

## Background

### Legal Aid NSW housing group

The Legal Aid NSW housing group is focused on issues relating to safe, appropriate and affordable housing. This covers almost all shelter except home ownership (mortgages), and includes private tenancies (with a landlord or real estate agent), social housing (Housing NSW, community housing, Aboriginal housing), caravan parks and boarding houses.

### Legal Aid NSW Disaster Response Legal Service (DRLS)

For over 10 years Legal Aid NSW has provided legal assistance to communities across NSW impacted by disasters as part of the government response to disasters. Legal Aid NSW is the lead agency in coordinating the legal response for NSW.

Legal Aid NSW lawyers specialise in everyday legal issues that often arise during disasters, causing acute hardship if left unresolved. They include insurance, employment, housing and tenancy, fines, social security, credit and debt and domestic and family violence. Following a disaster, DRLS solicitors offer legal advice face-to-face at recovery centres and community outreach hubs, and via a dedicated telephone helpline, about legal rights and guide clients through the process involved in asserting those rights. Anyone living in communities affected by disasters in NSW can access assistance from the DRLS. People who already experience vulnerability, including Aboriginal people, people at risk of homelessness and people with disability, receive more intensive socio-legal services from legal and allied professional staff.

The DRLS model of service delivery is targeted, timely and trauma-informed. We are committed to a holistic approach to a client's legal problems by providing early legal assistance, identifying systemic legal issues and referring them to appropriate stakeholders or regulators, and providing legal education to affected communities. Where necessary, we provide clients with ongoing legal assistance.

### Response to the March 2021 Mid North Coast and Hawkesbury Floods

Heavy rainfall from mid-March 2021 caused major flooding across NSW, with the Mid North Coast and Hawkesbury Nepean regions most affected. Around 18,000 people were evacuated, 87 homes destroyed, 1,400 severely damaged, 1,000 moderately damaged and 1,200 rendered uninhabitable.

The DRLS was immediately mobilised, with solicitors sent to eight recovery centres across the Mid North Coast and Hawkesbury-Nepean regions, as well as to mobile outreach hubs run by the Kempsey, Port Macquarie-Hastings, Nambucca Valley, MidCoast and Hawkesbury local councils. The 1800 helpline was activated. DRLS solicitors attended recovery centres and outreach hubs for a total of over 275 days and provided 818 legal services to flood affected people. 26% of all services were about housing issues, and 54% of those housing services related to issues arising from residential parks.

DRLS solicitors provided approximately 144 legal services to residents of residential land lease communities (caravan parks), which was 17.5% of all services. Services included advice, and more extensive assistance including casework. Residents seeking advice were from the Brigadoon Caravan Park in North Haven, Reflections Holiday Park, North Haven, Riverside Caravan Park, Port Macquarie, Dunbogan Caravan Park, Dunbogan, and the Windsor Riverside Van Park, Wilberforce.

## Summary

Legal Aid NSW has observed emerging issues for vulnerable clients in caravan parks as a result of the March 2021 floods and the gaps in protection in legislation for these residents. The combination of risk factors – including the increased frequency of extreme weather events, the location of some of these parks on historical floods plains, as well as the fact that caravan parks are housing some of the most vulnerable people in our community – underscores the need for clear and comprehensive regulation and active enforcement.

