplication of information, this concern is outweighed by the convenience to unrepresented parties of having a single online resource which provides 'end to end' guidance. The Commonwealth Administrative Appeals Tribunal uses a similar model in some of its high volume jurisdictions.

This guide should also include information about the evidence required to support an application.

A single guide to the anti-discrimination jurisdiction: A single guide to this complicated area of law would be of great assistance to parties. The *Legal Aid NSW Discrimination Law Toolkit* is helpful in this regard. Fact sheets or information should be distributed to applicants directing them to this resource, or NCAT could develop plain-English materials to explain to applicants what they must show in order to satisfy the relevant thresholds under the *Anti-Discrimination Act 1977*.

2.2 Streamlining the process for return of summons

Currently, return of summons are listed before the Registrar. This requires an appearance and therefore cost and inconvenience to the parties and the Tribunal. Given that the default access order is general access including copying, it would be more efficient to have an administrative process for granting access, in the absence of objection by a party or the non-party required to produce.

For example, in other NSW courts the party seeking the issue of the subpoena indicates the proposed access orders on the subpoena. If there is no objection by the producer or any party or person with a sufficient interest to the access order or production, the Registrar makes the access orders in the absence of the parties.

2.3 Evidentiary issues for motor vehicle matters

The frequent need for expert evidence to support a consumer's claim in motor vehicle matters presents financial and logistical challenges. Consumers typically find it difficult and expensive to source qualified experts, such as mechanics or auto electricians, who are prepared to write a report that meets the requisite standard for Tribunal proceedings.

Industry-funded expert panels could be created to assist the Tribunal in these matters. The panel would need to include experts in both metropolitan and regional areas who could examine and test motor vehicles and provide reports either for free or at a subsidised rate based on the amount of the claim.

The panel would operate in combination with members in a specialised motor vehicle list. Tribunal members could be selected for this list on the basis of their technical expertise. This could be based on the experience of New Zealand's Motor Vehicle Disputes Tribunal for guidance.

In Romeo's case study below, evidence obtained from an independent expert panel would have assisted in resolving the difficulty for all parties.

Case Study: Romeo

Romeo lives in a large regional town. He took his vehicle to AAA Automotive Repairs as the car was misfiring. During the repair, the mechanic drove the car into a tree causing significant damage to the driver-side front end. The mechanic told Romeo that their insurance company refused their claim because the car was not roadworthy. They claimed that the brake booster on the car failed which caused the mechanic to veer into the tree.

Romeo stated that the car was fully registered and had been seen by another mechanic at ZZZ Car Repairs two months prior. ZZZ Car Repairs had checked the car, including the brakes, and confirmed its roadworthiness, subject to the misfiring issue.

AAA Automotive Repairs accused Romeo of building the brake booster himself, and demanded a receipt from Romeo proving that he purchased it. Romeo provided the receipt, but AAA Automotive Repairs continued to deny liability.

Romeo spoke to the automotive technician who sold him the booster, who advised that had the booster failed, there would have been sufficient warning, and that if there was any damage to the booster it was from the impact. However, the automotive technician was unwilling to provide a report. Both AAA Automotive Repairs and ZZZ Car Repairs were his customers and he didn't want to jeopardise the business relationship with either side. Romeo was having difficulty in finding another qualified person to provide a report.

3 Ensuring that the decisions of the Tribunal are timely, fair, consistent and of a high quality

3.1 Efficiency adversely impacting good decision-making

The efficient and timely disposition of matters is important to the operation of the Tribunal. However, our casework experience has highlighted many instances where insufficient allocation of time to matters is having an adverse impact on the quality of decision-making and outcomes for vulnerable parties. This has adversely impacted on many of the people we assist. For example, in the case of Karen:

Case Study: Karen

Karen is an Aboriginal woman living in Far West NSW. She is a single mother and has 6 children. Karen receives Disability Support Pension and has a cognitive impairment. She is receiving support from Family and Community Services in relation to the care of her children.

There was damage to her rental property, mainly caused by her children. Karen's landlord sought to terminate her tenancy. Karen attended the Tribunal and her tenancy was terminated after a hearing that lasted less than 15 minutes. Very few questions were asked of Karen and there was little to no consideration of her circumstances. Karen was unable to explain to the Tribunal that she had a disability, that some of the damage was due to domestic violence, and that she was having issues managing her children's behaviour and was seeking help for this.

During the appeal proceedings, the Member made a comment about how quickly the termination proceedings were dealt with at first instance.

Tribunal processes are sometimes too quick due to case management demands, failing to give sufficient consideration to a matter or provide an opportunity for parties to properly put their case. Adequate safeguards are required to ensure high quality decision-making by the Tribunal and outcomes for parties in the context of a high workload and a busy list.

3.2 Inconsistent approaches to evidence

The Tribunal is not bound by the rules of evidence (s 38(2)) and is to resolve issues in proceedings with as little formality as possible (s 3(d)). On the whole, this makes the

Tribunal more accessible to our vulnerable unrepresented clients. However, the approach of Tribunal members to the evidence that will be accepted in proceedings can vary significantly, resulting in inconsistent outcomes for parties. Sharon, an Aboriginal client of Legal Aid NSW, had the following experience:

Case Study: Sharon

Sharon was a self-employed Aboriginal artist who sold her art to galleries around Australia. She purchased 100 tea towels for the purpose of screen printing them with her artwork. An art gallery had agreed to purchase half of the tea towels. Sharon engaged the services of a laundromat to have the screen-printed tea towels heat-set. Upon collecting the tea towels, Sharon discovered that her goods had been ruined by the laundromat.

