CATs: GAINS OR LOSSES FOR ACCESS TO JUSTICE? SACAT AND PUBLIC HOUSING APPEALS

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The model of the 'Super' tribunal, the generalist amalgamated civil and administrative tribunal (CAT), has been established in almost all Australian states and territories.[1] In most jurisdictions the aim of access to justice is a feature of the aims of their establishment. CATs are now well established throughout Australia, with the most recent legislation for the establishment of the Northern Territory Civil and Administrative Tribunal (NTCAT) operating since 6 October 2014. State and Territory CATs are largely distinguished from the Commonwealth Administrative Appeals Tribunal in having jurisdiction in relation to certain civil matters, for example residential tenancies disputes, or small claims, in addition to a range of administrative review functions.

The achievements of CATs in improving access to justice lie in the improvements to transparency and consistency in decision-making, as well as improving public awareness concerning the independence and informality of decision making. This paper considers the tension between these proposed and intended gains in access to justice and the potential losses in the ability of the generalist CATs to tailor their processes to the distinctive needs of highly vulnerable applicants. The overall gains of CATs may not account for the specific legal needs of some socially excluded applicants who may require tailored services to enable substantive access to justice before a tribunal.

To illustrate this balance, a case study of the South Australian Civil Administrative Tribunal (SACAT), the most recent of the CATs to be established, is considered. SACAT has strong legislative underpinning in terms of access to justice and has from the outset of its operations subsumed a jurisdiction which addresses applications from highly vulnerable and socially excluded, special needs applicants, in South Australian public housing appeals.

In South Australia, appeals from parties to public and community housing disputes were formerly managed by the Housing Appeal Panel (HAP). The jurisdiction of this Panel was transferred to SACAT from 30 March 2015 and relates to disputes which public housing tenants and former tenants, and applicants for public housing, have with the public housing provider in SA (Housing SA)[2] and disputes arising between tenants of and applicants for community housing in South Australia and community housing organisations.[3] The HAP was a small tribunal with limited jurisdiction, located within and serviced by a Department which also included the government authority (Housing SA), the scrutiny of whose decisions constituted the bulk of the HAP's jurisdiction. It was therefore a tribunal and jurisdiction

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which would benefit both from the appearance and actuality of independence by being placed in SACAT.

However, this paper focusses on the former HAP applicants and questions whether the distinctive special needs of this particular group of applicants to the new SACAT will be appropriately met. In so doing the most recent available evidence on the extent of the legal needs of public housing tenants is discussed and a comparison is drawn between the specialised and tailored service previously offered by the former HAP in SA and the new streamlined procedures envisaged at SACAT. The paper explains that where the distinctive special needs of applicants to a particular jurisdiction to be subsumed in a CAT are not able to be accommodated by the broad focus of a CAT, it may be that substantive access to justice for a particular vulnerable group or groups is at risk of being lost. If the special needs of socially excluded people are not able to be proactively managed, the right to review of those people may be effectively lost and their access to justice through the exercise of the jurisdiction might be effectively denied. The paper suggests that while the gains of efficiency and transparency are important, ensuring that the special needs of the most vulnerable applicants are met should be a twin goal for the new SACAT.

CATs legislation and access to justice

The CATs legislation in all Australian States and Territories emphasises accessibility and fairness, although with varying degrees of articulation in each of the statutes. There is a variety of means by which accessibility can be promoted and supported by CATs, such as through the availability of information and the procedures adopted by the Tribunal. The manner in which the rights to representation and costs are managed, the availability of informal resolution of disputes and its physical accessibility will all affect whether a tribunal's services and functions are easily recognised and understood by applicants. Many of the measurements of accessibility may develop with the culture and maturity of the Tribunal, however it remains the case that where new CATs are established, the legislative desiderata will set the scene.

The arguments in favour of CAT establishment go beyond administrative and financial efficiency. They extend to the promotion of access to justice in a broad sense, that a CAT will be an easier single place to find most of the review and decision making bodies that may be relevant to members of the public and their disputes. CATs will provide a single way to approach or apply for dispute resolution in relation to a myriad of decisions and to apply a single set of procedures. In addition, access to justice will be supported and promoted from the other side of the bench, that it will provide a centralised system of review and decision making, ensuring both greater accountability and more consistent and higher quality outcomes. Prior to joining a CAT, a small tribunal or board may have heard only few matters over a year, and so its members obtained limited consistent experience in managing decision making. As part of a larger tribunal the jurisdiction is exercised in an environment suffused with experience and decision making best practice. As it becomes easier for an applicant to get his/her matter into the tribunal, the matter will also be more efficiently dealt with, in the same environment and with the same processes, resources and expectations that apply in larger, busier but no more important jurisdictions, by the same experienced decision makers.

The legislation least forthcoming in articulating accessibility is the earliest, namely the Victorian legislation establishing VCAT in 1998.[4] That legislation states that its simple purpose is the establishment of the Tribunal, with no specification of its objects. However, the Three Year Strategic Plan for VCAT issued in 2010[5] identified fair and efficient decision making and improving access to justice as its primary priorities, also referring to 'engaging with the community' and 'an ADR centre of excellence'. The VCAT Strategic Plan for 2014-

2017 includes a Customer Charter, predicated on 'low cost, accessible, efficient and independent' high quality dispute resolution. The plan is subtitled *Building a Sustainable VCAT*, and focuses on modernising service delivery in order to reduce hearing waiting times; improving efficiency; providing better access in a physical sense (hearing locations and hearing room functionality); community involvement and engagement; and ongoing training for Members and staff.

The next legislation, in time, establishing the WA CAT was more explicit.[6] Section 3 included in its objectives the resolution of matters 'fairly, and according to the substantial merits of the case', acting speedily and with as little formality and technicality as practicable and to minimise costs.[7] Section 32 of the *SAT Act* deals with Tribunal procedures, specifying that the Tribunal is bound by the requirements of procedural fairness, is not bound by the rules of evidence but is to act according to equity, good conscience and the substantial merits of the case and may determine its own procedure. In addition, the Tribunal is enjoined to ensure that the parties understand the proceedings, including assertions against them and their legal implications, and upon request the Tribunal is to explain its decisions, procedures and directions to parties.[8] Section 87 provides that unless otherwise directed parties to proceedings before the Tribunal should bear their own costs.

