public interest
ADVOCACY CENTRE

Submission to the Statutory Review of the *Civil and Administrative Tribunal Act 2013*

10 July 2019

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development and communication.

Our work addresses issues including:

- Reducing homelessness,
- Access for people with disability to basic services like public transport, financial services, media and digital technologies,
- Justice for Aboriginal and Torres Strait Islander people,
- Access to affordable energy and water,
- Fair use of police powers, and
- Government accountability.

In 2004, PIAC established the Homeless Persons' Legal Service (HPLS). HPLS has provided legal assistance to more than 8,000 people who are homeless or at risk of homelessness, on over 11,000 occasions. HPLS provides free legal advice at 16 legal advice clinics based at homelessness services and welfare agencies throughout inner Sydney, outer western Sydney and the Hunter.

In 2009, PIAC established its homeless consumer advisory committee StreetCare, whose members have lived experience of homelessness. StreetCare is a diverse group, including women and men of different ages, Aboriginal people, and representatives from inner Sydney, outer suburbs and rural and regional areas. With support from PIAC, StreetCare provides direct input from people with a lived experience into government policy making and law reform initiatives, to tackle the structural determinants of homelessness.

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Public Interest Advocacy Centre

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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Introduction and context

This submission draws on our experience advocating for individuals at the NSW Civil and Administrative Tribunal (NCAT) over the five years it has operated. Since 1 January 2014, our Homeless Persons' Legal Service (HPLS) has conducted 834 cases relating to tenancy, including many that were before the Tribunal. We have also assisted disadvantaged individuals with guardianship, consumer, and discrimination matters. Our submission reflects this expertise.

We welcome the opportunity to comment on these experiences in the context of the recently announced Premier's Priorities, and the Stronger Communities cluster. We are particularly mindful of the NSW target of reducing homelessness by 50% by 2025, and the opportunity to work towards that goal by drawing connections between the justice sector and community services. The current review presents an opportunity to reflect on the role that NCAT could play in reducing homelessness by working in concert with the community sector.

Throughout the review period, NCAT has balanced consistently high case loads with its mission of providing just, quick and cheap processes for resolving disputes and reviewing administrative action. We support this model. Our submission highlights opportunities to expand access to this important forum.

This submission draws on the experiences of clients of our legal practice, consumer input from people with lived experience of homelessness (who may or may not have sought legal help), and our own experiences as legal practitioners. Case studies highlight key behavioural insights with a view to enhancing coordination and improving access to NCAT for the most vulnerable members of our community. To protect client confidentiality, we do not use clients' real names or initials.

In particular, we highlight the experiences of community members who are currently disengaged from NCAT and who have declined to attend or otherwise make use of its processes. We propose some strategies that may help improve access for this group, and hope this evidence base can help inform the continuing work of NCAT in strengthening our community.

Improving access to NCAT

The Tribunal seeks to resolve disputes and review administrative action through a just, quick and cheap process, with as little formality as possible. We would reflect that while many users do have positive experiences accessing NCAT and resolving disputes with relative ease, there are significant opportunities to improve access for vulnerable individuals. Such individuals may require additional support to achieve a just outcome at NCAT, or they may disengage by avoiding NCAT altogether. These are exemplified in the case studies below.

Case study: needing support to engage

AB is a young Aboriginal man with a history of schizophrenia. He receives regular community-based treatment, and lives in a social housing tenancy near Penrith. AB could not read or write well and was extremely withdrawn. As a result, he relies heavily on support from his family and a caseworker. His property manager commenced NCAT proceedings without warning, seeking termination of his tenancy on the basis of a breach of his agreement. AB's caseworker referred

the matter to us, and we attempted to negotiate with the property manager (PM). The PM declined to give specifics of about the issues they were seeking to address but described the property as 'filthy'. When we indicated we could arrange support for AB to clean up the property, the PM said they were 'determined to get him out' and that the tenant 'has had too many chances already'. AB instructed us that he could not attend NCAT as he was 'too scared', and because he did not have transport. He instructed us that 'he had tried to clean up a bit'. When we warned him of the dangers of failing to attend, he asked if we could appear on his behalf. We explained that we would have to seek leave, but would do our best. We were concerned that if AB did not attend, and was not represented, the application was likely to succeed. AB would then be facing homelessness with no prospect of reentering housing. Fortunately, we were granted leave to appear and negotiated in good faith to arrange support for AB to have his house cleaned. The PM, who was represented by an advocate from Family and Community Services (FACS), insisted on pressing the application for termination. The application was subsequently dismissed due to an absence of evidence in the correct form, and AB's tenancy was preserved.