## Recommendations

1. That section 37 of the *Residential (Land Lease) Communities Act 2013 (RLLC Act)* be amended to mirror previous obligations under previous section 24 of the *Residential Parks Act 1998 (NSW)*, to make it clear that there is an obligation on the park owner to be responsible for repairs and maintenance.
2. That operators be required to have a capital works fund to ensure that they can meet their repair and maintenance obligations.
3. That section 64(1) of the RLLC Act be amended to allow the NSW Civil and Administrative Tribunal (**NCAT**) to make an order to reduce site fees payable under a site agreement if the operator fails to repair or maintain a residential site.
4. That section 62 of the RLLC Act be amended to mirror section 43(2) of the *Residential Tenancies Act 2010 (NSW) (RTA)*.
5. That the remedies or penalties for breach of the rules of conduct at Schedule 1 be clarified.
6. That the legislation be amended to specify the obligations of operators regarding evacuation and disaster preparedness. These obligations must be resident-specific, taking into account any particular supports and needs (e.g. mobility issues, lack of a vehicle, etc). Operators should be required to display a map of the historical flood levels so residents are aware of where their van sits, as well as an evacuation plan. Information should be made available on how residents can make a complaint or raise concerns about the operator or park conditions to NSW Fair Trading.
7. That any person who resides in a community or residential community, as defined in section 4 of the RLLC Act, be afforded the rights and protections under the RLLC Act, including standing to bring proceedings against an operator under the RLLC Act. Likewise, we recommend that the general obligations of operators (including the responsibilities in section 37 of the RLLC Act) be extended to any person who resides in a community or residential community. This should apply regardless of whether the person is a resident under the RLLC Act, the RTA or the *Holiday Parks (Long-term Casual Occupation) Act 2002 (NSW)*.

## Issues and comments

We provide the following comments to inform the Department of Customer Service's review of the RLLC Act.

### Repair and maintenance obligations: section 37

#### Obligation to maintain residential sites

- The RLLC Act sets out the operator's responsibilities, and includes an obligation to "ensure a residential site is in a reasonable condition, and fit for habitation, at the commencement of a site agreement for the site" (section 37(1)(k)).
- What it fails to provide is an ongoing obligation to maintain the residential site, or repair any damage not caused by the home owner.
- Whilst it appears that the operator is responsible for repairing and maintaining land they own, ambiguities in the RLLC Act have led to many instances of home owners being required to repair or replace infrastructure owned by the operator. Some park operators report that the cost of undertaking repairs would put them out of business.

#### Ronan's story\*<sup>1</sup>

Ronan has lived at a caravan park on the Mid North Coast for over 10 years. He owns his dwelling and rents the site. Ronan is in his 70s and is reliant on a walker. He owns a mobile phone but does not know how to use it.

Ronan's dwelling was damaged in the floods. All residents were evacuated from the park and placed into emergency accommodation.

Ronan was told he needed to continue to pay site fees so that the park operators could "afford" to fix the park. He was advised about his right to seek a site fee abatement under the RLLC Act as the premises was wholly uninhabitable.

Ronan was very concerned about Legal Aid NSW writing to the operator as he feared it would jeopardise his housing and the relationship with the operator. He refused to instruct Legal Aid NSW to act.

- This is an issue that has only arisen since the commencement of the RLLC Act. Under section 24(1)(b) of the repealed *Residential Parks Act 1998* (NSW), it was clear that the park owner was responsible for the repair and maintenance of residential sites. This section stated that 'the park owner must provide and maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.' However, this language is not mirrored in s 37 of the RLLC Act.
- **Recommendation 1:** That section 37 of the RLLC Act be amended to mirror previous obligations under previous section 24 of the *Residential Parks Act 1998* (NSW), to make it clear that there is an obligation on the park owner to be responsible for repairs and maintenance.
- **Recommendation 2:** That operators be required to have a capital works fund to ensure that they can meet their repair and maintenance obligations.

#### Obligation to maintain common areas

- Section 37 of the RLLC Act also requires operators to maintain the community's common areas in a reasonable state of cleanliness and repair.

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<sup>1</sup> All case studies marked with an asterisk in this response have been de-identified.

- In one caravan park on the Hawkesbury, caseworkers have reported poor conditions of the park overall and a history of failure of regulatory oversight, which have exacerbated the impact of the recent flood. Issues include non-compliant disability access, lack of lighting on paths in the common areas, septic systems that regularly fail, and permanent vans in areas that should be movable.