The QCAT legislation[9] addresses the matter of accessibility very directly. One of its objects is to have the Tribunal 'deal with matters in a way that is accessible, fair, just, economical, informal and quick', as well as to promote the quality and consistency of tribunal decisions and decisions made by decision makers.[10] These objects are amplified in section 4, which requires the Tribunal to 'facilitate access to its services throughout Queensland', encouraging 'early and economical resolution of disputes', ensuring proceedings are conducted in an appropriately informal manner and, as well as requiring the maintenance and use of members' specialist knowledge and the encouragement of conduct to promote 'the collegiate nature of the tribunal', an injunction to 'ensure the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal'.[11] Section 28 of the *QCAT Act* enables QCAT to set is own procedures, acting fairly and with regard to the substantial merits of the case, and complying with the requirements of natural justice, not bound by the rules of evidence, and with as little formality and technicality as possible, and with appropriate speed. Section 29 reflects the WA provision, requiring the Tribunal to take reasonable steps to ensure that parties understand the issues before the Tribunal and its proceedings and decisions, but it goes further and provides that the Tribunal must also take all reasonable steps to 'ensure proceedings are conducted in a way that recognises and is responsive to' cultural diversity, and the needs of a party where the party is a child or a person with impaired capacity or physical disability.[12] Section 43 of the *QCAT Act* addresses representation, and specifies that the main purpose is to have parties represent themselves unless the interests of justice require otherwise; it permits representation with leave in specified circumstances. It includes provisions for alternative (or 'additional') dispute resolution (ADR) services to be provided by the Tribunal, including mediation,[13] and provides that unless otherwise directed, parties bear their own costs.[14]

The NSW Act establishing NCAT[15] also identifies accessibility and responsiveness among its primary objects[16], with familiar injunctions relating to being just, quick, cheap and as informal as possible, producing decisions that are 'timely, consistent and of high quality'. It also prescribes a 'guiding principle to be applied to practice and procedure':[17] the facilitation of just, quick and cheap resolution of 'the real issues in the proceedings'. This guiding principle is required to be implemented in the exercise or interpretation of any power under the *NCAT Act* or Rules. Section 37 of the Act promotes the use of 'resolution processes', including ADR, and section 49 provides that hearings are to be open unless otherwise directed.

In the ACT the CAT legislation[18] provides similar legislative objects for the Tribunal, although focussing more specifically on the quality of the Tribunal's role, but directing that 'access to the tribunal is simple and inexpensive for all people who need to deal with the tribunal'.[19] Section 7 spells this out in 'Principles applying to the Act', in particular specifying that the Tribunal is to ensure as many simple, quick, inexpensive and informal processes as are consistent with achieving justice, and to comply with the requirements of natural justice and procedural fairness. Section 30 provides that representation ('by a lawyer or someone else') is of right; Division 5.3 makes provision for the use of ADR by the Tribunal; section 38 provides that hearings will in general be held in public; and section 48 provides that, again in general (the Tribunal may order otherwise), parties are to bear their own costs.

Finally the Northern Territory legislation is similar to the South Australian enactments concerning accessibility, specifying that the Tribunal must be 'accessible to the public by being easy to find and access', and 'responsive to parties, especially people with special needs'. In addition, it requires the Tribunal to process and resolve proceedings 'as quickly as possible, while achieving a just outcome', including the use of mediation and ADR where appropriate and using straightforward language and procedures and acting with as little formality and technicality as possible, and ensure flexibility in its procedures.[20] Section 54 reflects the provisions in the WA and NSW legislation requiring the Tribunal to ensure that parties understand the matters in the Tribunal and the Tribunal's procedures, decisions and directions. Section 62 requires hearings to be in public unless otherwise directed, and the *NTCAT Act* makes provision for the tribunal to use a variety of ADR processes for dispute resolution.[21] Section 130 deals with representation, permitted of right. Section 131 provides that it is to be expected that parties will bear their own costs.

All these provisions in the relevant CAT statutes are relevant to whether the CAT is focused on accessibility for applicants. The culture of a tribunal is formed around the objectives in the establishing legislation and the purposes articulated at its commencement. However, the reality of access to justice for applicants to the CAT in practical or substantive terms inevitably goes beyond legislative provisions and statements in Objectives clauses.

The SACAT legislation

South Australia's Civil and Administrative Tribunal (SACAT) was established by legislation passed in 2013, and has been hearing and determining matters since 30 March 2015.[22]

The objectives of the *SACAT Act* are ambitious and impressive: they include the promotion of 'the best principles of public administration' in decision making, including independence in decision making, procedural fairness, high quality and consistent decision making, and transparency and accountability.[23] In addition, the objectives include significant access to justice objectives, such as accessibility 'by being easy to find and easy to access', and responsiveness to parties 'especially people with special needs', that applications are 'processed and resolved as quickly as possible while achieving a just outcome'; keeping costs to a minimum, using straightforward language and procedures, acting with as little formality and technicality as possible, and being flexible in the conduct of matters in terms of procedures.[24] There is clearly commitment and focus in the Act and the intended operations of SACAT, on enhanced access to justice as well as efficiency. Indeed, these were matters emphasised by both the SA Attorney General and the SACAT President at the commencement of SACAT's operations: the Attorney emphasised the 'huge step forward for the justice system in South Australia', and indicated that the 'streamlining' provided by SACAT would 'offer real benefits for the public and the justice system'.[25] The SACAT President, Justice Parker, in referring to the emphasis in the Tribunal on accessibility and efficiency for the public, said that 'SACAT has been provided with the tools to be as flexible

as possible so as to handle matters in the most appropriate way, which will be determined on a case-by-case basis'.[26]

Not articulated, but implicit in the SACAT model, is understanding that the Tribunal will be more accessible and will achieve better and more consistent processes for dispute resolution, including in hearings and as a result, in outcomes, in relation to matters previously managed and determined by the myriad individual tribunals and other previously isolated and self-contained decision-making jurisdictions.[27]

The intention is that SACAT will gradually accrue further jurisdictions over a staged process over time. Its commencement jurisdiction has included residential tenancy disputes and guardianship and mental health, which are both large volume jurisdictions. It also has jurisdiction over the appeals in public and community housing matters, previously within the jurisdiction of the Housing Appeal Panel (HAP).[28] The *SACAT Act* preserves all existing appeal rights arising in the jurisdictions transferred and they are managed within the SACAT structure.

