

19 February 2021

New South Wales Law Reform Commission
Department of Communities and Justice
Submission provided via nsw-lrc@justice.nsw.gov.au

Dear Commissioners,

Thank you for the opportunity to provide this brief submission to the Law Reform Commission's Open Justice Review – Court and tribunal information: access, disclosure and publication.

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law and policy, and the main resourcing body for the state-wide network of Tenants Advice and Advocacy Services (TAASs) in New South Wales. We have long-standing expertise in renting law, policy and practice. We train tenants' advocates, lawyers and community workers in the use of its provisions, we consult with government and industry peaks on related matters, and we conduct litigation in the public interest on specific questions arising from the legislation itself.

The TAAS network assists more than 25,000 tenants, land lease community residents, and other renters each year. This includes provision of advice and assistance in relation to the principles, procedures and practices applicable to tenancy dispute resolution processes in NSW, the primary forum for dispute resolution being the NSW Civil and Administrative Tribunal (NCAT). We have drawn on our work with the state-wide network of Tenants' Advice and Advocacy Services (TAASs) to inform this submission.

Given the nature of our work, our submission focuses on two specific areas concerning open justice and civil matters, specifically matters relating to tenancy, social housing, and residential communities:

1. Publication of reasons for decisions at the NSW Civil and Administrative Tribunal
2. Provision of statistical data relating to the NSW Civil and Administrative Tribunal

Thank you for your consideration. Please feel free to contact Jemima Mowbray if you have any questions or to discuss any points raised in the submission further.

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The Tenants' Union of NSW office is located on the unceded land of the Gadigal of the Eora Nation.

SUBMISSION

Open Justice Review – Court and Tribunal information: access, disclosure and publication

February 2021

1. Publication of reasons for decisions at the NSW Civil and Administrative Tribunal

We are concerned the NSW Civil and Administrative Tribunal's (NCAT) current policy relating to publication of reasons for decisions is inadequate, especially as it relates to matters in the Consumer and Commercial Division. The Tribunal is failing to provide adequate transparency and accountability through the scant publication of reasons for decisions relating to tenancy (residents in private rental and boarding houses arrangements), social housing matters, and residential community matters. The numbers of decisions with reasons being published by the Consumer and Commercial Division is clearly insufficient.

The current approach of the Consumer and Commercial Division of NCAT

[NCAT Policy 2 on Publishing Reasons for Decisions](#) sets out the current approach of the Tribunal to publication of reasons for decisions. The Policy provides that the Consumer and Commercial Division will not, apart from making reasons available to the parties, routinely publish its written reasons for decision. They explain this on the basis of the large number of decisions made in the Division, however they commit to publish a selection of the Division's reasons for decisions. The policy sets out that the usual practice of the Appeal Panel is to publish its written reasons for a decision.

In relation to decision making about which decisions will be published in the general Consumer and Commercial Division, the policy indicates that the Division Head will decide those that are 'significant' or 'representative'. The process is reasonably opaque, as no further explanation as to the basis of why or how particular decisions are selected is provided. We are aware of a number of occasions where requests were made to publish what the Tenants' Union considers significant decisions and these requests were declined by the Division Head with little explanation provided.

Publication of reasons for a decision are an essential element of open justice, ensuring transparency and accountability of Tribunal members and their decision making in relation to individual matters. Importantly it also builds public confidence in the consistency and fairness of Tribunal proceedings. Increased publication of the reasons for decisions made at the Consumer and Commercial Division and the Appeal Panel of matters relating to tenancy, social housing, residential communities would better inform the public of the expert thinking of the Tribunal, as well as improve decision making across Members.

Since the establishment of NCAT in 2014 there has been a clear move away from publishing decisions about tenancy and social housing matters in the Consumer and Commercial Division. Only a very small fraction of matters heard have a decision with reasons published. Significantly less than 1% of decisions relating to tenancy matters in the Consumer and Commercial Division are regularly published (ranging from 0.01% - 0.08%, average: 0.04% since the Tribunal's establishment at 2014¹), and this has been steadily decreasing since 2014.