Sharon commenced proceedings at NCAT against the laundromat. With the help of Legal Aid NSW, Sharon prepared an affidavit in support of her case. The affidavit included annexures, such as photos of the damaged tea towels and a letter from the art gallery stating that the print on the tea towels was of such poor quality that they could not proceed with their order. The art gallery's letter also indicated that they had previously purchased and sold Sharon's tea towels with no quality issues.

At the hearing, the NCAT Member told Sharon that he would not consider the letter from the art gallery because it was not prepared in an affidavit or statutory declaration signed by a gallery employee.

Sharon's case was subsequently dismissed. Sharon experienced mental health issues, exacerbated by the stress of the NCAT proceedings. She was very distressed at her inability to resolve the matter, and at the additional expense and effort in conducting the proceedings adding to her financial loss.

It is desirable for the Tribunal to be flexible in its approach to the nature of the evidence that it may take into account in determining a matter. This is also consistent with the framework set out for civil proceedings by s 140 of the *Evidence Act 1995*, where a court can take into consideration the nature of the claim, the subject-matter of the proceedings and the gravity of the matters alleged when determining whether it is satisfied on the balance of probabilities. However, the information currently published on NCAT's website about evidence is too vague to be of any guidance to the parties or the Tribunal. The publication of a more definitive guide would be of significant practical benefit.

3.3 Giving parties a better understanding of the Tribunal

One of the critical factors in whether vulnerable clients are afforded consistent and high quality decisions is their degree of familiarity with the processes and procedures of the Tribunal, their understanding of the subject matter of the hearing and the possible outcomes of the process. These factors can significantly impact a client's capacity to advocate for themselves, and therefore can create inconsistencies in the decisions of the Tribunal.

There are a number of approaches which may improve parties' understanding of the processes and procedures of the Tribunal as well as expanding their ability to participate in the process. These will ensure a consistent approach to vulnerable parties across NCAT, and lead to more consistent and high quality decisions across the Tribunal.

3.3.1 Access to legal or (where relevant) tenancy advice prior to hearing

Access to advice prior to a hearing allows parties to have a broader understanding of the subject matter of the hearing, the processes and procedures of the Tribunal and what to anticipate at the hearing, as well as being able to identify evidence and legal arguments to present at the hearing.

Case Study: Sarah

Sarah is an Aboriginal woman who had fallen behind in her rent due to travel costs associated with caring for her sick grandmother. Sarah was unrepresented at the Tribunal hearing and was unaware that her personal circumstances were relevant to the termination proceedings.

The Member terminated her tenancy after a 20 minute hearing, making the finding that Sarah had not submitted any reasonable explanation for her failure to pay rent. Sarah was not asked why she had not paid rent and had also not received her landlord's evidence. When Sarah came to Legal Aid NSW, she instructed that she did not know the proceedings were about termination and thought that she was there to enter into a payment plan.

Had Sarah received advice prior to attending the hearing, she would have been informed about the nature of the proceedings, that termination was a potential outcome, and that she could present her personal circumstances to the Tribunal in the context of explaining her rent arrears. Without this advice or information, Sarah was unable to adequately advocate for herself and consequently faced the detrimental decision of termination of her tenancy.

The Tribunal should stress to parties the importance of seeking advice, promote services that can assist parties and facilitate access to advice for parties.

3.3.2 Obligations of Tribunal Members to assist vulnerable parties

The obligations of the Tribunal set out in s 38(5) of the Act indicate an objective of ensuring clarity around the processes and procedures of the Tribunal, as well as ensuring all parties have an understanding of the nature of their matters. However, based on the experience of many Legal Aid NSW clients, this objective is not currently being met through existing processes, and often means that many people have Tribunal decisions made which affect them and which they do not understand.

Case Study: Juan

Juan is a tenant in social housing premises. His landlord applied to the Tribunal to terminate his tenancy for a breach related to criminal offences that Juan had been charged with. At the time Juan was in custody on remand and could not attend on the first occasion the application was listed. However, he was granted bail the day before the hearing was scheduled. The notice from the Tribunal said that the matter was listed for 'Conciliation and Hearing'. He was unable to prepare, but went to the Tribunal to request an adjournment.

At the Tribunal, the Member looked at the landlord's evidence and asked Juan a few questions. The Member said that the breach was sufficient to justify termination and began to ask about when the parties wanted to provide vacant possession. Juan understood that the Member had made a decision to terminate his tenancy, even though he had not been given an opportunity to give oral evidence or make submissions.

Juan's hearing lasted about 20 minutes and the Tribunal listed the final orders as being made by consent. Under the terms of the orders, his social housing tenancy was terminated and he had 28 days to vacate.