In the SA legislation, 'accessibility' is referred to in an expansive manner, that is it refers to SACAT as 'accessible by being easy to find and easy to access', and is linked in the same provision as also being 'responsive' to parties.[29] The Objectives state that this accessibility is to be achieved in a number of ways, such as timeliness in processing and resolving matters and the use of ADR and mediation. They also cite aims of keeping costs to a minimum, using straightforward language and procedures, acting with as little formality and technicality as possible and being flexible in its procedures 'to best fit the circumstances of a particular case or a particular jurisdiction'.[30] Some of these objectives are expanded upon in section 39 of the *SACAT Act*, 'Principles governing hearings'. The SACAT legislation makes provision for compulsory conferences in certain circumstances,[31] and mediation,[32] which can be required by the Tribunal. Representation is of right,[33] and costs are to be generally borne by the parties.[34]

Regulations, Rules and Directions pursuant to the Act may give a more specific sense of how these provisions might affect substantive access to justice and also suggest the manner of operation of the Tribunal 'on the ground'. The SACAT Regulations provide for an application fee for the commencement of proceedings, with some applicants in select jurisdictions provided with exemption from the payment of the fee.[35] Applicants seeking review of public housing decisions in SA are not exempt from payment of the application fee but the fee can be waived, remitted or refunded by order of the Registrar on the grounds of financial hardship,[36] or by a tribunal member if 'it is fair and appropriate'.[37] Without such a determination otherwise by a Presidential member, a matter cannot proceed without the payment or waiver of the fee.[38] There are provisions in the Rules concerning the necessary documentation and procedure for fee waiver applications and there is room for flexibility in these requirements.

From the outset the SACAT has adopted a number of practices to enable and support its aims of efficient operations. These include providing for online applications, supported by an 1800 phone line, and free public computer access at the Registry assisted by community access officers.[39] The provision of tribunal documents and communication with parties are also done electronically and with reliance on case management software. A cause list of hearings and conferences is published daily on the web site, other than in relation to guardianship, administration, mental health and consent to medical treatment cases, where for privacy reasons parties are notified directly.

Oral hearings are conducted in public[40] and ADR processes, in particular mediation and conciliation, are to be widely used by the Tribunal in all of its jurisdictions with the

expectation that this will significantly reduce the number of matters proceeding to a hearing. SACAT has established its jurisdiction in broad groupings through Streams. These are: Community (incorporating guardianship, administration and mental health); Housing and Civil (including residential tenancies matters) and Administrative and Disciplinary (including review of government decisions, incorporating the review of public housing decisions formerly heard by the HAP). The Streams enable the maximising of tribunal member competencies and experience. The Community Stream currently operates from a satellite location and may conduct hearings as required at other locations, such as hospitals. Otherwise the SACAT is to be a 'one stop shop' in relation to all the other jurisdictions subsumed by SACAT, and this expected to continue to be the case with additional accrued jurisdictions over time. There may also, therefore, be the perception that, in terms of access to justice, it seems that 'one size fits all' across all applicants before the SACAT.

Questions arise concerning how jurisdictional specialities and differences in applicants are to be proactively managed in processes that are inclusive of any previously existing excellence and management of particular needs. Where there has previously been a highly successful small specialist jurisdiction tribunal, easy for vulnerable applicants to find and benefit from tailored registry support, the concern may be that the quality of the previous body may be lost in the generality of the new CAT.

A former CAT President, Justice John Chaney of the WA Supreme Court and former President of SAT, recognises the concerns that arise with the establishment of CATs, including the possible 'loss of specialist expertise, and increased level of formality or legality, and the application of a 'one size fits all' approach to procedures which is unsuited to the wide range of jurisdictions that super-tribunals exercise'.[41] It is noted however, his view is that these concerns are not borne out in practice, and 'the benefits which have been identified in the way of accessibility, efficiency, flexibility, accountability, consistency and quality have all come to pass'.[42]

Access to justice and legal needs in Australia

The focus on a particular group of applicants is an approach that reflects the method of research into access to justice in Australia and internationally. Access to justice research seeks to measure the legal needs within a community through empirical research and by identifying the groups which experience significant unmet legal needs and barriers to legal services. Due to the persistent absence of comprehensive and reliable data research in Australia, it is difficult to identify an evidenced based picture of the groups in the community experiencing the highest legal needs. There is, however, significant evidence that public housing tenants are amongst the most socially excluded and high legal needs groups in the Australian community.[43]

Legal needs research has always benefited greatly from the perspectives of the community legal sector and the data produced relating to their work within the community. Access to justice relating to users of public and community housing is no exception. Analysis of the information gathered by community legal centres provides important insights into the legal needs of people experiencing housing stress and at risk of homelessness in Australia. The community legal sector has been at the forefront of developing integrated legal service responses for the homeless in direct response to their clients' legal needs. It has also contributed significantly to legal research through data collection and reporting on its complex casework. In addition to the daily work done by most generalist centres, all Australian states and territories have specialist homelessness and housing legal services, which use a multi-disciplinary approach to combining casework with outreach services, advocacy through in-house social workers and delivery of specialist community legal education programs.[44] Some of these specialist centres have also developed mutually

beneficial partnerships with private pro bono law practitioners, key government agencies such as public advocates, trustees and tribunals, and the peak tenancy and homelessness organisations. Many also partner directly with a non-government seniors organisation which provide helplines, manage phone enquiries and facilitate legal, financial and other referrals.[45]