While AB ultimately achieved a positive outcome, we are concerned that there are many vulnerable tenants in a similar situation. This case highlights a number of factors that can pose a barrier to participation in Tribunal proceedings, including:

1. Poor mental health;
2. Difficulties with communication, including reading and writing;
3. A history of negative interactions with institutions including courts;
4. Need for support to access appropriate services, such as cleaning; and
5. A lack of transport to attend NCAT at a location that may be a significant distance away.

The importance of legal representation

In this case, the tenant was able to call on a flexible legal service that was able to ensure his interests were protected. While there is no presumption in favour of legal representation, this case also highlights that social housing landlords tend to be represented by experienced 'advocates' who often have legal training. In our experience, private landlords will in most cases be represented by an agent with experience of Tribunal advocacy. In the face of confident and experienced adocates, vulnerable tenants who are not represented are additionally disadvantaged by the unequal power dynamic and gap in understanding of tribunal procedures.

It is clear that in cases involving multiple barriers to access, and a landlord who is represented by an experienced advocate, legal assistance can significantly improve the outcomes vulnerable people achieve. Legal representation can also help the Tribunal to operate in a just and efficient manner. In our experience, clients who are represented have a significantly greater chance of resolving the issues that led to the proceedings in the first place.

While we believe that legal representation is vital for many tenants, we also acknowledge that we have seen many cases of excellent practice by Members of the Tribunal and conciliators, who have often spent considerable time and effort explaining proceedings to individuals who are not represented and ensuring that parties are aware of all options available to them. We commend the Tribunal and its members for their very clear efforts to make NCAT accessible to all Tribunal users. Nonetheless, as our case study illustrates, there are some vulnerable individuals who cannot be assisted in this way under the current framework.

The general requirement to seek leave

In our experience representing a particularly vulnerable group of people (all our clients are homeless or at risk of homelessness), we have not identified any cases in which leave has been refused. Nonetheless, we are obligated to explain to clients that we will only be able to act for them if leave is granted, and clients are advised that if they do not attend NCAT in person we may not be able to act for them (or continue to act for them). This pressure can, paradoxically, make an already anxious and avoidant client less likely to attend on the day of their hearing.

Two possible approaches may address this concern. We note the recommendation of the Law Society of NSW that the *Civil and Administrative Tribunal Act 2013* (NSW) (CAT Act) be amended to remove the general requirement to seek leave. We would prefer a narrower approach that sets out specific circumstances in which the requirement can be waived. Our list is not comprehensive, but we suggest such circumstances should include:

1. Where a party is a tenant and the landlord is represented by an agent or other advocate;
2. Where a party is the subject of an application for a guardianship order; and
3. Where a party can demonstrate a disability or other impediment to their ability to represent themselves.

This approach would give vulnerable people certainty about whether their lawyer will be able to act for them, and would prevent situations in which individuals may be called before the Tribunal to explain why they are unable to act for themselves.

In the alternative, we understand that NCAT makes use of representation guidelines that set out the cases in which representation will generally be allowed. For example, landlords will usually be represented by their real estate agent. We note the Tenant's Union of NSW recommends that you include in the guidelines an assumption that a party can be represented when they are represented by an advocate from a Tenants' Advice and Advocacy Service (TAAS). We would expand this to include representation by a solicitor appearing from legal aid, a community legal centre, or acting pro bono. While we would prefer a broader approach that assumes representation can be allowed in all cases involving vulnerable parties, this narrower approach would be preferable to the status quo.

Recommendation 1
The CAT Act should be amended to remove the general requirement to seek leave in cases that are known to involve vulnerable parties.

Recommendation 2
In the alternative to Recommendation 1, the NCAT representation guidelines should be reviewed to include circumstances in which a party is represented by a TAAS, Legal Aid, a community legal centre, or a pro bono lawyer.

Adequate resourcing for representation services

In most cases, vulnerable tenants are referred to their local TAAS, which operate across NSW. Legal Aid may also be available, particularly where a tenant faces loss of their dwelling. Some other specialised services, like HPLS, will prioritise cases involving potential termination of vulnerable tenancies, and respond flexibly to client need. However, we all face resource

constraints. For example, HPLS representation services are only available in the Sydney metro area, and TAAS duty services do not operate at every registry or on every day when tenancy matters may be heard, and they do not always have capacity to engage in early negotiatiations that might obviate the need for a matter to progress to NCAT.

