

Proposed Residential Tenancies Regulation 2019

Legal Aid NSW submission to
NSW Department of Customer
Service

9 August 2019

323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited, pro bono legal

services and 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services.

Should you require any further information regarding this submission, please contact:

Melanie Bradfield
Solicitor
Civil Law Division

[REDACTED]
[REDACTED]

or

Brianna Terry
Senior Law Reform Officer
Strategic Law Reform Unit

[REDACTED]
[REDACTED]

Introduction

Legal Aid NSW welcomes the opportunity to comment on the proposed *Residential Tenancies Regulation 2019* (NSW) (**Regulation**).

We have not provided a response to all of the consultation questions set out in the discussion paper. Rather, we have focused our response on the issues of most significance to our clients, the majority of whom live in social housing.

Discussion questions

Part 4 Exemptions

Social housing tenancy agreements and separately metered gas (clause 28 – new)

Question 31. Is the new exemption provided by clause 28 appropriate? If not, why not?

The new clause 28 introduces an exemption from the landlord's obligation to pay all gas charges in social housing premises that use a centralised hot water heater system to calculate gas charges for tenants, where the charge payable for the premises is calculated using the individual hot water meter readings. The clause will reassign payment of these charges to the social housing tenant at the residential premises where the exemption applies.

Legal Aid NSW is concerned that this exemption, as currently drafted, may have an unfair impact on social housing tenants in circumstances where:

- There is a high vacancy rate in the building that the centralised hot water system services. The hot water system will still consume gas to maintain the pre-determined temperature of the hot water. If less hot water is used than the system is designed for, more energy is used to heat each litre of water. The tenants in such a block will be charged more than in a block where there are less vacancies, even though their actual water usage may be the same.
- The hot water system is not well maintained and uses a greater amount of gas to heat the water to the pre-determined temperature. Tenants may be charged more as a result of a landlord's failing to repair and maintain the hot water system.¹

These situations may also lead to unpredictable gas charges, making it difficult for social housing tenants to reliably budget.

In order to address these issues, at a minimum, Legal Aid NSW recommends that landlords should be required to ensure that hot water systems meet minimum maintenance standards. Landlords should also be required to put in place mechanisms to

¹ See Energy and Water Ombudsman NSW fact sheet "Common Hot Water Systems": <https://www.ewon.com.au/page/making-a-complaint/what-can-i-complain-about/common-hot-water>

ensure that high vacancy rates in unit blocks do not disadvantage tenants, by resulting in higher than expected gas charges.

Social housing tenancy agreements and rectification orders (clause 31 – new)

Question 34. Is the exemption provided by clause 31 appropriate? If not, why not?

Clause 31 would exempt landlords and tenants of social housing properties from the operation of the new Division 5A of Part 3, *Residential Tenancies Act 2010* (NSW), which deals with rectification orders.² The discussion paper states that social housing providers have existing processes for dealing with disputes about repairs and damage, which are generally handled by the Department of Communities and Justice and the NSW Civil and Administrative Tribunal (**NCAT**).

Legal Aid NSW does not support the exemption in clause 31 of the Regulation. In our view, social housing providers should not be exempt from rectification orders.

Currently, social housing tenants can raise issues regarding repairs and maintenance directly with their landlord, or by applying to the **NCAT**. However, these processes can be ineffective and many social housing tenants encounter significant difficulties obtaining repairs and maintenance, including social housing providers failing to comply with NCAT orders for repairs.

In its report, *Management of NSW Public Housing Maintenance Contracts*, the Public Accounts Committee of the NSW Legislative Assembly commented on the difficulties faced by tenants of the Department of Communities and Justice (**FACS Housing**).³ It stated:

The Committee has received evidence it can take much longer than 20 days, if at all, for tenants to receive responsive repairs on their homes and that planned maintenance programs are inadequate. The Committee has also heard that inadequate maintenance has led to work, health and safety issues for tenants.⁴

...While NCAT orders are legally enforceable, the failure of **LAHC** [Land and Housing Corporation] to comply with the orders was raised in a number of submissions. The Tenants' Union of NSW expressed concern that many tenants reported the necessity to renew NCAT applications and seek further orders because LAHC had not complied with a Tribunal order for repairs.⁵

These issues are ongoing, and Legal Aid NSW continues to assist clients where social housing providers have failed to comply with NCAT orders for repairs.

² *Residential Tenancies Amendment (Review) Act 2018* (NSW) [18].