Although these specialist community services produce quality data concerning the access to justice issues faced by people at risk of homelessness, they are generally unable to examine, analyse or investigate this data, and the legal needs research that has been undertaken, while individually usually of high quality, has remained constricted due to resources and methodology. Speaking in August 2010, Justice Ronald Sackville AO lamented the absence of such analyses in Australia:

> Australia has had too many ad hoc, repetitive and ineffectual inquiries into access to justice. There have been too few rigorous empirical studies evaluating programs and charting their progress over time. Too few studies have attempted to cross boundaries and derive lessons from studies or experiments on service delivery have been conducted largely in isolation from each other.[46]

The most comprehensive and robust program of legal needs research in the past decade has been produced by the New South Wales Law and Justice Foundation and, more specifically, the Foundation's *Access to Justice and Legal Needs Research Program* (A2JLN).[47] The A2JLN Program seeks to provide a thorough and sustained assessment of the legal needs of the community in NSW, with a focus on access to justice by disadvantaged people. In 2006 the A2JLN Program reported on its first broad-scale quantitative study on legal needs: the NSW Legal Needs Survey (NSW Survey) provided valuable empirical data on legal service provision and law reform in NSW.[48] The NSW Survey confirmed that there is overall no rush to the law by those surveyed, but that one third of individuals in the communities surveyed who face justiciable issues take no action at all. However, the Survey reported a relatively high incidence of legal events over a one-year period, with some individuals, such as those with a chronic illness or disability, experiencing 'clustering' of legal events. These factors are also likely to be particularly pertinent for public housing tenant groups, who have proportionally high rates of ill-health and disability.

The Survey reported that, in general, people rarely sought advice from legal advisers and, in three-quarters of the cases where help was sought, only non-legal advisers were consulted. The type of legal event and socio-demographic factors were significant predictors of whether or not people acted in response and whether they then sought help from others. The most socially excluded, such as public housing tenants, were the least likely to either act in response, or to seek help in response to a legal problem. The most common accompanying belief to inaction was that doing something about the legal issue would make no difference to the outcome. The study also showed that participants were more likely to be satisfied with the outcome of events where they sought help, rather than where they did nothing.

The key results from the NSW Survey were largely confirmed by similar results and findings emerging in the subsequent A2JLN Australia-Wide survey, published in 2012.[49] The Legal Australia-Wide Survey (LAW Survey) was an ambitious and long-awaited quantitative study of legal needs across and throughout the whole of Australia. The aim of the LAW Survey was to:

> …deal with key questions that go to the heart of understanding the legal and access to justice needs of the community and how to address these needs. It assesses the prevalence of legal problems across the community and the *vulnerability of different demographic groups* to different types of legal problems. It examines the various adverse consequences that can accompany legal problems as well as the responses people take when faced with legal problems and the outcomes they achieve.[50]

While these results provide a complex picture, they confirm previous findings that disability and either non-English-speaking background or low-English-proficiency, were significant indicators for significant unmet legal needs and barriers to access to justice. These factors are both highly prevalent in public housing tenant groups.

In addition to the insight gained through the legal needs research, multi-disciplinary research into public housing also provides important evidence-based insights into the vulnerabilities of public housing tenants in relation to seeking review of public housing decisions. An Australian study in 2012 found that:

> Although public housing tenants have access to secure and affordable housing, they appear to be generally less trusting than private renters or homeowners and exhibit less confidence in government institutions.... Public housing tenants express lower levels of interpersonal trust even controlling for a range of social background factors, suggesting that as a form of tenure, public housing in some ways exacerbates the disadvantage of tenants.[51]

Low levels of trust in public institutions will not only affect the likelihood of seeking out assistance and complaint resolution with public housing authorities and also accessing review of decisions by a Tribunal. Suspicion about the independence of one government agency, such as a tribunal, from another, such as the decision making agency, has been shown to inhibit applications for review of government decisions in the UK.[52]

The Australian Housing and Urban Research Institute's July 2015 *Report into Disadvantaged Places in Urban Australia* also found that:

> [T]he public renter group stood out as having a notably low proportion of respondents who had recently attended a local event (29% compared with 44% across all tenures). As well as the relatively high incidence of disability in public housing, this finding might reflect the location of public housing in terms of accessibility to local centres. This latter hypothesis appears consistent with the finding that 23 per cent of public renters had difficulty in getting to places of importance whereas this was true for only 9 per cent of all respondents.[53]

This report identified the difficulty with getting to places as a significant social exclusion factor by measuring how often people living in disadvantaged places used public transport and visited people and other locations. This factor also necessarily affects access to justice by way of access to the physical locations where information and assistance may be sought. Social exclusion has primarily been linked to public and social housing in the international policy discourse, and many analyses as well as state-sponsored initiatives have been targeted at public housing estates.[54]

Public housing applicants

The accessibility of an effective review of public housing decisions is a matter of real significance within the Australian community.[55] Provision of public housing, pursuant to clear rules appropriately applied, is an essential aspect of enabling engagement and participation in a civil society for those who are socially excluded in our community. As part of this, it is important that there be proper scrutiny of the application of these rules to the distribution and management of the limited and valuable public housing

Public housing in Australia is limited almost exclusively to applicants who are social security beneficiaries.[56] Public housing tenants have little or no employment, poor health often with multiple health issues, and are socially excluded by these and other factors.[57] Two thirds of public housing applicants are women and most are single parents.[58] Demand for public housing far outstrips supply and it is only those who are homeless or at risk of homelessness who obtain housing, and often then only following a long wait.[59] Decisions concerning access to public housing and the other related benefits are made through public bodies and

generally by public servants,[60] governed by government policies and legislation. Policies include guidelines on assessing eligibility including complex, difficult and subjective assessments of the impact of an applicant's personal, medical and social circumstances on their capacity to obtain and maintain housing. There is therefore plenty of scope for decision makers to make a 'wrong' decision on the facts of an application concerning public housing. A decision-maker may misinterpret or misapply policy or incorrectly assess or misunderstand the applicant's circumstances. Given the combination of complex of public housing policies, the limited resources for distribution and the significant social needs of the applicants, there is also plenty of scope for dissatisfaction with the outcome of decisions and the likelihood that applicants may desire to have the decision reviewed.[61]

There are numerous implications of 'defective decision making' by public agencies, including 'the human dimension', as well as the cost implications for government in both mispaid benefits and in the resources directed to the resolution of disputes.[62] In addition, in relation to public housing, there are the significant political and social costs which arise in the context of limited resources. There are ever extending waiting lists and the correlative impacts on other aspects of the applicant's lives, including upward pressure on the cost of private rent, as well as visible homelessness and increased pressure on other government and private services.