¹ Methodology adopted to determine percentage of decisions with reasons published as follows: number of published decisions with reasons available on NSW case law website each financial year from 2014/15 – 2019/20 as a percentage of total number of matters finalised in the Division or by the Appeal Tribunal as

The Appeal Panel has published only around a quarter of decisions relating to tenancy and social housing matters (ranging from 17.8% - 32.5%, average: 24.7% since 2016 when information was first made available regarding numbers of tenancy and social housing matters being heard by the Panel).

In relation to publishing decision about matters relating to residential communities the Tribunal has only been marginally more effective. The numbers of decisions published by the Consumer and Commercial Division has been again generally less than or just over 1% of all decisions (ranging from 0.0% to 1.5%, average: 0.8%). The Appeal Panel has published just under three quarters of decisions about residential communities (ranging from 50% - 100%, average: 71%).

reported in the NCAT Annual Reports 2014/2015 through until 2019/2020. For 2014 – 2017 this figure is as a percentage of total number of applications made, as data on matters finalised was not made available.

	CONSUMER & COMMERCIAL DIVISION		APPEAL PANEL	
	Tenancy, social housing, boarding houses	Residential Land Lease Communities	Tenancy, social housing, boarding houses	Residential Land Lease Communities
2014/15	36	1	40	0
2015/16	33	4	58	0
2016/17	20	3	62	2
2017/18	8	5	52	6
2018/19	11	8	42	4
2019/20	6	0	41	7

Published reasons for decisions on tenancy and social housing matters at NCAT, 2014 – 2020, source: NSW caselaw website, <https://www.caselaw.nsw.gov.au/>²

	CONSUMER & COMMERCIAL DIVISION		APPEAL PANEL	
	Tenancy, social housing, boarding houses	Residential Land Lease Communities	Tenancy, social housing, boarding houses	Residential Land Lease Communities
2014/15*	44893	1458	Not available	Not available
2015/16*	44008	644	Not available	Not available
2016/17*	42552	240	191	1
2017/18	42813	336	197	7
2018/19	43029	507	236	8
2019/20	41686	908	183	14

Matters heard on tenancy and social housing matters at NCAT, 2014 – 2020, source NCAT Annual Reports (<https://ncat.nsw.gov.au/ncat/about-ncat/annual-reports.html>)

*Numbers are tenancy and social housing applications lodged in Division, subsequent figures (from 2017/2018) refer to tenancy and social housing matters finalised through the Division.

² Numbers indicate published reasons available on NSW Case Law website relating to decisions made by either the Consumer and Commercial Division of NCAT or the NCAT Appeal Panel that cite the following legislation for the financial years 2014/15 – 2019/2020: *Residential Tenancies Act 2010*; *Boarding Houses Act 2012*; *Boarding Houses*; *Landlord and Tenant Act 1899 Regulation 2013*; and *Residential (Land Lease) Communities Act 2013*.

Even without the restrictions of a binding decision from a superior court, being able to see and argue for the applicability of a particular line of reasoning will create more transparent decision-making processes and encourage quality decisions. This applies not only to decisions made by the Appeal Panel relating to tenancy, social housing matters, and residential communities, but also those made by the general Consumer and Commercial Division. The Appeal Panel has taken on a clear function of leading the decision-making and it is appropriate this be preserved, but many decisions are not subject to appeal. Further, Appeal Panel decisions are more illuminating of appeal law than substantive tenancy law.