Without a clear understanding of the nature of proceedings, and where Members do not actively seek their contribution, vulnerable parties may not be able to adequately present their evidence, resulting in decisions skewed in favour of other parties. Where Members place an emphasis on the 'quick and cheap' aspect of the Tribunal's objectives, adequate opportunities may not be afforded to vulnerable parties to articulate their case, as in Juan's matter above and Karen's case study on page 8.

Legal Aid NSW recommends the introduction of a clear standard across all jurisdictions of the Tribunal, consistent with the requirements contained in s 38(5). Legal Aid NSW recommends a positive obligation on Tribunal Members to ensure that unrepresented parties have adequately understood the nature of the proceedings.

At the commencement of any hearing involving an unrepresented party, Members should be required to:

1. Ask each party whether they have received any advice in relation to their matter and, where appropriate, refer a party for advice
2. Explain the process and procedures of the hearing
3. Explain the subject matter of the hearing, and
4. Explain all potential outcomes of the hearing

In the conduct of a hearing, Members should consider the following factors:

1. Whether parties have received advice
2. Material inequality between the parties, and
3. The individual's vulnerability with regard to their socio-economic status, disability status, literacy and education levels or cultural background

While the Act is designed to operate without the need for advocates, we are of the view the legislation should contain a clear and elevated onus on the Member to ensure that vulnerable participants understand what is happening in the proceedings and can participate equitably. Tribunal members should be mindful of these obligations and be adequately trained so that they can identify vulnerable parties and provide the assistance they may need to understand and engage with the proceedings.

3.3.3 Conciliation processes leading to unfair outcomes

NCAT's emphasis on the use of conciliation processes can provide an effective mechanism to reach favourable outcomes for each party. However, where there is a power imbalance between parties, conciliation can result in poor quality outcomes, particularly for vulnerable parties.

Case Study: Nicole

Nicole met with Legal Aid NSW through the Aboriginal Women Leaving Custody project. While Nicole was in custody, squatters and vandals caused damage to the social housing property she was renting.

Nicole relinquished her tenancy, and the social housing provider applied to NCAT for an order requiring Nicole to pay for the damage. Legal Aid NSW provided advice and assistance to Nicole prior to the conciliation, and told her that she should not be liable for the damage in the circumstances and, in any event, the landlord's application was made out of time. Nicole intended to attend the conciliation and make a statement about her defences to the claim.

However, during the conciliation process, Nicole agreed to pay a portion of the damages and undertook to commence a payment plan, without being provided an itemised breakdown of the damages. Nicole told us she had felt overwhelmed by the process and the demands of the social housing provider. She simply wanted the matter to be over, and made an agreement on unfavourable terms.

Had Nicole felt confident to raise her defences to the claim or if the Tribunal had taken more steps to assist her, Nicole may have been able to achieve a fairer outcome in the case.

It is imperative that NCAT ensures that the emphasis on conciliation does not disadvantage vulnerable parties. Currently, the Act does not have clear provisions about the conduct of conciliation or the role of conciliation officers. This presents an opportunity to establish some safeguards around conciliation to ensure it is used as an effective mechanism in all matters, rather than creating risk that the power imbalances between parties skew conciliation processes and outcomes.

Legal Aid NSW recommends amendments to the Act to require that Members conducting conciliation:

- are present for the duration of all conciliation for social housing matters, due to the socio-economic vulnerability of social housing tenants and the serious potential consequences in social housing matters, such as termination
- are required to take steps to ensure that all parties understand the processes and procedures of the Tribunal and the conciliation process, and
- have discretion to refer parties to available advice and information services and to recommend conciliations are adjourned to allow this to occur.

3.3.4 Greater representation to address inequality between the parties

Many of the issues raised in relation to securing consistent and high quality decisions can also be addressed through legal representation in Tribunal proceedings. According to the Law and Justice Foundation, organisations are far more likely to be represented than individuals in the Consumer and Commercial Division, both as applicants and respondents.¹ Where individuals do not have representation, particularly when opposing an organisational party, an unequal power dynamic is likely to arise.

This is particularly true in social housing matters. Even in circumstances where a social housing provider is not officially represented by an agent, it is likely that the representative for the provider has had significant experience in the Tribunal and a thorough understanding of its processes, procedures and the relevant law.

Case Study: Shane

Shane is a young Aboriginal person with a cognitive impairment who had a complex matter before the Tribunal which could have resulted in him becoming homeless.

The Member used the discretionary power in s 45 of the Act to decline Legal Aid NSW's request to represent Shane. In the course of the proceedings, the Member was having difficulty communicating with and managing Shane, so he reversed his decision and allowed Legal Aid NSW to represent the client.

Shane's representative conducted the hearing on his behalf and was successful in having the matter dismissed.

The *Consumer and Commercial Division Guideline on Representation* does not provide adequate protections for social housing tenants in termination proceedings. As mentioned previously, tenants in these matters are typically vulnerable. There is an inherent power inequality in the proceedings, and the potential outcomes are grave. Leave for representation of tenants should be granted in social housing termination matters, and the Guideline should be altered to reflect this.

¹ Suzie Forell and Catorina Mirrless-Black, *Data insights in civil justice: NSW Civil and Administrative Tribunal Overview (NCAT Part 1)* (Law and Justice Foundation of New South Wales, November 2016) 30-31.