#### Access to residential site by operator: section 39

- In the experience of one of our solicitors, the operator entered the home of a home owner after the floods to carry out their own clean-up, without the consent or knowledge of the home owner.
- Section 39 of the RLLC Act, which regulates access to “a residential site and any home located on it”, is potentially drafted too broadly and permits access without consent of the home owner in certain circumstances.
- Consideration should be given to limiting the access by the operator to the site only, and not the home itself, for example, in an emergency or where there is a need to avert danger to life or valuable property. In our view, it is not necessary to allow operators, which have no interest or ownership in the home, to access the homes of home owners. This is consistent with the equivalent provisions in South Australia, which limit access rights to the site (under a residential park site agreement), rather than the home itself.<sup>2</sup>

#### Power of Tribunal to reduce site fees: section 64

- Section 64(1) of the RLLC Act allows NCAT to make an order to reduce site fees payable under a site agreement in certain circumstances.
- It does not give NCAT the power to reduce site fees for failure to maintain a residential site under section 37 of the RLLC Act.
- **Recommendation 3:** That section 64(1) of the RLLC Act be amended to allow NCAT to make an order to reduce site fees payable under a site agreement if the operator fails to repair or maintain a residential site.

#### Dilapidation: section 43

- Section 43 of the RLLC Act provides that an operator may require a home owner to carry out work to rectify a defect if the residential site or home located on it is significantly dilapidated.
- While this provision rightly provides the operator with a remedy to address dilapidated homes, it also enables the operator to pursue the home owner regarding repairs to the site, regardless of the reason for the damage.

#### **Maya’s story\***

Maya owns a dwelling at a caravan park on the Mid North Coast. She is in her 80s and is undergoing chemotherapy.

Maya’s dwelling was significantly damaged in the floods. Her insurance policy excluded flood damage. She has been living with her daughter since.

Maya was encouraged by the park operator to relinquish her site. She was told that if the dwelling could be repaired, it would need to be built up a level. This would make access very difficult for her.

<sup>2</sup> Residential Parks Act 2007 (SA) s 41.

Council attended the park to check DA compliance. The dwelling was on an angle so it was not compliant with the 2-metre distance from road requirement. This would be a significant rectification cost to Maya, who has lived there for 20 years and was unaware of the DA compliance issues.

Maya was given a month's site fee abatement by the park operator, but told fees would recommence imminently, and if the dwelling could not be fixed then she should relinquish it.

Maya is in a difficult position due to the extensive costs to fix the dwelling, the onerous requirements to build up a level which would restrict access, as well as DA compliance issues. Maya's family is considering placing her into an aged care facility and relinquishing the site.

#### Site becoming uninhabitable: section 62

- Section 62 of the RLLC Act allows for an abatement of the site fees, only when the site is wholly uninhabitable.
- This contrasts with section 43(2) of the RTA, which permits abatement when the site is wholly or partly uninhabitable.
- For example, following a flood, the toilet facilities at a park are damaged and not useable, however a person's residential site remains habitable. In these circumstances, the site has become partly, but not wholly, uninhabitable due to the flood. Under the RTA, a tenant would be entitled to a rent reduction, but under the RLLC, a home owner would not be entitled to an abatement of the site fees.
- **Recommendation 4:** That section 62 of the RLLC Act be amended to mirror section 43(2) of the RTA.

#### Rules of conduct for operators: Schedule 1

- Section 54 of the RLLC Act requires operators to comply with the rules of conduct at Schedule 1. The rules require that an operator must, among other things, act honestly, fairly and professionally, and not engage in high pressure tactics, harassment or harsh or unconscionable conduct.
- We have seen clients subjected to behaviour by operators that is inconsistent with the rules of conduct. There is a significant power imbalance between residents and park operators, even more so than in regular tenancy arrangements. Our clients report a constant fear of the repercussions of speaking up, including retaliatory evictions. Some clients have had their support services refused entry to the site as those services are raising concerns about the park operator.

#### Shane and Olivia's story\*

Shane and Olivia owned a dwelling at a caravan park on the Mid North Coast. They have disabilities and are vulnerable.

Their dwelling was destroyed in the floods and they did not have insurance. The whole park site was not habitable for at least a month.

Shane and Olivia stopped paying site fees, as advised, and resided in emergency accommodation.

The site operators sent them aggressive and abusive messages. The site operators entered the site without their consent to "clean up", disposed of their goods, then issued them with an invoice for clean-up fees.

Shane and Olivia have been referred to a community legal centre, which is making an application on their behalf to NCAT.

