

Residential Tenancies Act Review

Legal Aid NSW Submission to
NSW Fair Trading

February 2016

Table of Contents

Introduction

Question 15: Do the existing provisions governing excessive rent increase strike the right balance between the interests of landlords and tenants? If not, how could they be improved?	3
Question 16: Do the Act's provisions governing termination for rental arrears strike the right balance between the interests of landlord and tenant?.....	3
Question 17: Should the introduction of late fees for rent owing be considered?	5
Question 28: Does the Act adequately protect the interests of sub-tenants/co-tenants and landlord in shared tenancy arrangements?	5
Question 32: Are the current termination periods appropriate?	7
Question 33: Should landlords be required to provide a reason for terminating a tenancy? If so, what types of reason should be considered?	7
<i>Retaliatory evictions</i>	9
<i>Social Housing providers using 'no grounds' provisions</i>	10
Question 40: Do you have any suggestions to encourage the early resolution of tenancy disputes and reduce the number of tenancy disputes?.....	10
Further consideration of these discussion questions and options specifically for victims of domestic and family violence (DFV)	12
<i>Termination</i>	13
<i>Liability that arises as a result of DFV</i>	14
<i>Tenancy databases</i>	15

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) to provide legal assistance to people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to respond to the Fair Trading NSW Discussion Paper 'Statutory review of the Residential Tenancies Act 2010'. Legal Aid has significant expertise in relation to Housing Law and the *Residential Tenancies Act* (the Act). We have three specialist housing lawyers and 140 civil solicitors who undertake a variety of work across all civil law areas, including housing. In 2014-2015 Legal Aid provided advice to 2583 people on housing related issues. We also granted aid in 98 cases for housing related issues. Most grants of aid for case work are to conduct litigation or Alternative Dispute Resolution (ADR).

Legal Aid NSW has 22 offices in metropolitan and regional NSW and 210 regular outreach locations.¹ In 2015 the Civil Law Services for Aboriginal Communities Service was permanently established within Legal Aid NSW (CLSAC).

CLSAC visits a number of disadvantaged Aboriginal communities to provide assistance with fines, debt, consumer law, housing and social security problems. In 2014-2015 the service provided 2,262 advice and minor assistance services.

Informed by our casework services Legal Aid NSW submits that access to affordable and secure accommodation is a major issue in NSW. As discussed in Fair Trading's paper, the rental market has changed significantly, with families with children the largest category of households. In addition the NSW Government is increasingly relying upon the private rental market to meet the needs of low income tenants who are on lengthy public housing waiting lists.

Tenants, unlike landlords, generally do not have a choice about participating in the rental market because they simply cannot afford to buy a home in the current property market. Many landlords, by contrast, have opted to invest in property as a way to generate additional wealth. This creates an imbalance in power between the parties that must be acknowledged in reviewing the role of the Act. To this extent we endorse the commentary contained in the submissions by the Tenants Union NSW in relation to this review.

We have not provided a response to all the issues raised by the discussion paper. Instead, these submissions aim to highlight the areas in which tenants feel these inequalities of power most harshly and offers recommendations as to how to ameliorate this.

¹ Legal Aid Annual Report 2015

Question 15: Do the existing provisions governing excessive rent increase strike the right balance between the interests of landlords and tenants? If not, how could they be improved?

Legal Aid NSW has identified rent increases as an important issue in the review of the Act. The law currently does not restrict the amount by which rent can be raised or the frequency of increases. This is out of step with other Australian jurisdictions. Rental unaffordability is a huge issue in NSW and is a constant concern for our clients.

Legal Aid NSW endorses the comments and recommendations made by the Tenants Union NSW on this issue.

Recommendations

- 1) The frequency of rent increases should be limited to once per year, to give tenants certainty.
- 2) Where a proposed rent increase exceeds the consumer prices index, the onus should be on the landlord to show the increase is not excessive.
- 3) NCAT should be able to consider the question of affordability, and other questions relating to the landlord's motives for increasing the rent if warranted, when considering whether a rent increase is excessive.

Question 16: Do the Act's provisions governing termination for rental arrears strike the right balance between the interests of landlord and tenant?

Section 89 of the Act provides tenants with the opportunity to retain their tenancy if they repay the arrears before eviction. The intention of the section is undermined by subsection 89(5) which allows landlords to proceed with eviction where the tenant has 'frequently failed to pay rent owing'. NCAT has interpreted this widely, meaning that any non-payment, including the arrears that is the subject of the notice of termination, or a period of arrears years prior can be a basis to find that the tenant has frequently failed to pay rent. This uncertainty complicates the task of providing tenants in arrears with legal advice. If the tenants repay their arrears they are at risk of being terminated in any event, although this may leave them without money to secure a new tenancy.