An adverse decision concerning an application for public housing support is likely to have profound and immediate consequences on individuals. The applicant may face immediate eviction, ongoing homelessness, or continuing exposure to a damaging personal, social or physical environment. Obtaining public housing or housing support has a significant impact on the lives of applicants. It enables them to obtain housing, avoid or end homelessness, establish or live together as a family, have consistent access to medical and education services, and access and maintain employment opportunities.

Access to secure and affordable housing is acknowledged and protected as a fundamental human right in a number of international conventions to which Australia is a party.[63] Secure housing is important as a matter of personal security and place, and also provides a basis to secure employment; a fixed address to receive social security entitlements; a setting for the enjoyment of family and community life and all this entails (including the right to vote); and a basis for the pursuit of education and related activities. The impact in some Australian jurisdictions of specific human rights legislation[64] may require public authorities to act consistently with human rights. Justice Kevin Bell of the Supreme Court of Victoria recently stated, extra judicially, in the context of Victorian and ACT Human Rights legislation:

> In human rights terms, the dwelling is not just property but a home. The public housing provider is not just a landlord but a public authority with human rights obligations. The tenant is not just a renter but a person of inherent value and worth, of potential and capability and a bearer of human rights.[65]

The human right to administrative justice, that is, the right to correct and transparent government decision making, a fair hearing and independent review processes, such as is provided by a Tribunal, is also increasingly recognised in international commentary.[66] This human right may also incorporate a right to legal advice and representation as part of facilitating substantive access to justice.

Advice and advocacy services available to provide specific assistance and support for public housing applicants remains limited in Australia. In addition to the generalist community legal services discussed above, each jurisdiction has a specialist service providing tenancy advice and advocacy support to public housing tenants and applicants for housing assistance as well as to tenants and applicants in the private rental market.[67] Some of these services are relatively well funded and provide extensive services ranging from training and advocacy to

publications and research.[68] The advocacy services do not however always extend to appearing at hearings before review bodies such as tribunals.

Tenants in public housing have special needs for advocacy and support as they often face restrictions on their tenancy which do not apply to private renters or to home owners, in particular in relation to their personal conduct or behaviour. Personal conduct such as disruptive and disturbing behaviour or anti-social or unusual activity not easily understood by others may often be associated with mental illness, social isolation and exclusion, cultural difference, or disability. As a result, public housing tenants are often subject to special arrangements relating to conduct that can make their tenancies more fragile or more likely to be terminated. Socially excluded people therefore also face housing decisions that may not apply to other tenants and which can impact disproportionately on their security of tenure or capacity to obtain or maintain housing.[69] A very low income, coupled with disability, mental illness or social exclusion, may place a tenant at a very high risk of breaching a term of a tenancy agreement, and the circumstances of such tenants are that they are most likely to be homeless and at severe risk if their tenancy is terminated. The need for administrative justice, and to access an independent and effective review process, is acute for these applicants; the need of the broader community to be confident that the most vulnerable members of the community are ensured access to fair and proper decisions is similarly acute.

In Australia, formal administrative means for seeking review of decisions concerning public housing were established throughout the 1990s pursuant to a condition of the funding for public housing provided by the Commonwealth. These appeal mechanisms have taken a variety of forms throughout the States and Territories. Only in SA is the right to review decisions of the public housing authority placed on a legislative and determinative basis.[70] This power reposed in the HAP from 2007[71] and was transferred to SACAT at the commencement of its operations. While there are review mechanisms throughout Australia, there is a range of processes and varying degrees of independence.[72] In NSW, although there is a well developed and functioning hearing process for reviews within the Department of Housing, it is not legislatively based and is recommendatory only. In some jurisdictions[73] reviews are conducted within the Department on the papers. In WA and NT there are hearing processes, but these are managed and staffed by the public housing agency. In the ACT there is a review process conducted on papers only by an internal advisory committee established by the housing commissioner, with a right of appeal to the ACT CAT. The most recent figures, however, suggest a very low appeal rate.[74] In none of the other jurisdictions can the review of the public housing decisions proceed to the CAT. Accordingly, there is little guidance or information available from other CATs as to their effectiveness or use in respect of the review of public housing decisions. Prior to the SACAT, the SA system, through the HAP, arguably already provided the best model for applicants in terms of enforceability of outcome for public housing matters. In SA, the HAP has consistently heard between 80 – 120 appeals relating to public housing decisions each year since 1992 when it was first established.[75] Appeals were heard by the HAP following an internal review with approximately 400 requests for internal review each year. About one quarter of these matters then proceeded to a hearing by the HAP following the review, and about 1/3 of matters heard resulted in a changed decision for the applicant.[76]

Access to SACAT by parties to public housing disputes in SA

The SACAT procedures and rules should positively impact on public housing applicants and affect their access to justice by allowing them access to an independent, professional, skilled and resourced decision making body for the consideration and determination of their applications. While they essentially had this before through the HAP, SACAT is independent of the government decision maker, and will be better resourced and known in the wider

community, giving its decisions a greater authority and context. If a matter proceeds to a hearing it will be heard in a proper hearing environment by a skilled and experienced decision maker. While previously HAP applicants had the additional benefit of tribunal members who are expert in the processes and policies of public housing, this expertise will be readily learned at SACAT. Overall, public housing applicants are not disadvantaged in these respects.