We strongly agree with the observation made by the UTS Faculty of Law in their Preliminary Submission and noted in the Consultation Paper, that “a baseline of transparency around publication” is required to enhance accountability. We believe the current approach taken by NCAT in relation to the Consumer and Commercial Division is not reaching an appropriate baseline. Prompted by the proposal in their submission, we suggest NCAT’s Consumer and Commercial Division is a division for which ‘a presumption in favour of publication of reasons for decisions’ would be appropriate. Failing this, we recommend that NCAT’s Consumer and Commercial Division be required to publish a ‘minimum percentage of reasons for decisions’ each year.³

Staged implementation of a minimum threshold of publication

Towards this, we recommend all decisions for which there is a written statement of reasons should be published and made available in a timely manner. This policy change could be implemented immediately and relatively easily. However, given the clearly insufficient number of decisions with reasons currently being published, it is likely that even with implementation of such a change the percentage of decisions being published would fall below what we consider would be an appropriate ‘minimum threshold’.

We understand that implementation of a requirement for publication of a minimum percentage of reasons for decisions may need to be staged and be accompanied by additional resourcing of the Consumer and Commercial Division. We would suggest requiring a starting baseline of 5% of decisions in the NCAT Consumer and Commercial Division regarding tenancy, social housing matters, and residential communities, with this threshold rising incrementally each year to 30%, to be then reviewed and assessed again as to whether this is striking the right balance.

Further consideration is also required in relation to how the Division might ensure they meet an appropriate ‘minimum threshold’. Standardised, wider, consistent and more transparent policies of decision release should be published as a guide for the public on how the Division Head has determined why certain decisions with reasons are being published (i.e. beyond simply the current ‘significant’, or ‘representative’). In addition to the Division meeting a minimum threshold for publication, each Tribunal Member should be required to also publish a minimum percentage of reasons for decisions.

We understand limited resourcing restrictions may be currently restricting the capacity of the Tribunal to publish reasons for all decisions, particularly those relating to tenancy and social housing matters heard in the Consumer and Commercial Division. We acknowledge the Tribunal may require additional funding to meet the threshold standards we recommend. However, we would strongly suggest cost should not override and degrade the access, transparency and accountability provided by publication of decision with reasons.

³ UTS Faculty of Law, *Preliminary Submission PCI25*, <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Court%20information/PCI25.pdf>, accessed 16/02/21, p16 -17

We believe the current statutory prohibitions set out in Civil and Administrative Tribunal Act (specifically, at Division 6: Information disclosure, sections 64 – 70) are appropriate, and our recommendations above do not or should not imply any weakening of the protections and discretion in relation to restrictions outlined in the Act. Where it may usefully facilitate the publication of further reasons for decisions, we would support further protections or discretion allowing anonymisation or de-identification of decisions to protect vulnerable people involved in Tribunal proceedings.

Recommendation 1

That the NCAT policy on publishing reasons for decisions be changed immediately, such that all decisions for which there are written reasons are published and made available in a timely manner.

Recommendation 2

That there be a presumption in favour of publication of reasons for decisions in all residential tenancy matters at the NCAT's Consumer and Commercial Division and the Appeal Panel.

Recommendation 3

That, failing implementation of the above, NCAT's Consumer and Commercial Division be required to publish an appropriate 'minimum percentage of reasons for decisions' each year.

Recommendation 4

That standardised, wider, consistent and more transparent policies of decision release should be published as a guide for the public on how the Division Head of NCAT's Consumer and Commercial Division has determined why certain decisions with reasons are being published.

2. Provision of statistical data relating to the NSW Civil and Administrative Tribunal

The Consultation Paper does not discuss in great detail access to statistical data as an issue of open justice – either for the general public or for researchers. Clearly recognising the importance of research to open justice, discussion in the paper focuses on current restrictions or barriers faced by researchers to accessing court information such as court files (including transcripts) of ongoing proceedings. This may be because it is presumed statistical data is easier to access and to some degree already publicly available for many courts and tribunals.

[NCAT Policy 3 Provision of statistical data](#) sets out the circumstances in which statistical data might be provided to external bodies and individuals and establishes procedures for dealing with requests for the supply of such data.

