



Submission to NCAT Statutory Review

Contact:

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Who we are

NSW Council for Intellectual Disability (CID) is a systemic advocacy organisation that works to ensure all people with intellectual disability are valued members of the community. CID has been a leader in disability rights for more than 60 years.

People with disability are at the front and centre of everything we do – they are decision makers, staff members, board members and spokespeople. We work to build a community that protects rights, includes everyone and supports people well. We focus on issues that people with disability tell us are important, such as the NDIS, health, jobs, education, transport and safety.

CID promotes human rights. We help people with disability to be heard, we speak up on the big issues and campaign for change. We advise on how to be more inclusive so that our society is equal and accessible.

We believe people with disability should have the same opportunities as everyone else. Through CID all people with disability their families and supporters can learn, build skills, and actively participate in the community. We provide information, hold workshops and develop useful resources. We go to community events, share our stories and connect with peers.

As the peak advocacy group for people with intellectual disability and their families for the last 60 years, CID has taken a strong interest in access to justice for people with intellectual disability including the accessibility of the NSW Civil and Administrative Tribunal (NCAT).

While NCAT is more accessible in its processes for people with intellectual disability than the courts usually are, we feel its accessibility needs to be closely protected and continuously enhanced with the aim of fully complying with the United Nations Convention on the Rights of People with Disabilities and section 3(c) Civil and Administrative Tribunal Act 2013 (CAT Act): *to ensure that the Tribunal is accessible and responsive to the needs of all of its users.*

We have an interest in issues of accessibility across NCAT's divisions but our greatest depth of experience is with the Guardianship Division.

CID was centrally involved in the working parties that developed and implemented the Guardianship Act 1987. We highly valued the Guardianship Tribunal in providing a model which safeguarded individual rights and interests and provided processes that were inclusive of people with disability.

When the Guardianship Tribunal was absorbed into NCAT we represented CID, Alzheimer's Australia, the Mental Health Coordinating Council and Brain Injury Australia on the working party to develop the NCAT Act. We were very pleased that the CAT Act included some protections of key features of the Guardianship Tribunal, as set out below.

1. Multidisciplinary panels with members carefully chosen for their particular skills in disability issues, including communicating with people with disability.

Cognitive disability impedes a person's ability to submit papers or evidence. Multidisciplinary panels better enable the Tribunal to ask relevant questions to draw out evidence about the need for guardianship or financial management. Tribunal members with insight into the disability sector, including the NDIS and aged care systems, as well as medical and health welfare issues make the hearings more informed. They are likely to better enable the subject person ('the person') to participate in the hearing.

Schedule 6 clause 4 of the CAT Act requires that the Guardianship Division sit as three members for original applications including "an Australian lawyer", a member with "a professional qualification" and a member with "a community-based qualification".

Clause 4 has weaknesses:

- It does not require members to have skills in communicating with people with disability, in ensuring they are fully included in Tribunal proceedings, or in promoting the principles in section 4 of the Guardianship Act. NCAT is required to comply with the section 4 principles in determining substantive issues and in its procedures.
- It has wide ranging exceptions to the requirement for multidisciplinary panels, including in relation to reviews of guardianship and financial management orders.

The impact of these weaknesses is that there is no guarantee that members will have appropriate expertise and in fact many review hearings may be dealt with by a single member lawyer who lacks the necessary expertise.

Recommendations:

- There should be no weakening of the legislative requirement for multi-member panels for Guardianship Division hearings and preferably that requirement should apply to reviews of guardianship and financial management orders.
- There should be a legislative requirement that members hearing guardianship cases have established expertise in communicating with people with disability, in including them in Tribunal processes and in applying the principles in section 4 of the Guardianship Act.

2. An investigative approach both prehearing and during hearings.

Guardianship Division hearings should be directed at involving the person as much as possible: legal representation is not a requirement and unnecessary legalism can be minimised. The Tribunal can ensure the real issues for the person are identified and explored in a manner as non-adversarial and conciliatory as possible. Guardianship and financial management hearings often involve contentious issues with high levels of emotion. An investigative approach reduces conflict and improves the opportunity for the participation of the person and their supporters.

The CAT Act is generally supportive of this kind of approach though funding restrictions on Tribunal staffing impair its application.

Recommendation:

The funding and staffing of the Guardianship Division should be reviewed with a view to ensuring there is adequate and skilled staffing to give effect to the Tribunal's obligation to ensure it is accessible and responsive to the needs of people with disability.

3. All substantive matters being dealt with in hearings rather than on the papers, with greater opportunity for the subject person to participate in the hearing.

Section 50 of the CAT Act allows the Tribunal to dispense with a hearing and deal with the matter on the papers. However, very importantly, Schedule 6 clause 6 specifies that a hearing is required for all substantive Guardianship Division proceedings.

Guardianship and financial administration applications can result in a person losing their decision making rights, a serious incursion on their human rights. It is essential the person has every opportunity to participate to their fullest ability. Where a person has a cognitive impairment they need to be supported to understand and participate in the hearing or they are likely to be unaware of the decision making process and their rights, including their right to appeal the decision.

Dealing with matters on the papers denies the person and their supporters the opportunity to participate in the Tribunal process. Subject people are very often at a significant disadvantage because of their cognitive impairment; it is unreasonable to expect a person with intellectual disability to be able to represent their interests in written form. Decision making based on papers alone would restrict a person with intellectual disability's access to justice.