At a very practical level however, there may be some less noticeable differences at SACAT. Previously HAP applicants made their applications on a paper form, available from the registry of HAP, Housing SA (the decision making authority) offices and other agencies. Application forms were also sent out to applicants by post on request, or in some cases along with a decision which was likely to be subject to appeal. There was no application fee. Under these circumstances, practical support in lodging the appeal, if not available from a support agency,[77] would be provided by the HAP registry, including providing and filling out the application. Given applicants are required to seek an internal review before the matter can be taken to independent review, an additional step is required if the decision has been affirmed and the applicants want to proceed further. Public housing applicants need proactive practical support to make the decision to proceed to appeal and often require specific information about their right to do so. Importantly they also may require reassurance concerning their safety from any perceived government repercussions. Previously, the HAP registry also made arrangements directly with the applicant for a suitable time and arrangements for the hearing. Applicants may be constrained by illness or other personal circumstances making flexibility around hearing times important. At HAP, all hearings were in private, and written reasons for all decisions made by the HAP were provided to the applicant.

These practical tailored registry supports previously provided by HAP may be lost with the transfer of jurisdiction to SACAT. Applicants are no longer able to use a paper hard copy of an application form. Instead telephone assistance is available through the SACAT Registry, as well as public computer access at the Registry with community access officers to provide on site support. An application fee of $69 now applies and while this would be likely to be waived for an applicant on Centrelink Benefits, an applicant is still initially confronted with the requirement to pay the fee[78] or to make an application for waiver.[79] An applicant faces a double process at SACAT if the application is referred to a conference or other ADR process to discuss resolution.[80] If the resolution is unsuccessful then the matter will proceed to a hearing. It may be the case that a public housing applicant will not understand the need to re-attend at SACAT, why there are more hearings, or they simply may not have another bus fare, or the physical or mental resources to re-attend.[81]

The applicant may also reasonably decide not to attend if they are concerned about their hearing being in public, or that the decision in their case will be published (SACAT practice). Public housing appeals very frequently involve discussion of highly personal, confidential and often distressing issues, consideration of which might form the basis of the appealed decision. Applicants are often reluctant to reveal and discuss these matters publicly, and it is conceivable that a hearing in public may dissuade them from pursuing an appeal. While hearings can be held in private, this is a matter to be decided on a case by case basis.

The thrust of these concerns is that in the case of public housing appeals, if the type of tailored support previously existing is not provided to applicants to negotiate SACAT, access may be at risk of being diminished rather than preserved or enhanced in the review of public housing appeals. This is not because SACAT's processes or Rules are poor or unconcerned about access, but because applicants in the public housing jurisdiction have specific and distinctive needs. The rules procedures and processes need to be devised and

applied in a discriminating manner to support the review rights of particular groups of specific vulnerable tribunal users.

The concern is that, faced with the requirement for an online application, with no paper form that can be obtained, perused and considered beforehand; the requirement of a fee; reference to Housing SA for advice and support rather than through the Registry; the knowledge that a hearing will be in public, with public discussion of deeply personal and sometimes traumatic matters; and the possibility that there may be more than one attendance for a 'hearing' (a conference as well as a hearing), may well determine an applicant who has limited understanding of court, tribunal and bureaucratic systems, not to pursue an appeal against a government decision which may well have been overturned or varied on appeal.[82] For that applicant, access has not been either preserved or enhanced, rather, their right to appeal has been diminished.[83]

This is not an argument that SACAT should not exercise the former HAP jurisdiction, nor that it should duplicate the processes and practices of the former body. Rather it is an argument for the flexibility available to the Tribunal to proactively plan for systemic supports to be available for public housing decision applicants as a matter of course, rather than requiring them to apply on an individual basis, appreciating that these individuals share many characteristics of vulnerability and social exclusion. It is these characteristics which may mean their right of review of government decisions impacting on their lives is no longer real.

Conclusion

This paper has highlighted some of the tensions in the proposed and intended gains in access to justice by amalgamating small specialist tribunals into the favoured generalist CAT in Australia. By using the case study of SACAT and the example of public housing appeals in SA, some of the practical details facing applicants and affecting substantive access to review may be described and proactively addressed. If the processes in place for SACAT's operations inhibit applications for the review of public housing decisions, or significantly reduce their numbers, it may be that the goal of enhancing access to justice is not truly being achieved for all.

Enabling access to administrative review is a central aspect of access to justice. Enabling substantive access to review for vulnerable and socially excluded applicants in SA, presenting with special needs, would present a noble outcome for SACAT.

Endnotes

1 See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*VCAT Act*); *State Administrative Tribunal Act 2004* (WA) (*SAT Act*); *ACT Civil and Administrative Tribunal Act 2008* (ACT) *(ACAT Act*); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (*QCAT Act*); *Civil and Administrative Tribunal Act 2013* (NSW) (*NCAT Act*)*; South Australian Civil and Administrative Tribunal Act 2013* (SA) *(SACAT Act);* and *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (*NTCAT Act*). On 28 April 2015 the Tasmanian Attorney General announced that work had commenced to consider the feasibility of a single amalgamated Civil and Administrative Tribunal for Tasmania, along the same lines as similar tribunals elsewhere in Australia.
2 See *South Australian Housing Trust Act 1995* (SA) s 32D.
3 See *Community Housing Providers (National Law) (South Australia) Act 2013* cl 3(1)(d) and (2) sch 2 of pt 5 of sch 1; and *South Australian Co-operative and Community Housing Act 1991* s 84(1)(a).
4 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*VCAT Act*).
5 *Transforming VCAT: Three Year Strategic Plan 2010.*
6 *State Administrative Tribunal Act 2004* (WA) (*SAT Act*).
7 Ibid s 9.
8 Ibid s 32 (a) and (b).
9 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (*QCAT Act*).
10 Ibid s 3.