In addition to tenancy matters, we are also able to provide flexible representation as-needed in a range of other matters, including in relation to general commercial disputes, consumer matters, discrimination, and guardianship applications. Because we focus on providing this support to a severely disadvantaged segment of the community, the total numbers of other representation provided are relatively low. Nonetheless, the demand for our services significantly outstrips our ability to meet the need among our client group. While some other community legal centres or pro bono legal providers may offer a similar type of help in some cases, we are not aware of any other service that specifically assists individuals with NCAT proceedings.

Recommendation 3
The NSW Government should continue to support the TAAS and other specialist advocacy services, including HPLS, that help people who would otherwise be unable to access NCAT processes.

Identifying deeply disengaged individuals

While we give priority to matters that might prevent homelessness, or address imminent housing crisis, HPLS cannot offer representation to everyone who faces termination. Critically, we cannot assist those who do not seek out our help in the first place.

Case study: deep disengagement
DJ, a 50 year old Aboriginal man, was living with his partner TS, and TS's child, in a social housing tenancy. TS developed a severe health crisis, and suffered a number of heart attacks over a period of months. During this time she did not check her mail and was sometimes late with her rent. She was unable to present to her housing provider's office as she was constantly in and out of hospital. One day, DJ found an NCAT notice in the stack of mail. DJ and TS faced some barriers to attending, as TS was still suffering from an acute health situation. DJ believed that there was nothing he could do as they could not afford to pay back any debt at the moment. The letter had the number for the Tenant's Advice service, but DJ's phone wasn't working. Anyway, he didn't want to ring another number just to be stuck on hold and then told 'they couldn't do anything unless we paid back the rent arrears'. DJ and TS resigned themselves to eventually becoming homeless and did not seek advice or attend the Tribunal. The landlord obtained an order for termination of the lease and DJ and TS were ultimately forcibly removed from the property. TS's child entered out of home care and TS's health continued to decline.

In this case, DJ and TS did not access the support that might have been available, and did not consider that they might have realistic alternatives to being evicted into homelessness. In our experience, this is unfortunately a very common reaction to NCAT notices, particularly for tenants who are Aboriginal or Torres Strait Islander.

We believe that better data collection would help illuminate the extent of this problem. In our view, NCAT should prioritise increased data collection, particularly about:

1. The number of termination applications that result in a termination order being made.

2. The number of termination orders made in the absence of the tenant.
3. Whether parties are represented (whether by an agent, advocate, legal representative, or other support person).
4. The demographics of NCAT users, and in particular the number of NCAT users who identify as Aboriginal or Torres Strait Islander, where such information is available.

Options for identifying as Aboriginal or Torres Strait Islander could be included in the NCAT application process. Social housing landlords would generally also have this information about their tenants and should be required to include this information in their application documents.

These figures may help to build an evidence base around the extent of the issue identified in our case study above.

Recommendation 4
NCAT should collect and publicly report on the number of termination applications resulting in a termination order; the number of termination orders made in the absence of the tenant; the representation of parties; and the demographics of NCAT users.

Towards an Indigenous list

As members of the NCAT Tenancy, Social Housing and Aboriginal Consultative Forum are aware, a proposal has previously been raised to establish an Indigenous 'list day' for social housing tenancy matters involving Aboriginal and Torres Strait Islander tenants. During 'list day' a range of support services would be available to locate tenants who did not attend, to provide support and representation where required, and to assist tenants to resolve the issues that might be placing their tenancies at risk.

This concept was supported by the Indigenous Issues Committee of the Law Society of NSW, and by local services in the Western Sydney area. It was proposed that such a list be established at the Penrith Registry of NCAT and that it operate on a pilot/trial basis for an initial period.

Noting the difficulties of identifying which matters might involve an Aboriginal or Torres Strait Islander tenant before the parties attend NCAT (or even during their attendance), we would recommend that matters can be 'removed' to the list on the request of the tenant (or their advocate), or on the request of the landlord if the tenant does not attend. We note that the landlord will be aware of the Aboriginal or Torres Strait Islander status of their tenants in most social housing tenancies.

While the details of such a trial would need to be developed on a collaborative basis with NCAT as a whole, and staff at the relevant registry, we would urge you to consider implementing such a proposal. We note the success of similar Aboriginal lists in the Family Court and Federal Circuit Court.[1]

[1] See, for example, Trent Shepherd, 'A Meeting Place for Aboriginal Families to Support Aboriginal Families' (2018) 12 *UNSW Law Society Court of Conscience 22*.