3.3.5 Appointment of separate representatives for children in certain cases

The Tribunal has the power to appoint either a Guardian ad Litem or separate representative for a child who is a party to proceedings: s 45(4). It may also appoint either a guardian ad litem or separate representative for a child who is not a party to proceedings, but is directly or significantly affected by proceedings: s 45(4A). A separate representative operates on a 'best interests' model, similar to the role of an Independent Children's Lawyer, or Independent Legal Representative, in family/care proceedings.

Presently, there is no general guidance across the Tribunal's jurisdictions as to when it may be appropriate to appoint a separate representative for a child, including as an alternative to appointing a Guardian ad Litem. Only the Guardianship Division Guideline on Representation provides guidance on when an appointment may be appropriate in that Division.

NCAT should develop generally applicable guidelines for Tribunal Members and parties to Tribunal proceedings about when separate representation of a child is appropriate. The Guardianship Division Guideline would be an appropriate starting point. The guidelines for the appointment of an Independent Children's Lawyer in family law proceedings are also a useful reference point.²

Where there are issues that may significantly affect a child, for example review of a decision to remove a child from the care and control of an authorised carer, the Tribunal should ordinarily consider the appointment of a separate representative rather than a Guardian ad Litem. Such an approach is consistent with the model of representation in analogous jurisdictions such as care and family. It is especially appropriate where the issues are legally and factually complex, or where evidence may need to be obtained, and tested. In such cases, a Guardian may do their best to advocate for the child's interests, but their lack of legal expertise and experience may lead to delays and difficulties in the conduct of the proceedings.³

Whether the Tribunal appoints a separate representative or a Guardian ad Litem, some guidance about the role and responsibilities may assist both practitioners and Tribunal members. This could draw on the guidelines in the Guardianship Division as a starting point. The Family Court has also offered some guidance to independent children's lawyers about the nature of their role, and their responsibilities to the court and the

² See for example the decision of the Family Court in *Re K* (1994) 17 FamLR 537, although the guidelines for appointment of a separate representative in these NCAT proceedings are likely to be different to the guidelines set out by the Court in family law proceedings.

³ An example where a Guardian's lack of legal expertise appears to have caused difficulties is *CXB v Biripi Aboriginal Corporation Medical Centre* [2017] NSWCATAD 372.

child.⁴ The Law Society of NSW has also produced some very useful guidance for all solicitors who represent children.⁵

Legal Aid NSW maintains panels of appropriately experienced and qualified practitioners who are able to represent children in both care and family law proceedings. When the Children's Court, Family Court or Supreme Court make orders that a child should be represented, Legal Aid NSW arranges that appointment through the in-house practice, or by appointing a private practitioner from a panel. In the event the Tribunal appointed a separate representative for a child in a matter that relates directly to the child's care arrangements, it would be appropriate to have a similar arrangement in place.

3.4 Internal appeals and applications to set aside decisions

3.4.1 Time limits are too short

Equitable access to a mechanism of appealing Tribunal decisions that are considered unsound is essential to promote fair and high quality decision-making. However, unduly short time limits prescribed for appeals and applications to set aside determinations undermine this objective.

The time limit to make an application to set aside a Tribunal decision is too short. These applications are typically made in circumstances where a decision was made in the absence of the party. The application must be made within 7 days of the decision, not from the date the party received notice of the decision (cl 9(3) *Civil and Administrative Tribunal Regulation 2013*). This leaves a person only a few days to seek information from the Tribunal, obtain advice and then prepare and lodge an application. As the application is determined on the papers (cl 9 (8)) and only one application can be made (cl 9(6)), it is crucial that sufficient supporting documentation and other information is included at the time the application is lodged. The short time limit does not adequately allow for this to occur. It should be increased to 14 days from the date the decision was made.

Similarly, the time limit to lodge an appeal in residential proceedings is not long enough at only 14 days from the date the party was notified of the decision (*Civil and Administrative Tribunal Rules 2014* r 25(4)(b)). As appeals are limited to questions of law or a substantial miscarriage of justice in the limited circumstances prescribed by cl 12(1) of Schedule 4 of the Act, applicants will normally need advice and assistance before filing. There can be difficulties in receiving proper and full advice, particularly if reasons for a decision or a recording of the hearing is required. Advice can also be difficult to obtain where a party lives in a rural or remote area.

⁴ For example *P v P* (1995) 19 FamLR 1.

⁵ Law Society of NSW, *Representation Principles for Children's Lawyers* (4th ed, 2014).

The time to lodge an appeal in these matters should be extended to 28 days. This would make it consistent with the timeframe to lodge appeals in other Tribunal matters (r 25(4)(c)). It is also appropriate given that many of the appeals that we encounter concern a loss of housing. Given the gravity of the interest at stake, it is important that the time limit is sufficient to allow an appeal to be properly prepared.

By necessity, Legal Aid NSW assists clients to file internal appeals and set aside applications outside of the prescribed time limits. The Tribunal often grants an extension of time, but the requirement to seek leave adds an extra layer of complexity and detail to the application, and generates uncertainty for our clients.