- **Recommendation 5:** That the remedies or penalties for breach of the rules of conduct at Schedule 1 be clarified.
- We welcome further information from the Department about what compliance policies are in place to monitor these issues.

### Flood and fire risk management

- In a caravan park on the Hawkesbury, our clients report that they were never advised they were in a flood risk area, did not know what the evacuation plan was, were not warned about the rising flood waters, and were not assisted to evacuate. There was no park staff member on site during the evacuation period. None of the clients we spoke to knew there is a regulator they could complain to about these issues.
- **Recommendation 6:** That the legislation be amended to specify the obligations of operators regarding evacuation and disaster preparedness. These obligations must be resident-specific, taking into account any particular supports and needs (e.g. mobility issues, lack of a vehicle, etc). Operators should be required to display a map of the historical flood levels so residents are aware of where their van sits, as well as an evacuation plan. Information should be made available on how residents can make a complaint or raise concerns about the operator or park conditions to NSW Fair Trading.

### Regulation, oversight and dispute resolution

- There is a need for clarity about the roles of local councils (whose DA approves the existence of the site) and NSW Fair Trading (which regulates operators).
- In our experience, dispute resolution in this area is difficult and not accessible in its current form – for example, going to NCAT and obtaining expert reports is costly for our clients. In many cases, especially following a natural disaster, clients would not be able to afford an expert report without Legal Aid NSW’s funding and assistance. In our experience, the use of expert reports in some matters has been critical to support our clients’ matters.
- We consider that there is scope to make the dispute resolution process more accessible for park residents, for example, by drawing on the low-cost and accessible models available in other jurisdictions, such as consumer law (AFCA). In our experience, the majority of park owners are businesses, as opposed to individual investors that are regulated under the RTA. In these situations, the power imbalance between the landlord and tenant is far greater, and there is a need for more proactive enforcement of tenants’ rights under the RLLC Act, to address the inherent power imbalance in these relationships. Further, more proactive enforcement of matters by NSW Fair Trading will also enable it to have a better understanding of the key compliance issues in this sector, and lead to overall increased compliance.
- We would be happy to meet with the Department, to share the experience of our solicitors, to inform possible options for reform and what can be learnt from other areas of law (e.g. strata and consumer law), and would welcome a discussion with the Department regarding alternative dispute resolution options in this area.

### Inconsistent access to rights and protections under legislation

- We are concerned about the inconsistency across the RLLC Act, RTA and *Holiday Parks (Long-term Casual Occupation) Act 2002* (NSW) with regard to the rights and protections of residents and tenants, and the enforcement of those rights. The experience of our clients living in a caravan park may be the same, but their access to, and ability to enforce, rights and protections differ, depending on which legislation covers their agreement. Likewise, the landlord and operator may be one and the same entity, but their obligations may differ, depending on the legislation.

- For example, home owners may apply to NCAT for determination of a dispute with an operator under the RLLC Act, but tenants do not have standing to do the same. Operators have responsibilities towards home owners with regard to emergency evacuation procedures, but these responsibilities do not extend to tenants under the RLLC Act, even though they would be equally impacted during an emergency. Furthermore, there is no clear recourse for tenants under the RTA if a landlord fails to provide an evacuation plan.
- We consider that, generally, any person who resides in a community or residential community, as defined in section 4 of the RLLC Act, should enjoy equivalent rights and protections, whether their agreement falls under the RLLC Act, the RTA or the *Holiday Parks (Long-term Casual Occupation) Act 2002* (NSW).
- **Recommendation 7:** That any person who resides in a community or residential community, as defined in section 4 of the RLLC Act, be afforded the rights and protections under the RLLC Act, including standing to bring proceedings against an operator under the RLLC Act. Likewise, we recommend that the general obligations of operators (including the responsibilities in section 37 of the RLLC Act) be extended to any person who resides in a community or residential community. This should apply regardless of whether the person is a resident under the RLLC Act, the RTA or the *Holiday Parks (Long-term Casual Occupation) Act 2002* (NSW).
- We would welcome a discussion with the Department about this matter.