Recommendation 5
NCAT should explore opportunities to enhance participation by Aboriginal and Torres Strait Islander tenants involved in termination proceedings by trialling an Aboriginal list in partnership with relevant community services.

Inconsistent fee waiver decisions

We note that while NCAT fees are relatively low, fee waivers must be applied for and they are granted at the discretion of the Member who receives the application. In our experience assisting clients in the general commercial division and the administrative division, there is some inconsistency in the approach taken by Members in relation to waiver applications.

Case study
RF had approached PIAC for help with an appeal before the Tribunal. He received a Centrelink payment as his only income. Although there was a single originating matter, two decisions had been made, and we therefore needed to file two appeal applications. A fee waiver was granted in relation to one of the applications and refused in the other. The client was not vexatious or bringing multiple applications needlessly, so the refusal of a waiver in one of the applications appeared to be unfair.

An alternative approach may be to adopt a fee exemption approach, similar to that employed in the Federal Court and Federal Circuit Court. Under the *Federal Court and Federal Circuit Court Regulation 2012* (Cth), an exemption generally applies in prescribed circumstances, such as if they are granted Legal Aid or hold a Health Care Card: see Part 2, Division 2.3.

Recommendation 6
NCAT should consider strategies to improve consistency in fee waiver decision-making. It may be appropriate to strengthen fee waiver guidelines, or to adopt a fee exemption guideline similar to that used in the Federal Court and Federal Circuit Court.

Enforcement of Tribunal Orders

In addition to our work preventing terminations, we often assist individuals whose tenancies are placed at risk due to the action – or inaction – of the landlord. These cases often involve issues that are the landlord's responsibility, such as damage not caused by the tenant, or general maintenance concerns. These issues can be a particular concern for tenants in social housing, where maintenance requests can be ignored for months or years.

Unfortunately, even once a Tribunal order is obtained, NCAT has limited powers to address non-compliance with its own orders. In our experience, this is a particular problem with repairs and maintenance issues. A landlord who is ordered to carry out repairs will simply ignore such an order, and will rarely face any consequence.

Case study: continual failure to undertake necessary repairs
HPLS was approached by HL, who lived in a social housing property that had suffered flooding following recent thunderstorms. In addition, HL had made multiple maintenance requests over the previous year, all of which had been ignored or refused. HL has a physical disability and, while he is a strong advocate for himself, he was unable to access NCAT procedures without some

support. Over a period of years beginning in 2015 he obtained specific performance orders on multiple occasions. Completion dates often elapsed without contact or action by the landlord. We repeatedly attended the Tribunal to obtain further orders, including orders for compensation for failure to follow orders. On each occasion, we needed to seek leave to apply for a further order. The process was intensely frustrating for HL, and he spent many unnecessary months living in unsanitary and unsafe conditions. The process of repeatedly making orders, only to have those orders ignored, was also highly inefficient for the Tribunal.

In a case like this, there are limited remedies available. The matter could be referred to the Supreme Court under s 73 of the CAT Act for a finding of contempt, but we are not aware of any cases in which this has occurred. The maximum penalty prescribed in s 72 (100 penalty units, or $11000) is a limited deterrent for a corporation where the cost of performance may exceed the possible penalty.

Recommendation 7
NCAT should consider issuing a guideline for Members that, when making orders in relation to property repairs and maintenance, an order should also be made as a matter of course that the parties are at liberty to apply for further orders.

Recommendation 8
The CAT act should be amended to strengthen its enforcement provisions. The maximum penalty for a corporation under s 72 should be higher, and additional enforcement mechanisms should be introduced.

Threat of termination

While social housing providers sometimes seem to ignore orders made by the Tribunal, tenants have no such privilege. In our experience, it is common practice for social housing landlords (including government departments which should be acting as model litigants) to apply for termination orders over the whole tenancy when they simply want to recover a debt. We have seen many cases in which the landlord appears to have no intention of terminating the tenancy but applies for termination orders as a way of securing repayment of a debt.

Similarly, we have seen cases in which social housing providers have used the threat of termination, or simply the threat of 'the Tribunal', as way to pressure tenants to behave in a certain way. A caseworker from a support service we partner with made the following comments.