3.4.2 Technical difficulties with concurrent set aside applications and appeals

The Act and Regulation allow a party to make both an application to set aside a determination and an appeal, on the condition that the set aside application is filed first (cl 9(5)). However, given the short time frame to file an appeal in residential proceedings referred to above, this means that to preserve their rights, a party will normally have to file an appeal before the set aside application is determined. This results in further costs being incurred by the party, and can be a drain on the resources of the Tribunal.

The Appeal Panel case of *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 determined that waiting for the outcome of a set aside application is an insufficient reason to justify the Tribunal extending the time for a party to lodge an internal appeal (at [41] – [44]). However, it would be logical if the legislative scheme allowed for this. The problem would be overcome by stating that where a party has made an application to set aside a decision, the time to appeal starts running from when the party received notice of the determination.

3.4.3 Excessive delay in decision-making for the Appeal Panel

There have also been a few occasions where the appeal panel has taken an inordinately long time to make an appeal decision. *NCAT Guideline 1 – Internal Appeals* states that if a decision is reserved, “the presiding member should give a general indication of when the written decision is likely to be provided to the parties” (at [71]). However, there is no process for the Tribunal to revise that estimate when required. Legal Aid NSW was recently involved in a case where it was indicated that a decision would be made within 3 months, but it took 7 months to be handed down. The appeal concerned a social housing eviction and the delay, without any further communication from the Tribunal, had an adverse impact on our client’s health.

The objects of the Act would be better served if there was greater consistency in the time taken for the Appeal Panel to make decisions, and if the Tribunal could improve communication with parties when there are legitimate delays.

4 Ensuring the Tribunal is accessible and responsive to the needs of all its users

4.1 Access to justice for Aboriginal people

Substantially more could be done to improve the Tribunal's accessibility and responsiveness for Aboriginal and Torres Strait Islander people (for brevity, hereafter, Aboriginal people).

Aboriginal people are among the most disadvantaged users of our justice system. Aboriginal people are over-represented in the criminal justice system and are more likely to experience multiple legal problems⁶ as a result of economic and social disadvantage as well as structural and historical racism. With reference to the divisions of NCAT, Aboriginal people:

- have higher rates of disability,⁷ lower life expectancy, and increased chronic health risks which might lead to over-representation in (or increased need for) guardianship matters
- have lower rates of home ownership and are also more likely to be social housing tenants⁸
- experience housing law issues as one of their most prevalent legal issues, with social housing residency exponentially compounding the likelihood of experiencing other legal problems⁹
- experience higher rates of financial and English illiteracy, and experience financial exclusion from mainstream consumer and financial markets,¹⁰ making them the target of unscrupulous traders

⁶ Zhigang Wie and Hugh M McDonald, 'Indigenous People's experience of multiple legal problems and multiple disadvantage – a working paper' (2014) 36 *Updating Justice* 5.

⁷ Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Population 2016 Census Data Summary* (Catalogue No 2071.0, 28 June 2017).

⁸ Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Population 2016 Census Data Summary* (Catalogue No 2071.0, 28 June 2017).

⁹ Zhigang Wie and Hugh M McDonald, 'Indigenous People's experience of multiple legal problems and multiple disadvantage – a working paper' (2014) 36 *Updating Justice* 5.

¹⁰ Weier, M, Dolan, K, Powell, A, Muir K, and Young, A 'Money Stories: Financial Resilience among Aboriginal and Torres Strait Islander Australians' (2019) Centre for Social Impact (CSI) – UNSW Sydney, for National Australia Bank.

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- are often employed in their communities in the community and health sectors, meaning they require working with children checks (which can be challenging to obtain where the person has a criminal history), and
 - commonly experience discrimination in daily life.¹¹

All of these factors mean that Aboriginal people are likely to be over-represented in NCAT proceedings as respondents. Aboriginal people are also likely to have an increased need to proactively use NCAT to protect their rights but, in our experience, they are under-represented as applicants. The lack of statistical information available about Aboriginal people's use of and engagement with NCAT (see further below) makes it difficult to assess the magnitude of this issue, but it is strongly supported by our casework experience.

Our Aboriginal clients who are experiencing social and economic disadvantage face barriers to engagement with NCAT due to:

- a lack of awareness of avenues to pursue their rights in NCAT in relation to matters such as obtaining housing repairs, seeking compensation from landlords or rent reductions, consumer rights, vehicle repairs, challenging working with children check decisions and discrimination
- limited understanding of the broader purpose and role of NCAT, and of its process and procedure more specifically
- the prevalence of Aboriginal people as respondents in tenancy (social housing) matters, as well as guardianship and working with children check matters, rather than as applicants
- a general apprehension about engaging in Tribunal processes based on the overwhelmingly negative experience of Aboriginal people in court processes more generally in Australia
- limited cultural awareness and responsiveness of NCAT staff and members, and cross-cultural communication challenges, and
- physical and technological access issues resulting from regional isolation, lower levels of technology literacy, limited phone and internet coverage, limited access to computers and the internet, limited postal services and access to available transport.

These factors demonstrate that Aboriginal people are less likely to be engaging with NCAT as a means of accessing justice, and when they do, there are barriers to obtaining successful outcomes. These issues are not insurmountable – outlined below are potential opportunities to improve accessibility and responsiveness for Aboriginal participants.