It is also difficult for Tribunal members to make informed decisions without being able to meet and seek to understand the person's views and situation. In guardianship and financial management matters there can be a limited amount of information put before the Tribunal and the person's views may not be sufficiently represented to the Tribunal.

The importance of continuing the legislative requirement for Guardianship Division proceedings to be determined in the hearing rather than on the papers is illustrated by the practice in South Australia where review hearings are very commonly dealt with on the papers. The Australian Guardianship and Administration Council reports that the person with disability participates in only approximately 5% of South Australian review hearings (<https://www.agac.org.au/announcements/107-agac-releases-guidelines>). This represents a fundamental denial of the autonomy of people with disability.

Recommendation:

The CAT Act should continue to require that all Guardianship Division proceedings are dealt with by hearing rather than on the papers.

4. Accountability through written reasons for decision in plain English and with minimal legalese.

Written reasons for decision are an essential justification for the taking away of rights. Written reasons offer greater transparency and accountability to the applicant, parties and potentially to the person. They are an important guide for appointed guardians and financial managers in understanding the reason for their appointment and the issues that led to a substitute decision making order. They are used when reviewing Tribunal orders to determine whether the person has an ongoing need for a guardianship order.

Section 62 of the CAT Act only requires that written reasons for Tribunal decisions are provided on request of a party. However, following our advocacy, Schedule 6 clause 11 requires written reasons for all substantive Guardianship Division decisions.

Reasons for decisions of the former Guardianship Tribunal tended to be in comparatively plain English and to avoid unnecessary legal language. Since the Guardianship Tribunal has been absorbed into NCAT, we have observed reasons becoming much less user-friendly for ordinary readers through a reduction in plain English and an increase in unnecessary legalism.

In fact, to give effect to its accessibility obligation, the Tribunal should provide much more accessible reasons generally and at least provide a summary of reasons in a format that is most accessible for the subject person.

Recommendation:

The CAT Act should continue to require written reasons for decision for all substantive Guardianship Division matters.

The CAT Act should require that Guardianship Division reasons are written in a way that is accessible to ordinary readers and that the division is required to provide at least a summary of reasons in a format that is maximally accessible to the subject person.

Support in hearings

Guardianship and financial management orders can be beneficial tools for people with cognitive impairment, but they also involve taking away fundamental rights. It is critical that people subject to applications have support to participate in and understand the decision making process by the Tribunal. Accessible communication about Tribunal matters is a form of support. Advocates may help the person understand the process and to express their views about the need for a substitute decision maker. Separate representatives can assist the person to participate in the process and should be available.

We do not believe it is necessary to increase legal representation in the hearing process, as this is likely to result in the exclusion of the person with cognitive impairment.

Recommendation:

Guardianship Division staff should be obliged not only to inform a person with disability of available sources of advocacy and support but to proactively link the person to advocacy and support where the person wants this.

Hearing locations

Holding hearings in more metropolitan, regional and remote settings will improve accessibility for people with intellectual disability and other people with cognitive impairment. NCAT's offices in Castlereagh St offer limited accessibility and the city location can be an intimidating environment and burdensome journey: these factors can negatively impact the people participating in the hearing process.

Hearings should be held in locations that avoid the appearance of wrong doing or of the participants being 'in trouble', such as court room environments. These types of environments and messaging are intimidating and inappropriate to the type of decision making at hand.

Since the Guardianship Tribunal was absorbed into NCAT, we have seen a marked increase in the use of court rooms and other formal hearing environments in regional areas. We also note with concern the recent research of the Australian Guardianship and Administration Council, which says that people with disability only attend in person approximately 30% of Guardianship Division hearings with a further 30% by telephone and 20% by videoconference. Approximately 20% of people with disability do not participate at all (<https://www.agac.org.au/announcements/107-agac-releases-guidelines>).

Recommendation:

The CAT Act should prohibit Guardianship Division proceedings being held in courthouses and should require the Tribunal to conduct regional hearings to the degree required to ensure maximum participation by people with disability.

NCAT accessibility

People with intellectual disability have the same rights as other NSW citizens to access justice through NCAT divisions. People with intellectual disability are disadvantaged when justice systems do not offer accessible communications including written and electronic information, forms and signage, as well as hearings.

CID strongly encourages the NCAT review to consider how people with intellectual disability and other cognitive impairment are able to access all NCAT Divisions, learn about their rights and participate in NCAT processes. While the accessibility of its communications could certainly be improved, we consider the Guardianship Division to be a leader within NCAT in terms of its awareness of and sensitivity to the participation of people with intellectual disability in its processes.

This issue is particularly important for NCAT jurisdictions that are focused on people with disability, including Appeal Division hearings of appeals from the Guardianship Division and Administrative and Equal Opportunity Division reviews of decisions of the Public Guardian and of the NSW Trustee.

This issue will also be particularly important if the Tribunal is given further jurisdiction in relation to disputes between residents and landlords of supported accommodation as is proposed in the NSW Government's 2018 consultation on protection for residents in long-term supported group accommodation in NSW.

(<https://www.facs.nsw.gov.au/about/reforms/future-directions/resident-rights-consultation>)

Recommendation:

The review of the CAT Act should consider amendments to ensure all divisions of the Tribunal are at least as accessible and responsive to the needs of people with disability as the Guardianship Division.