Undermining the incentive for tenants to pay the arrears leads to bad outcomes for all.

The discussion paper states that this exception has been included to 'prevent tenants taking advantage of this concession by deliberately and repeatedly paying their rent late.' Based upon experience, Legal Aid NSW does not support the notion that large numbers of tenants would deliberately and repeatedly pay their rent late. Most tenants are aware that they can be given a 'no grounds' notice at the landlords discretion and, as a result, are at pains not to trigger this outcome.

In the 2014 Affordable Housing Survey conducted by the Tenants Union NSW, 77 percent of respondents said they had put up with a problem, or declined to assert their tenancy rights for fear of an adverse consequence.² It seems far more likely that tenants fall into arrears as a result of rental stress, because unexpected expenses have put them into arrears.

In our experience, most tenants are anxious to repay the debt and remain in the property. For many, the expense of being evicted and having to find alternative accommodation can be catastrophic. There is a social benefit in giving people the opportunity to stay in their housing if it is sustainable.

Case study

Rebecca has two kids and had been living in Community Housing for eight years. When her youngest child turned eight her parenting payments ceased and she was placed on Newstart. As a result her automatic Centrepay rental payments ceased without her knowledge. She did not receive notices in relation to the debt or the related tribunal hearing because of problems with theft from and vandalism to the communal mailboxes. On the first listing, NCAT terminated her tenancy in her absence, finding that she had frequently failed to pay rent. This finding was based on the arrears that were the subject of the termination notice, as well as a period of arrears three years prior.

Rebecca became aware of the termination when the sheriff came to her door. She offered to pay the landlord \$1000 upfront (paid by her mother) and installments for the remaining sum. The Community Housing provider refused to agree to this arrangement as they had obtained orders under section 89(5) of the Act at NCAT.

Legal Aid NSW assisted Rebecca to lodge a Set Aside Application. We disputed that she was a frequent non-payer, and outlined her vulnerable circumstances and her offer to repay. NCAT declined to set aside the termination. Legal Aid NSW has now lodged an internal appeal.

Recommendation

- 4) Section 89(5) of the Act should be repealed.
- 5) Section 89 should compel the landlord to accept a reasonable repayment plan made by the tenant. If the parties cannot agree on an amount the Tribunal should be able to determine the repayment amount and frequency.

² Tenants Union NSW Affordable Housing Survey Report 2014

Question 17: Should the introduction of late fees for rent owing be considered?

Late fees are not an appropriate response to rent arrears. Legal Aid NSW submits that late fees only serve to compound the problems of financial hardship and housing stress. As stated above, in our experience tenants do not deliberately go into rent arrears but find themselves in arrears because of rental stress in the Sydney housing market.

Many low income earners living in private tenancies are paying significantly more than 50 percent of their incomes on rent and therefore have to rely on charities for food and vouchers to pay their utility bills.

Case study

Mary is a refugee from Sierra Leone and is a single mother of two children aged 12 and 16. As a result of a workplace injury she was forced onto the Newstart Allowance. The rent was 80 percent of her Centrelink income. She looked around for a more affordable property but was only able to find a slightly cheaper property at 75 percent of her income. She was unable to obtain social housing due to the lengthy wait lists. Legal Aid NSW has referred Mary to charities to assist with food and utilities.

Recommendation

- 6) Late fees for unpaid rent should not be introduced

Question 28: Does the Act adequately protect the interests of sub-tenants/co-tenants and landlord in shared tenancy arrangements?

Legal Aid NSW is of the view that section 10 of the Act produces unfair outcomes for sub-tenants. The Act states that a tenancy agreement may be written, oral, or a combination of both. However in certain shared housing arrangements, the Act requires the agreement to be in writing in order to be legally valid. If there is no written agreement then sub-tenants are not protected by the Act or any other parallel legislation, such as the *Boarding Houses Act*. Remedies are often only available through the Courts, which are uneconomic to pursue.

Legal Aid NSW submits that sub-tenants should not be subject to the requirement that the sub-tenancy agreement be in writing for the following reasons:

- Shared housing is often the only remaining affordable housing for people on low incomes.
- Shared housing arrangements are often informal and less likely to be based upon written agreements.
- There is often an inequality in bargaining power that means sub-tenants cannot insist on their agreement in writing.

