

NSW Justice Statutory Review – NCAT 5-year Statutory Review

25 July 2019

Introduction:

Thank you for providing an opportunity to contribute a submission to the NSW Civil and Administrative Appeal Tribunal (**‘NCAT’**) 5-year Statutory Review (**‘the Review’**). The Open Government, Information and Privacy Unit (OGIP), Legal Services, Department of Communities and Justice (the department) decide access applications made under the *Government Information (Public Access) Act 2009* (*GIPA Act*) on behalf of the department. The OGIP Unit have experienced numerous instances where applicants who are aggrieved by decisions made under the GIPA Act exhibit intimidating or harassing behaviour. These applicants often become fixated on issues completely irrelevant to their original concern and inappropriately use the external review pathway provided by NCAT to ventilate irrelevant issues. In many instances the external review sought by the applicant is a matter in which the NCAT has no jurisdiction. The current case management pathway in the NCAT is time consuming and costly for agencies to defend decisions made under the GIPA Act. Essentially there is an inconsistent approach by NCAT members to compliance with the “guiding principles” in s. 36 of the CAT Act (that is, “just, quick and cheap resolution of Tribunal issues”), especially where applicants are vexatious and/or incompetent.

Background:

The department has experienced numerous instances where fixated individuals seek information via the *Government Information (Public Access) Act 2009* (**“the GIPA Act”**) and subsequently seek an external review in the NCAT. On each occasion the information requested does not relate to the initial concern or grievance. In one instance an applicant had complained to the Office of the Legal Services Commissioner regarding conduct of a solicitor involved in the administration of a deceased estate. The information subsequently sought under the GIPA Act involved several GIPA applications being made seeking information such as emails or records created by the GIPA decision maker rather than information relating to the original grievance. In other instances the applicant has become fixated on the GIPA decision maker and uses the external review process as part of an ongoing campaign of harassment which impacts on the health and safety of employees. In one instance an applicant emailed an employee 2700 times over a three month period.

The process is often used to revisit an issue finalised in another jurisdiction and it appears applicants do not understand that the NCAT external review process cannot provide the remedies sought. Significant government resources are required to prepare submissions and submissions in reply, to attend the case conference, mediation, directions hearings (which are often required on more than one occasion)

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and the NCAT hearing. These steps provide a pathway for fixated persons to continue to harass and intimidate employees involved in the case management or called as witnesses.

One fixated applicant made numerous applications for external reviews of various decisions made by the department under the GIPA Act to the NCAT. This applicant engaged in a range of behaviours over the course of numerous access applications including sending intimidating/threatening emails to employees and publishing the names and defamatory comments of OGIP employees on the applicant's website under the moniker of a 'Wall of Shame'. Additionally the applicant requested the issue of summonses from the NCAT requiring employees to attend to give evidence without any basis relevant to the external review. The summons was granted by the Registrar without consideration as to whether the person summoned had relevant evidence to be put before the Tribunal.

Proposals:

Adopt a similar model to the United Kingdom's Administrative Court. In the United Kingdom's Administrative Court, a claimant must first obtain permission from the court to apply for review. The court will refuse an application seeking permission for judicial review unless it is satisfied there is an arguable ground for review with a realistic chance of success. The court may refuse to provide permission for a judicial review on several grounds including undue delay and a lack of substantive difference in the outcome. The Administrative Court, on receiving an application can make several decisions; it can grant permission, refuse it or grant it in part. The claim can be refused on the basis that it is "totally without merit" which means that the case is bound to fail but not necessarily vexatious. The Administrative Court's decision to refuse can be reconsidered at an oral hearing where the claimant must provide grounds for renewing the application for permission. The standard time for an appeal of the decision in the Administrative Court is 30 minutes. Given this model the following is proposed:

- I. Applicants be required to seek permission for an external review before NCAT by submitting written submissions and any evidence outlining the grounds for review. Where an applicant seeks to summons a witness, this should also be addressed in the submissions including the valid grounds for the issuing of a summons. The issue of whether a summons can be issued should be determined by a tribunal member rather than a registrar.
- II. The applicant's written submissions and relevant evidence are then determined by a Tribunal Member in order to determine whether there is an arguable ground for review with a realistic chance of success before permission for external review is granted.
- III. Where the applicant is granted permission for external review, the relevant responding department is then notified and directed to provide submissions.

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IV. The matter is then listed for hearing for determination by a tribunal member.