¹¹ Australian Health Ministers' Advisory Council, *Aboriginal and Torres Strait Islander Health Performance Framework 2014 Report* (2015) 15.

4.1.1 Assessment of level of NCAT participation by Aboriginal people is essential

As noted below (at 5.1) there is no data available about Aboriginal people's use of NCAT. There would be value in commissioning a review of NCAT access and engagement by Aboriginal people with a view to:

- understanding the level of accessibility by the Aboriginal community, the unmet need, the barriers to use and the potential solutions, and
- developing a plan setting out actions and targets that could improve engagement and participation.

In 2017, the Victorian Civil and Administrative Tribunal (**VCAT**) launched a *Koori Inclusion Action Plan 2018-22* in response to comprehensive research into Aboriginal people's experience of VCAT.¹² This included actions to:

- appoint a Koori Engagement Officer
- raise awareness of VCAT in the Aboriginal community
- establish a pool of culturally competent Members especially in the tenancy and guardianship divisions
- deliver cultural awareness training for staff
- improve collection of data and data reports regarding Aboriginal use of the Tribunal, and
- promote Aboriginal employment at the Tribunal.

A similar range of actions in NSW is required, following appropriate Aboriginal community consultation and quantification of engagement. Some further views on these initiatives based on our casework experience are set out below.

4.1.2 Develop an Aboriginal Inclusion Action Plan

An Aboriginal Inclusion Action Plan would set out a clear and transparent plan and aspiration for the inclusion of Aboriginal people and be consistent with s 3(c) of the NCAT Act *'to ensure that the Tribunal is accessible and responsive to the needs of all of its users'* and ss 3(f) and 3(g) to be accountable and maintain public confidence.

4.1.3 Create an Aboriginal Engagement Officer role

Creating role(s) for Aboriginal Engagement Officer(s) (or similar) would have many benefits, including playing an important role in explaining NCAT processes and procedures to Aboriginal participants, and leading community engagement to raise

¹² Victorian Civil and Administrative Tribunal, *VCAT Koori Inclusion Action Plan 2017 – 18*, 5 July 2017.

awareness and understanding of NCAT in the Aboriginal community. The NSW Local Court and VCAT provide a similar kind of service. Legal Aid NSW regularly conducts outreach and awareness raising events in community with Aboriginal field officers and community liaison officers that result in large numbers of the community attending for advice, assistance and education about their legal problems.

In addition, an Aboriginal-specific contact centre serviced by Registry staff would be a way to promote the accessibility of information about NCAT processes. Many other government departments such as Victims Services NSW and the Australia Taxation Office provide such a service.

Such a role would also be consistent with several objects of the Act, including improving accessibility and responsiveness (s 3 (c)), resolving matters justly, quickly and cheaply (s 3(d)) and promoting confidence and trust in NCAT (s 3(g)). If Aboriginal participants had a greater understanding of NCAT processes, there would likely be increased participation and attendance, provision of targeted submissions, fewer adjournments and appeals and ultimately better outcomes for participants.

4.1.4 Promote Awareness of NCAT in the Aboriginal community

There are a number of ways in which NCAT could raise its profile and awareness of its processes in the Aboriginal community. These range from developing culturally appropriate and designed resources (fact sheets, online videos, etc.) to delivering presentations in the community, and attending services expos and events with other government services. Presentations of information regarding NCAT, specifically about areas of law which affect Aboriginal people, would lead to increased knowledge and awareness within the community and an increase in Aboriginal participants proactively using NCAT's services.

4.1.5 Aboriginal Members and cultural competence

Public confidence in Tribunal decision-making and the Tribunal's accessibility and responsiveness could be promoted by expanding the diversity and representation of Tribunal members.

Efforts should be made to recruit Aboriginal Members to NCAT to expand this diversity and to be responsive to the needs of Aboriginal participants. This is particularly so in divisions and lists with a high proportion of Aboriginal community participants, such as the social housing list.

Section 13 of the Act (regarding qualifications of members) already provides for the appointment of general members with special knowledge, skill or expertise in relation to any class of matters in respect of which the Tribunal has jurisdiction (s 13(6)(a)), or is

capable of representing a section of the or group of persons in relation to any one or more classes of matters in respect of which the Tribunal has jurisdiction (s 13(6)(b)).

In our casework experience, our clients have had positive experiences at hearings of the NSW Housing Appeals Committee where an Aboriginal member sits on all appeals for Aboriginal applicants. This has been very successful in engaging with applicants, asking culturally appropriate questions and eliciting important information relating to the client's personal circumstances. Our Aboriginal clients have responded very well in this informal and culturally appropriate environment, resulting in a number of positive outcomes.

4.1.6 Develop cultural competence of Members

Similarly, it is important that all Members are culturally competent. This is key to understanding the complexity of Aboriginal clients' lives which are often informed by factors such as cultural obligations to extended family, trauma related to the ongoing impact of the Stolen Generations and other government policies, and significant ongoing social and economic disadvantage. These factors may play out in various ways before the Tribunal and it is important for Members and staff to have a high degree of understanding of these factors to ensure that outcomes are just and the Tribunal is meeting the needs of its users.