³ We have used the term 'FACS Housing' in this submission as it is the term most commonly used by our clients and colleagues in the social housing sector, which is managed by different agencies within the Department of Communities and Justice.

⁴ Public Accounts Committee, Legislative Assembly of the NSW Parliament, *Management of NSW Public Housing Maintenance Contracts* (Report 3/56, October 2016) 7.

⁵ *Ibid*, 18

In addition, research by the Law and Justice Foundation demonstrates that social housing tenants encounter barriers in applying to NCAT. In 2015, 95 per cent of matters in the social housing list involved landlords taking action against tenants, while only 5 per cent of applicants were tenants.⁶ Orders for repairs were only sought in only 1.4 per cent of social housing matters, despite problems with repairs and maintenance being widespread.⁷

The new rectification order provisions in Division 5A of Part 3 of the *Residential Tenancies Amendment (Review) Act 2018* (NSW) would provide social housing tenants with an additional and more accessible avenue to seek to address repairs and maintenance issues. In our view, these provisions should apply to social housing landlords.

Alternatively, if this exemption does progress, we submit that it should be limited to FACS Housing, and should not exempt community housing providers (including Aboriginal community housing providers). FACS Housing is continuing to transfer an increasing number of properties to community housing providers. We are concerned by the lack of robust mechanisms in place to effectively regulate tenancy agreements managed by community housing providers, whose decisions are not subject to the additional ministerial scrutiny or judicial review that otherwise applies to decisions made by government agencies.⁸ By ensuring that community housing providers are not exempt from the new rectification order provisions, NSW Fair Trading could play an important role to ensure a high standard of service provision regarding repairs and maintenance for social housing tenants. Rectification orders would provide an additional regulatory avenue in this context.

Concern regarding section 92A Residential Tenancies Act 2010 (NSW)

Legal Aid NSW acknowledges that, if the rectification provisions are applied to social housing landlords, they will also apply to social housing tenants. In this context, we reiterate the concern that we raised in our letter to the then Department of Finance, Services and Innovation dated [REDACTED] (attached), regarding the new section 92A of the *Residential Tenancies Act 2010* (NSW) (RTA).⁹ When this section commences, it will allow a landlord to apply to NCAT to terminate a tenancy agreement where the tenant fails to comply with a rectification order, unless there are *exceptional circumstances*. The term 'exceptional circumstances' is not defined in the RTA, and this provision could result in a significant imbalance of rights between landlords and tenants, and unforeseen consequences for tenants.

Currently under the RTA, damage to property by a tenant may constitute a breach of the residential tenancy agreement. A landlord is required to prove that the damage occurred

⁶ Suzie Forell and Christine Coumarelos, *Data insights in civil justice: NSW Civil and Administrative Tribunal – Consumer and Commercial Division (NCAT Part 2)* (Law and Justice Foundation of New South Wales Report, Sydney 2016), 7 and 24.

⁷ Forell and Coumarelos (n 6) 40.

⁸ For example, Legal Aid NSW can write to the relevant Minister, to raise systemic issues in relation to social housing administered by FACS Housing, and there may also be additional avenues for review of decisions made by FACS Housing, as a government agency.

⁹ *Residential Tenancies Amendment (Review) Act 2018* (NSW) [27].

during the tenancy, and that the tenant intentionally or negligently caused the damage.¹⁰ If the breach is proved, NCAT can make a specific performance order for the tenant to fix the damage, or order that the tenant pay the landlord compensation for the repair of the damage.¹¹ There are also additional matters that are required to be considered by NCAT, if the residential tenancy agreement is a social housing tenancy agreement.¹²

Under the new section 92A, NCAT will be able to terminate the tenancy if the tenant fails to comply with a rectification order, unless there are 'exceptional circumstances'. This imposes a different test compared to the current section 87(4) of the RTA, which directs NCAT to weigh up the seriousness of the breach, and the circumstances of the case, before making an order to terminate the tenancy. The current provisions governing termination notices for breach of a residential tenancy agreement allow for a balanced and fair approach, and offer alternative remedies for the breach to loss of dwelling, that may be more appropriate in the circumstances of the case. There are also other existing mechanisms that landlords can use during, or at the end of, a tenancy, to remedy damage to property. For example, where there is serious damage to the property, a landlord may apply to NCAT to obtain a termination order without giving any termination notice to the tenant.¹³

By comparison, under the new rectification provisions (section 92A), if a landlord fails to comply with a rectification order, NCAT may impose a fine of up to \$2,200.¹⁴ This can only be imposed if NSW Fair Trading prosecutes the landlord for failing to comply with a rectification order. In our experience, these types of prosecution actions are rare. The consequences for a landlord who fails to comply with a rectification are arguably less severe than for a tenant who fails to comply with such an order, who may suffer the loss of their home.