Case study: a community housing provider speaks to a support service
Sarah is a caseworker at a specialist homelessness service. She was contacted by RS, who had a current tenancy with a community housing provider but was seeking urgent assistance to be rehoused. RS said he was about to be evicted because he had been charged with a criminal offence (goods in custody). RS said he was innocent, and his lawyer thought the charges might be withdrawn. Sarah contacted the property manager (PM) at the community housing provider and was advised that the landlord 'wants him out', and 'if he doesn't get out we'll just take him to NCAT'. Although Sarah felt that RS might be able to resist eviction, she thought it was clear that the PM believed that going to NCAT would produce a result favourable to the landlord. Sarah also felt that she needed to preserve her organisation's relationship with the community housing provider for the benefit of other clients. Ultimately, although RS may in fact have been able to

preserve his tenancy if the matter had proceeded to NCAT, the threat of NCAT prompted his caseworker to find him alternative accommodation.

As this case study highlights, landlords will sometimes use not only the threat of termination – but also the threat of NCAT itself – as a way to pressure not only tenants but also other service providers.

We note that a very significant proportion of NCAT's tenancy caseload relates to applications for termination for non-payment of rent, which we assume to refer to proceedings under s 88 of the *Residential Tenancies Act 2010* (NSW). According to the Quarterly Management Report for the January – March 2019 quarter, such applications make up slightly more than half (50.3%) of all matters in the general tenancy list, and nearly two thirds (63.5%) of all matters in the Social Housing list.

In our experience, many of these applications could be avoided if the landlord were willing to negotiate a reasonable repayment plan with the tenant. We have also seen cases in which a tenant has made good faith attempts to negotiate before attending NCAT, but the landlord has insisted on proceeding. Tenants are often unaware that s 88 does not give NCAT power to evict them if they agree to, and comply with, a repayment plan. They may feel threatened by the prospect of 'eviction' and pressured to repay arrears at a rate that is not affordable.

If the tenant is unable to resolve their arrears, and the matter does proceed to NCAT, it is our experience that most cases are resolved by agreement through conciliation. This does not produce a different result than might have been attained through direct negotiations if the landlord had been able to offer the tenant more flexibility. While going to NCAT can therefore produce a more positive outcome for tenants, we note that facing termination is extremely stressful. Given that rental arrears often arise in circumstances involving temporary crises, unexpected events, or acute times of hardship, the experience of being threatened with eviction adds further stress to the lives of already vulnerable clients.

Recommendation 9
NCAT should consider engaging in community education about the appropriate use of s 88 applications by landlords, and the rights of tenants to resist such applications if arrangements can be made for repayment.

Recommendation 10
NCAT should consider issuing a practice direction that an application for termination for non-payment of rent should not be brought if the applicant believes there are reasonable prospects of negotiating repayment of arrears. Instead, if an enforcement mechanism is needed, the application should be brought for payment of rent arrears.

Summary of recommendations

1. The CAT Act should be amended to remove the general requirement to seek leave in cases that are known to involve vulnerable parties.

2. In the alternative to Recommendation 1, the NCAT representation guidelines should be reviewed to include circumstances in which a party is represented by a TAAS, Legal Aid, a community legal centre, or a pro bono lawyer.

3. The NSW Government should continue to support the TAAS and other specialist advocacy services, including HPLS, that help people who would otherwise be unable to access NCAT processes.

4. NCAT should collect and publicly report on the number of termination applications resulting in a termination order; the number of termination orders made in the absence of the tenant; the representation of parties; and the demographics of NCAT users.

5. NCAT should explore opportunities to enhance participation by Aboriginal and Torres Strait Islander tenants involved in termination proceedings by trialling an Aboriginal list in partnership with relevant community services.

6. NCAT should consider strategies to improve consistency in fee waiver decision. It may be appropriate to strengthen fee waiver guidelines, or to adopt a fee exemption guideline similar to that used in the Federal Court and Federal Circuit Court.

7. NCAT should consider issuing a guideline for Members that, when making orders in relation to property repairs and maintenance, an order should also be made as a matter of course that the parties are at liberty to apply for further orders.

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9. NCAT should consider engaging in community education about the appropriate use of s 88 applications by landlords, and the rights of tenants to resist such applications if arrangements can be made for repayment.

10. NCAT should consider issuing a practice direction that an application for termination for non-payment of rent should not be brought if the applicant believes there are reasonable prospects of negotiating repayment of arrears. Instead, if an enforcement mechanism is needed, the application should be brought for payment of rent arrears.