The idea of cross-cultural and cultural competency training is well accepted across the justice sector and legal system as a way to promote equality before the law. For example, the Judicial Commission of New South Wales has addressed this issue by conducting educational programs for all courts in New South Wales. They actively promote the particular needs of specific sections of the community at their annual conferences and through their valuable *Equality Before the Law Bench Book*.¹³ This sets out cultural information and knowledge to be aware of when working with Aboriginal participants in a court setting and includes practical advice about managing bias, communication styles, use of language, and options that might be open to a court to obtain a successful or worthwhile outcome. Development of a similar resource for NCAT could, for example, address some of the complex issues surrounding housing disputes¹⁴ which are briefly outlined below in consideration of a specialised list. It could also address the complex family and kin relationships in guardianship matters, and the impact of past government policy on working with children check matters.

Many of the case studies included in this submission illustrate how increased cultural competency of both members, and the processes of NCAT itself, could improve

¹³ Judicial Commission of New South Wales, *Equality before the Law Bench Book*, June 2018.

¹⁴ Some of which are outlined by Legal Aid NSW lawyers in Jemima McCaughan and Merinda Dutton 'Dispute Resolution as a catalyst for change in the Housing System: A call for genuine engagement with Aboriginal Communities' (2017) 11 *UNSW Law Society Court of Conscience* 8.

outcomes for Aboriginal people. Similarly cultural awareness training of NCAT Registry staff, particularly those with client-facing roles, is important.

4.1.7 Promote Aboriginal Employment

There would be benefit in NCAT developing an Aboriginal Inclusion Plan, or at minimum a Reconciliation Action Plan, which identifies steps to increase the employment of Aboriginal staff. The benefits of promoting and improving the representation of Aboriginal staff is well established across the State and Commonwealth public sectors¹⁵ and would have the direct benefit of promoting the accessibility of the service within the community, in line with the objects of the Act.

4.2 Improving the use of technology

Legal Aid NSW would welcome greater use of technology to enable increased access to, and use of, NCAT. Presently, online applications are only available for certain matters in the Consumer and Commercial Division. The lack of online options for other application types significantly affects accessibility, especially for parties living in regional, rural and remote locations. This is particularly problematic where time limits to lodge applications are very short, such as for applications to set aside a final decision, or to appeal from a decision in residential proceedings.

Parties should also be able to file documents with the Tribunal online, similar to the services available to users of the NSW Online Registry. Lack of access to e-filing creates barriers for people living in regional and rural NSW, particularly when there are limited regional registries and documents cannot be personally filed in other locations. It is also a barrier for people with certain disabilities or carer responsibilities. *NCAT Procedural Direction 1* allows the service of documents by electronic means (at 9(c) and 19(b)), and it would be good if the Tribunal actively encouraged parties to make greater use of this.

There are also limited telephone and audio-visual link (**AVL**) appearances and cumbersome processes for requesting telephone appearances, which can be refused. The case study below demonstrates the kind of flexibility that can and should be applied to methods of appearance to facilitate the just, quick and cost efficient resolution of matters before the Tribunal.

¹⁵ Australian Public Service Commission, *Building an Indigenous Employment Strategy - A starter kit for Commonwealth agencies* (2011), 9 –10.

Case Study: Toni

Toni lodged an appeal from a Tribunal decision to terminate her Aboriginal Housing Office tenancy. At the first call-over of the appeal, Toni did not appear at the Tribunal and had not written to the Tribunal to make other arrangements.

The Tribunal Member called the telephone number on the Tribunal file to give Toni an opportunity to appear by telephone. She answered and the call-over was able to go ahead with her participation.

We regularly assist Aboriginal people who are, or have been, incarcerated. At the time of their imprisonment they either have not been served with a hearing notice, or where they do receive it, they cannot attend for practical reasons. Clients in custody have limited or no access to phone services and no access to AVL facilities with NCAT. They are moved around facilities regularly and without notice, and the post is often delayed or not delivered at all.

Case Study: Trudy

Trudy received a notice of hearing from the Tribunal while she was in custody. The notice was addressed to her 'care of' the correctional centre. She received it the day before the hearing date, even though the notice was dated some time prior to that.

The notice required that she attend in person, and made no acknowledgment of the fact that she was not capable of doing so. It did not provide her with any alternative options such as appearing by telephone or AVL, or seeking leave to have representation. It did not provide contact details for tenancy services.

A decision was made in Trudy's absence to terminate her tenancy. Legal Aid NSW assisted her to lodge an internal appeal.

Greater investment in AVL facilities by the Tribunal would significantly improve access, particularly for prisoners.

4.3 Scoping Aboriginal tenancy lists

In our experience, Aboriginal people are most likely to be respondents in tenancy (social housing) matters. The 2016 *Data Insights in Civil Justice* report series produced by the

NSW Law and Justice Foundation found that in the NCAT Consumer and Commercial Division:

The Tenancy and Social housing lists are dominated by applicants who are landlords: private landlords in the Tenancy list (76.7% of applicants in this list) and government and non-government social housing services in the Social housing list (95.3%).¹⁶

As discussed above, there is a lack of data regarding the numbers of Aboriginal participants in NCAT proceedings. Aboriginal tenants, as respondents in tenancy and social housing matters face significant adverse consequences if they cannot fully participate in, and engage with, NCAT processes. Aboriginal tenants risk losing their tenancies, incurring large end-of-tenancy debts and gaining negative classifications that prevent or restrict their ability to be re-housed in the future. These are all significant issues which often result in homelessness and which has an effect on Aboriginal social and economic outcomes.

