THE LAW SOCIETY
OF NEW SOUTH WALES

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NCAT Project Team
Department of Attorney General and Justice
Level 14, 10 Spring Street
SYDNEY NSW 2000

By email: ncat@agd.nsw.gov.au

Dear Sir/Madam

**Discussion paper 3(a) - Appeals**

Following consultation with the relevant Policy Committees, the Law Society of New South Wales is pleased to provide the comments below regarding discussion paper 3(a) which relates to appeals.

The following recommendations made by the NCAT Project Team are supported:

- Decisions in the Consumer and Commercial Division, Administrative and Equal Opportunity Division and Victims Support Division should be appellable to the internal appeals tribunal,
- Existing appeal avenues to the Supreme Court should be preserved in relation to professional discipline matters and in matters determined under the *Commissioner for Children and Young People Act 1998* and *Child Protection (Offender Registration) Act 2000*, and
- Concurrent appeal rights to the Supreme Court in relation to guardianship matters should also be preserved.

The following comments are made with regards to other recommendations made by the NCAT Project Team:

**(1) Appeals to the internal appeal tribunal should be as of right on a question of law**

Appeals to the internal appeals tribunal should be as of right on a question of law. An equivalent of section 118 of the *Administrative Decisions Tribunal Act 1997* (the ADT Act) should be included to ensure that the appeal tribunal is empowered, of its own motion or at the request of a party, to refer a question of law arising in the appeal to the Supreme Court for the opinion of the Court.

**(2) Appeals to the internal appeal tribunal on a question of fact, or a question of mixed law and fact, should only be with leave**

Leave should only be required to appeal on a question of fact. Section 113(2) of the

ADT Act, which refers to leave to "extend to a review of the merits of the appealable decision", should be retained. This has been tested in the Courts (e.g. Lloyd v Veterinary Surgeons Investigating Committee [2005] NSWCA 456 (21 December 2005).

**(3) Interlocutory appeals should only be permitted in exceptional circumstances**

"Exceptional circumstances" is not an expression currently used in the ADT Act and it has been narrowly interpreted by the courts in other contexts. It is a harsh threshold that could ultimately produce inefficiency, increased costs and injustice, all contrary to the proposed objectives of NCAT. Section 113(2A) of the ADT Act (requiring leave for an appeal against the exercise of an interlocutory function) should be retained.

**(4) Applications for leave to appeal should be conducted on the papers without the need for face-to-face hearing (unless the appeal tribunal believes that circumstances warrant otherwise)**

The appeal tribunal should have discretion to determine whether or not it is appropriate to conduct an appeal on the papers without the need for a face-to-face hearing.

**(5) NCAT's President should have full discretion as to how the appeal tribunal is to be constituted**

The constitution of the appeal tribunal should be enshrined in legislation for transparency and consistency across NCAT. The ADT currently requires at least three members to constitute an appeal panel, one of whom must be a non-judicial member (s.24 of the ADT Act). Notwithstanding that most appeals are on a question of law, the non-judicial member does not decide on questions of law (s.78(2) of the ACT Act). It would be preferable for the appeal panel to include judicial members only in these circumstances.

**(6) Application fees should also be carefully considered to ensure that a balance is struck between accessibility and cost recovery**

It is inappropriate to refer to "cost recovery" in the NCAT which is not a user pays regime. To do so would be contrary to the proposed objectives of the new Tribunal.

**(7) Appeals from the internal appeals tribunal should be directed to the Supreme Court on a question of law only, with the leave of the Court**

Section 119 of the ADT Act currently allows appeals to the Supreme Court on questions of law, as of right (subject to s.119(1A)). It would be a narrowing of this right of appeal to require leave of the Supreme Court for appeals from NCAT on questions of law. Section 119 should be retained.

**(8) Should a monetary threshold be set in relation to appeals in minor civil disputes?**

Disputes under $10,000 should not be appellable or eligible for a re-hearing.

**(9) Should the content of the CTTT Regulations in relation to re-hearing be adopted by NCAT in relation to leave to appeal?**

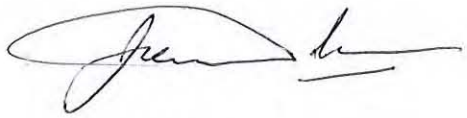
Regulation 22(1) and (2) should be combined as one provision. All decisions issued by NCAT should be accompanied by reasons for the decision. The timeframe for lodging an application for a re-hearing should be 28 days from the date of the decision. Regulation 23 is uncertain and should stipulate a more finite time frame for "been notified" e.g. 14 days from the date of the notice attached to a copy of the application, from NCAT. The same applies to Regulation 24 and the words "was notified". Regulation 25 should carry a caveat that the exclusion applies if the party seeking a rehearing was legally represented.

**(10) Are there any other mechanisms that can be used to ensure appeals from minor civil disputes are handled in an efficient manner?**

There needs to be a clear pathway formulated, communicated to parties and attached to the publication of the decision regarding the avenues for appeal and re-hearing.

If you have any questions in relation to this letter please contact Chelly Milliken, Legal Policy Advisor, on 9926 0218 or chelly.milliken@lawsociety.com.au

Yours sincerely



John Dobson
**President**