11 Ibid s 4.
12 Ibid s 29(c).
13 Ibid s 75 – 83.
14 Section 80.
15 *Civil and Administrative Tribunal Act 2013* (NSW) (*NCAT Act*).
16 Ibid s 3(c).
17 Ibid s 36.
18 *ACT Civil and Administrative Tribunal Act* 2008 (ACT) (*ACAT Act*).
19 Ibid s 6(b).
20 *Northern Territory Civil and Administrative Tribunal* Act 2014 (NT) (*NTCAT Act*) s 10.
21 Ibid s 107 and following deal with compulsory conferences, and s 117 and following address mediation.
22 *South Australian Civil and Administrative Tribunal Act 2013* (SA) (*SACAT Act*).
23 Section 8(a)(i)-(iv) *SACAT Act*.
24 Section 8, *SACAT Act*.
25 See Katherine Cook, *Recent Developments in Administrative Law*, (2015) 80 *AIAL Forum* at 5.
26 Ibid at 6.
27 For a general overview of the pre-SACAT tribunal system in SA, see Sage-Jacobson, S 'Have you Heard from South Australia' (2012) 68 *AIAL Forum* 61.
28 The *Statutes Amendment (South Australian Civil and Administrative Tribunal) Act 2014* (SA) transfers the jurisdictions of the previous tribunals and other bodies to SACAT.
29 *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(b); this is duplicated in the NT legislation.
30 Ibid s 8(g).
31 Section 50.
32 Section 51.
33 Section 56.
34 Section 57.
35 Regulation 14, with sch 1 cl 1 setting the fee at $69.00. The Crown in various capacities is exempt, as are public sector employees making an application against a public sector agency pursuant to the *Public Sector Act 2009* (SA) and applications under the jurisdiction of the previous Guardianship Board (SA).
36 Regulation 14(7).
37 Regulation 14(8).
38 Regulation 14(6).
39 There is no hard copy or paper application form available for SACAT applications; the application form is to be completed online only.
40 *SACAT Act* s 60, but the Tribunal may direct that that any particular matter or part thereof should be heard in private (s 60(2)).
41 Justice John Chaney, 'Australian Super-Tribunals – Similarities and Differences', paper presented at *Best Practice in Tribunals: A Model for South Australia,* Law Society of SA/COAT-SA, 14 June 2013, at 2.
42 Ibid, and Justice Chaney notes here that a WA Parliamentary Review of SAT had concluded that the Tribunal was meeting its objectives.
43 See for example, C Coumarelos et al, *Law and Justice Foundation of NSW, Legal Australia-Wide Survey: Legal Need in Australia* (2012), which showed that 50.5 per cent of those who identified as homeless and 22.8 per cent of those in basic/public housing had experienced three or more legal issues, compared with only 15.7 per cent in other types of housing generally. See also H Douglas, 'Homelessness and Legal Needs: A South Australia and Western Australian Case Study' (2008) 29 *Adelaide Law Review* 361; and Council to Homeless Persons, 'Homelessness and the Law: Access to Justice' chapter 1: Legal Issues Facing People Experiencing Homelessness (2014) 27(9) *Parity* 6-28.
44 Street Law Centre (Western Australia), QPILCH Homeless Persons' Legal Clinic (Queensland), Housing Legal Clinic (South Australia), PIAC Homeless Persons' Legal Service (New South Wales), Canberra Community Law (previously Welfare Rights and Legal Centre & Street Law), Darwin Community Legal Service (Northern Territory), Justice Connect Homeless Law (Victoria).
45 See, for example, Justice Connect in NSW and Vic; https://www.justiceconnect.org.au/our-programs/homeless-law, accessed 13/8/15.
46 Ronald Sackville, 'Access to Justice: Towards an Integrated Approach' (2011) 10 *The Judicial Review* 221; 235-256.
47 See the many publications and Reports available on the website of the Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs Program at http://www.lawfoundation.net.au/ , accessed 13/8/15.
48 See Christine Coumarelos, Zhigang Wei and Albert Zhou, 'Justice Made to Measure: New South Wales Legal Needs Survey in Disadvantaged Areas' (Law and Justice Foundation of NSW, 2006). This study focused on legal needs in six disadvantaged areas in NSW and was administered during September and October 2003 via telephone interviews with 2,431 residents.
49 Christine Coumarelos et al, *Law and Justice Foundation of NSW Legal Australia-Wide Survey: Legal Need in Australia* Volume 7 'Access to Justice and Legal Need' (2012).
50 Ibid at 231; emphasis added.

51 Jed Donoghue & Bruce Tranter 'Social Capital, Interpersonal Trust, and Public Housing' *Australian Social Work* Vol. 65, No. 3, September 2012, pp. 413-430. This research is based on the analysis of survey data from the 2003 Australian Survey of Social Attitudes (AuSSA), with a large sample of Australian adults aged 18 and above (Gibson, Wilson, Denemark, Meagher, & Western, 2004).

52 See D Cowan et al, *The Appeal of Internal Review: Law, Administrative Justice and the (non) Emergence of Disputes* (Oxford, Hart Publishing, 2003). This study examines applications for review of government decisions in the UK including in relation to homelessness.

53 Hal Pawson and Shanaka Herath, 'Disadvantaged Places in Urban Australia: Residential Mobility, Place Attachment and Social Exclusion' Australian Housing and Urban Research Institute, July 2015 at p 48; at http://www.ahuri.edu.au/publications/download/ahuri_myrp704_fr3#page=3&zoom=auto,-43,300 accessed 13/8/15.

54 Ibid at 52.

55 See discussion, Hon Justice Kevin Bell, 'Protecting Public Housing Tenants in Australia from Eviction: the Fundamental Importance of the Human Right to Adequate Housing and Home' (2013) 39 *Melbourne University Law Review* 1.

56 See Housing SA Eligibility Guidelines (*Housing SA Policies and Guidelines*, 2015). For example, in SA, basic eligibility includes an income and assets test, which takes into account gross income and size of household.

57 Roy Morgan Research, National Housing Survey, Australian Institute of Health and Welfare, *2007 National Housing Survey: Public Housing*, National Report November 2009 at 137; 78% of applicants for public housing nationally are over 45 years of age; see Australian Institute of Health and Welfare, *Public Rental Housing 2008 – 9* (2010), 2); 65% of applicants for public housing have 'special needs'; *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria*, Parliament of Victoria, 2010 at 11 reported that two thirds of applicants for public housing in Victoria are from the category of 'greatest need'.

58 Roy Morgan Research, National Housing Survey, Australian Institute of Health and Welfare, *2007 National Housing Survey: Public Housing*, National Report November 2009, ibid at 138.