Housing is a complex issue as it relates to Aboriginal tenants and communities. There are usually unique features particular to Aboriginal tenancy disputes including:

- housing locations or clusters are likely to be in remote and regional areas with significantly high Aboriginal populations
- Aboriginal communities and regions frequently correlate with areas of overall high disadvantage and low access to services including social support and legal services
- Aboriginal communities were often former Aboriginal missions or reserves where the land and housing is now owned by Aboriginal Land Councils or other Aboriginal housing providers, complicating the roles and relationships of tenant, landlord, land owner, and traditional owner
- the connection between land rights and native title, self-determination and tenancy is a complex one and NCAT is not well equipped to consider the impact of these factors
- the management of housing stock in these areas is often outsourced by Housing NSW to the Aboriginal Housing Office and to Aboriginal social housing providers
- there is a strong correlation between repair issues and non-payment of rent resulting in 'rent strikes' by tenants due to the poor state of repair of the properties and/or poor engagement by social housing providers with the community
- the quality, timeliness and cost of repairs in rural and remote locations can be a significant issue impacting on resolution of housing issues

¹⁶ Suzie Forell and Catorina Mirrless-Black, *Data insights in civil justice: NSW Civil and Administrative Tribunal Consumer and Commercial Division (NCAT Part 2)* (Law and Justice Foundation of New South Wales, November 2016) 23.

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- complex family relationships and kinship networks can contain obligations to care for extended family members, but can also create situations of overcrowding and perceived tenancy problems, and
 - there are high rates of incarceration in Aboriginal communities which affect housing and homelessness.

In our experience, issues relating to rent and housing management will often peak in particular 'clusters' relating to a particular area, Aboriginal community or housing provider. Legal Aid NSW has frequently noticed 'clusters' of Aboriginal tenants coming before the social housing list with a common housing provider (either FACS Housing or an Aboriginal housing provider). This is usually indicative of broader and more complex issues going on in the wider community.

There would be benefit to having an Aboriginal tenancy and social housing list within the Consumer and Commercial Division of NCAT to manage these complex issues in a more holistic and considered way. The features and benefits of this list could include:

- a specialised focus on Aboriginal identified tenants and housing providers
- use of Aboriginal Members or specialised Members with cultural competence and expertise
- these Members could explore the wider range of personal circumstances of the Aboriginal tenant
- the list could more actively use and make referrals to specialist Aboriginal Tenancy Advocates or legal representatives
- increased use of conciliation, mediation and ADR functions to try to resolve complex housing issues for Aboriginal tenants
- improved and targeted process advice and assistance provided by an Aboriginal Engagement Officer to ensure tenants understand and participate in NCAT proceedings
- accommodation of any special needs related to the regional location such as regional hearings, and
- consideration of broader issues related to tenancy, such as the frequently problem of 'rent strikes' in response to a failure to repair.

This approach would represent a more sensitive and appropriate way to engage with Aboriginal tenants without an advocate. It could also improve the quality and timeliness of NCAT decisions when dealing with housing disputes involving Aboriginal tenants. An extension of powers to allow these other issues (e.g. repairs) to be heard without specific cross claims could also be beneficial.

5 Ensuring the Tribunal is accountable and has processes that are open and transparent

5.1 The need for improved data about Aboriginal engagement and access to justice

There is no data available regarding Aboriginal people's engagement with NCAT as either an applicant or a respondent, making it difficult to assess the effectiveness of NCAT in serving this important part of the community. In November 2016 the Law and Justice Foundation, in its report *Data insights in civil justice: NSW Civil and Administrative Tribunal*, recommended that data capture, extraction and reporting be considered when developing a replacement case management system and that the issues identified in that report be taken into account.¹⁷

We consider that NCAT processes, procedures and forms should collect and publish data regarding whether a participant identifies as Aboriginal. This could be added as an available field on relevant NCAT forms. Consideration should also be given to the issue of self-identification noting that not all Aboriginal or Torres Strait Islander participants will choose to disclose this.

Data collection about Aboriginal participation would provide an effective way to demonstrate the success over time of any new initiative or measures to promote Aboriginal participation and engagement. It would also provide meaningful data about the impact and effectiveness of specific areas of law, the need for reform in those areas, and any consequences on service delivery. In the criminal justice system, NSW Bureau of Crime Statistics and Research statistics are well known for assisting with service delivery from a variety of agencies and have also provided insights into the outcomes for parties, which may give rise to law reform. In NCAT, for example, publishing statistics on how many termination orders are made, and against whom, would provide similarly useful information.

5.2 Access to operational data

The Tribunal produces management reports that are distributed to members of the Divisional Consultative Forums. To promote transparency and accountability, we suggest that these are published on NCAT's website.

¹⁷ Suzie Forell and Catorina Mirrless-Black, *Data insights in civil justice: NSW Civil and Administrative Tribunal Overview (NCAT Part 1)* (Law and Justice Foundation of New South Wales, November 2016) 17.