For the above reasons, we believe that the new s 92A is unnecessary and may result in unjust outcomes.

Part 5 Enforcement

Monetary limit of jurisdiction of Tribunal (clause 33)

Question 36. Is the jurisdictional limit set for the rental bond and other matters adequate? If not, why not?

Legal Aid NSW does not support increasing the jurisdictional limit of NCAT in residential tenancy proceedings from \$30,000 to \$40,000 for rental bond matters and from \$15,000 to \$40,000 for other matters.

¹⁰ *Residential Tenancies Act 2010* (NSW) s2 51(1)(d) and 87.

¹¹ *Residential Tenancies Act 2010* (NSW) s 187.

¹² *Residential Tenancies Act 2010* (NSW) s 154E.

¹³ *Residential Tenancies Act 2010* (NSW), s 90.

¹⁴ *Residential Tenancies Act 2010* (NSW) s 65C(8) (yet to commence). See *Residential Tenancies Amendment (Review) Act 2018* (NSW) schedule 1, s 18.

In our view, the jurisdictional limit should reflect the types of matters heard in the division and the contract between the parties. We acknowledge that NCAT's jurisdictional limit for other types of matters is higher than the current limit for residential tenancy proceedings. For example, the jurisdictional limit for consumer claims is currently \$40,000. However, the nature of residential tenancy agreements is fundamentally different to consumer or commercial contracts. Legal Aid NSW considers that the proposed increase to \$40,000 in residential tenancy matters is not appropriate.

We do not agree that this increase will benefit tenants and we are concerned that it may result in unfair outcomes. The vast majority of applicants in both the tenancy and social housing divisions are landlords (76 per cent and 95 per cent, respectively).¹⁵ The proposed increase would allow for potentially significant orders for compensation to be made against tenants, where NCAT is not bound by the rules of evidence.¹⁶ In our experience, there have been instances where NCAT has made orders for compensation against the tenant where the evidence was arguably not sufficient to justify the order, as illustrated by our case study below. We are concerned that raising the jurisdictional limit may increase the potential for unfair outcomes for tenants.

While we acknowledge that NCAT is a lower cost jurisdiction that is familiar with the operation of the RTA, in our experience claims above the current jurisdictional limit are fairly uncommon. When they do arise, we consider that it would be more appropriate for those matters to be heard in the Local Court.¹⁷ The more formal processes and evidentiary rules that apply to proceedings in the Local Court would, in our view, provide for greater scrutiny of claims, which is appropriate where significant monetary amounts are involved.¹⁸ We submit that the existing jurisdictional limits of NCAT in residential tenancy proceedings should remain.

¹⁵ Forell and Coumarelos (n 6) 24.

¹⁶ *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

¹⁷ This is supported by research by the Law and Justice Foundation in Forell and Coumarelos (n 6) 47.

¹⁸ However, we note that the rules of evidence do not apply in the Small Claims Division of the Local Court, which has a jurisdictional limit of \$20,000. See *Local Court Act 2007* (NSW) ss29 and 35.

Case Study 1

Amy is a social housing tenant who has lived in her property for 20 years. During this time her landlord has done very little maintenance on the property. Amy has lived with repair problems, such as a leaking bath, for many years despite reporting these problems to her landlord numerous times.

The landlord applied to NCAT for an order for to terminate Amy's tenancy on the basis that Amy had caused serious damage to the property. The landlord also applied for the jurisdictional limit in compensation and provided an itemised quote outlining work required to be done to the property totally \$60,000.

Amy did not receive notice of the hearing. NCAT terminated her tenancy in her absence and ordered that she pay \$15,000 in compensation to her landlord.

Legal Aid NSW assisted Amy to file an appeal of this decision. There was some damage to the property, but it was caused by Amy's violent ex-partner over a number of years and it mainly consisted of holes in walls and broken doors. Upon close inspection of the quote, there was a large number of items which were not related to this damage. This included replacing the stove which was in good working order, re-water proofing the bathroom, and re-tiling.