The amount of data relating to residential matters published by NCAT has significantly reduced relative to its predecessor tribunal (the Consumer, Trader and Tenancy Tribunal). Currently basic statistical data on the Tribunal's workload and performance is made available in the NCAT Annual Reports which are tabled in Parliament and published on their website. Data is also made available to advocates and others within the TAAP network via NCAT Quarterly Management Reports distributed to members of NCAT Consultative Committees. However, these reports are provided somewhat irregularly, for example the last report made available to the Tenants' Union of NSW was the NCAT Quarterly Management Report Jan-Mar 2018.

In [our submission to the statutory review](#) on the *Civil and Administrative Tribunal Act 2013* presently underway we highlighted the limitations on statistical data currently made available regarding applications, orders, and outcomes. Specifically, we identified the following gaps in data provision in the Quarterly Management Reports (the most detailed statistical data regarding NCAT shared with us).

For example, the reports do not currently provide data on:

- attendance by parties at hearing
- representation of parties at hearing
- orders made (determination, negotiated outcome, dismissal, withdrawal, adjournment)
- orders sought vs orders made
- orders made with reference to data on attendance and representation of parties.

While the level of detail indicated above may not necessarily be best provided through Quarterly Management Reports, we believe annual reporting of such data, at a minimum, should be made available. While we acknowledge the possibility of this data – in particular orders made - misleading participants, we believe the benefits outweigh this concern. It will allow better planning, education for participants and, because we believe the rate of conciliated outcomes to be relatively high where both parties attend, this may encourage participants to negotiate further. Providing regular and more detailed data on applications and outcomes allows external stakeholders to better plan the allocation of resources and provide best possible advice to parties.

We are aware the CCD Case Management System (CCD CMS) does not currently record the value of orders sought versus orders made and is not able to report on this except for in decisions which are published. The CCD CMS is also currently unable to record applications where more than one order is sought in a single application. The most recent analysis of data sourced from the CCD Case Management System undertaken in 2016 (based on 2015 data) by the Law and Justice Foundation identified a number of concerning limitations regarding variability of detail recorded in relation to matters.⁴

The current limitations on data collection and reporting hampers analysis and debate in areas from homelessness prevention, social housing policy and practice, the effectiveness of current regulation of the private rental market, and appropriate funding of advice and advocacy services.

The current limitations prevent us from being able to assess the effectiveness of specific laws and processes, and to identify the need for law reform and where more support may be needed for NCAT users. This is especially important for minority groups that tend to be disproportionately impacted by specific laws and face extra challenges accessing help. Therefore, the addition of data on demographics particularly on Aboriginal and Torres Strait Islander people's engagement with the Tribunal would be useful to assess the impact of laws and service delivery on this group and areas for reform.

The lack of outcomes and decisions reporting also diminishes advocates' capacity to give clients good guidance as to likely outcomes and recommend courses of action. A key strength of Tenants' Advice and Advocacy Services is the advice and information about the Tribunal that they provide tenants to assist them in weighing up the various factors impacting upon their decisions. Legal analysis of the case, likely outcomes both legal and interpersonal and financial are all relevant to decisions. Ensuring tenants are well informed about the Tribunal process and previous outcomes results in a high rate of negotiated outcomes which are less costly for all parties. This is only possible where advocates have access to accurate and timely data on the likely range of outcomes and past experiences.

⁴ Law and Justice Foundation, 2016, "Data Insights in civil justice: NSW Civil and Administrative Tribunal - Consumer and Commercial Division (NCAT Part 2).", [http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/NCAT_CCD_2016.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/NCAT_CCD_2016.pdf), accessed 18 February 2021

Recommendation 5

That the Quarterly Management Reports currently provided to the Consultative Committees by the Consumer and Commercial Division of NCAT be made accessible to the public as an immediate start.

Recommendation 6

That attendance, representation and orders made by the Consumer and Commercial Division of NCAT also be published; further that there be annual reporting of this level of data.

Recommendation 7

That the data management software of NCAT be upgraded, with additional investment if needed, in order to facilitate greater data collection and analysis.