59 see Bell, above n 55, 3; since the 1990s all public housing authorities throughout Australia have addressed increased demand and diminishing resources by adjusting allocation, rather than by increasing supply, with the consequence that there is progressive concentration of disadvantaged people in public housing. See also Keith Jacobs et al, 'What Future for Public Housing? A Critical Analysis' Australian Housing and Urban Research Institute, September 2010. In SA, the wait for housing, even after being assessed as 'Category 1', that is, homeless or at risk of homelessness, may be up to 48 months.

60 For a discussion of the increasing trend in Australia to provide public housing through community housing organisations, housing associations or cooperative housing organisations: see K McEvoy and C Finn 'Private Rights and Public Responsibilities: the Regulation of Community Housing Providers', (2010) 17 *Australian Journal of Administrative Law* 159.

61 Note that in the year 2012-2013 complaints about Housing SA comprised almost 20% of all complaints to the SA Ombudsman; see http://www.ombudsman.sa.gov.au/complaints/complaint-statistics/, accessed 13/8/15.

62 See R Creyke , 'Tribunals and Access to Justice' [2002] *Queensland University of Technology Law and Justice Journal* 4 at p 6: for Centrelink decisions, according to a 2001 Auditor General's analysis of age pension claims, there was an error rate of over 50%, although Centrelink's own assessment set the error rate at about 3%. Similar analyses are discussed by L Pearson, 'The Impact of External Administrative Law Review: Tribunals' [2007] UNSWLRS 53, 57.

63 See for example, the *Universal Declaration of Human Rights* Art.25; *Covenant on Economic, Social and Cultural Rights* (ICESCR) Art 11; and the *Convention on the Rights of the Child* (CRC) Art. 5(e).

64 *Human Rights Act 2004* (ACT), and *Charter of Human Rights and Responsibilities Act 2006* (Vic).

65 The Hon Justice Kevin Bell above n 55 at 36.

66 See AW Bradley, 'Administrative Justice: a Developing Human Right?' (1995) 1 *European Public Law* 347, and see also discussion in L Kirk, 'The Constitutionalisation of Administrative Justice', in *Administrative Justice – the Core and the Fringe*, Proceedings of the 1999 AIAL Forum.

67 See general discussion on these issues in *A Better Lease on Life – Improving Australian Tenancy Law*, National Shelter Inc, April 2010.

68 In Victoria, NSW, Queensland, Tasmania and ACT these are Tenants' Unions. In South Australia the support service is the Tenant Information and Advocacy Service, operated through Anglicare, and in WA and NT, Tenants' Advice Service. Throughout Australia, State and Territory Fair Trading or Consumer Affairs Offices provide advice to private tenants on tenancy matters; however, this advice is not generally available to public tenants.

69 For example, if a public housing tenant in SA has his/her tenancy terminated for disruptive behaviour, he/she is excluded from seeking any support from the public housing agency for two years: this includes rehousing, or any other housing assistance. A tenant in the private housing market can seek alternative housing in such circumstances whether in private or public rental; they may not have a good reference, but they are not excluded. A public housing tenant in such circumstances will have extremely limited capacity in any sense to obtain a private tenancy and is most likely to become homeless.

70 See s 32D *South Australian Housing Trust Act 1995* (SA). The HAP also had jurisdiction in relation to community housing disputes and this jurisdiction too has transferred to SACAT. See above n 2 and 3.

71 Previously, from 1992, the HAP operated pursuant to policy only and was non determinative, making recommendations to the Minister.
72 See, K McEvoy, 'Building Secure Communities; Delivering Administrative Justice in Public Housing' (2011) 65 *AIAL Forum* 1 (pp1-24) and http://law.anu.edu/aial.
73 Victoria, Tasmania and Queensland.
74 From 2009 - 31 March 2010, there were 384 first level reviews; 22 second level reviews before the advisory committee; and 2 matters appealed to the ACAT.
75 The HAP was initially a recommendatory body but, in 2007, it was legislatively established and took on a determinative function.
76 Unpublished figures from the Public and Community Housing Appeals Unit, SA, available from Housing SA. In 2009 there were over 150 appeals heard. In 2014 there were 73 appeals heard and determined by the Panel, and 95 in 2013. In addition, the Panel also heard and determined a number of community housing disputes each year. There were 19 appeals heard and determined by the Panel between January and March 2015, prior to the transfer of the jurisdiction to SACAT.
77 Such as the Tenant Information and Advice Service (TIAS).
78 Newstart Allowance benefits are presently about $560 per fortnight for a single person, $940 per fortnight for a couple; DSP is about $780 single, $1,179 for a couple; and the Age Pension is about $860 per fortnight for a single person and $1,296 for a couple.
79 The SACAT Registry advises that, in practice, holders of a Commonwealth Centrelink concession card will automatically have the filing fee waived; this is specified on the SACAT website and on the online application form.
80 There are issues not discussed here concerning the appropriateness of ADR in administrative review, in particular where expenditure of public monies is concerned, as in public housing: in this context an application, for example, for waiver of a small charge for water use where the applicant lives in a complex without separately metered premises, and the water charge is calculated by a formula dictated by legislation or policy, is not appropriately susceptible to resolution by ADR processes as it might be in a private tenancy matter, where the issue is one of litigation, not distribution of public money across (say) 15,000 tenancies which will be subject to the same rule.
81 SACAT enables hearings by telephone where the applicant is unable to attend, as did HAP.
82 Approximately 1/3 – 1/2 of appeals to HAP were overturned or varied; these figures are contained in the statistics maintained by the Public and Community Housing Appeal Unit, SA, see above n 76. See also R Creyke, above n 62, discussing the error rate at the primary decision level.
83 The SACAT Registry advises that, from March 2015 (the SACAT commencement date) to the end of August 2015, SACAT has received a total of 33 applications which would otherwise have been made to HAP: this figure is consistent with the number of applications which were received by HAP in the equivalent period in 2014. As at the end of August 2015, 23 of those applications have been resolved, a number by SACAT alternative dispute resolution officers by telephone, without the applicants being required to attend a hearing. 12 applications have been referred to ADR with 11 resolved in that process. At that date three applications had gone to a hearing.