Legal Aid NSW is most often approached by sub-tenants for advice in relation to eviction or the refusal to return a bond. Our lawyers find it can be difficult to advise such clients because in many cases they do not know if the head tenant has a written agreement with the landlord, and thus whether section 10 of the Act operates to exclude them. In cases where section 10 does apply, we are forced to advise that there is no minimum period for eviction, no requirement for formal notice and no judicial oversight of the eviction. There is also no requirement for the head tenant to lodge the bond and no cheap and quick forum for dispute resolution.

Legal Aid NSW submits that it should be open to NCAT to determine whether the parties intended to create a tenancy on the facts, in accordance with section 13 of the Act.

Case Study

Kim responded to an ad on a website to rent a room. She met her flatmate, a man who was already living in the house as a tenant. She agreed to pay \$200 a week rent (including utilities) and \$400 bond. She paid this money directly into her flatmate's account at his request. She had her own room with a lockable door. She did not have a written agreement with her flatmate.

It was a tense shared living arrangement, with the flatmate often being rude and abusive towards her. He would come into her locked room with his key, and say he was the landlord and was entitled to do this. Later, the flatmate said that he was going to increase the rent because he did not think she was contributing enough to utilities. Kim refused to pay and the flatmate called the police. She left the property with the police. The flatmate then refused to refund Kim her bond money.

To commence proceedings in the Local Court would have cost Kim a \$95 fee and service costs. This would have been around 50 percent of her claim. If she had already made attempts to recover her bond through NCAT she may have paid up to 70 percent of her claim before other considerations, such as taking time off work to attend the tribunal and/or court.

Kim had only been in Australia for around a year. She was not familiar with Australian tenancy laws and at the beginning of her lease she was unaware of the additional requirements for sub-tenants to have an agreement in writing. She had a period of 'couch surfing' and only had casual work. She found it difficult to find a new rental without her bond.

Recommendation

- 7) Repeal Section 10 of the Act or in the alternative provide that all sub-tenants should be included in the Act, unless they expressly opt out.

Question 32: Are the current termination periods appropriate?

The current termination periods are no longer appropriate due to the changing profile of the rental market. Families need time to relocate. Not only are suitable rental properties hard to find, but considerations of proximity to schools, daycare centres and supports make finding new accommodation more complex. We support the comments and recommendations by the Tenants Union NSW on this issue.

Recommendation

- 8) Sections 84, 85 and 94 of the Act should be amended to ensure residential tenancy agreements may only ever be terminated with grounds.
- 9) The notice period required when ending a tenancy on the grounds of sale should be increased from 30 days to 60 days.

Question 33: Should landlords be required to provide a reason for terminating a tenancy? If so, what types of reason should be considered?

Legal Aid NSW submits that landlords should be required to provide a reason for termination. A prescriptive list of reasons for issuing a notice of termination would ensure that termination of tenancy was for a legitimate purpose.

The Discussion Paper states that the proposal to remove 'no grounds' terminations would need to be balanced against the view that landlords are entitled to deal with their property as they see fit. This fails to consider that the tenant's basic need for shelter should take some small precedence over the landlords' desire to make unencumbered decisions about the disposition of their investment.³ The Act already regulates the ways in which a landlord can deal with property that is subject to a residential tenancy agreement.

We agree that landlords should be able to deal with their property as necessary, but this should be fettered to prevent abuse. The law should work to preserve the residential tenancy agreement whenever possible. If a landlord requires vacant possession of the property for a proper purpose, then provisions currently exist to achieve this. These grounds are broad, and include the sale of the property or to protect against hardship to the landlord if the agreement continues, including both financial and personal hardship.

Other jurisdictions have additional grounds for landlords to issue notices of termination. To strike a balance, we submit that if the Act was amended to remove 'no grounds' notices, the Act could also be amended to expressly broaden the grounds for termination by the landlord.

³ Tenants Union NSW submission page 41

For example, in Victoria additional grounds for a landlord to issue a notice of termination include:

- Renovation
- Demolition
- Sale of the property
- If the landlord needs to inhabit the property, either personally or by an immediate family member.

Case Study

Maryanne had lived in a property for 15 years in the Inner Sydney area. She suffered from a mental illness and was no longer able to work. Her only income was the disability support pension. The location of her rental property was crucial as she was close to the university and could undertake further study, as well as being close to support services including treating doctors. Maryanne considered herself a good tenant, she always paid her rent on time and looked after the property. She had also carried out some renovations to the property, with the landlords consent and at her own expense, including updating parts of the kitchen. The landlord had not increased her rent dramatically over this time, in consideration for the improvements she had made to the property.

Maryanne received a 90 days 'no grounds' notice of termination. She started to look at comparable properties in the area and found they were completely out of her price range. She could not negotiate with the landlord to remain in the property any longer than the 90 days. She was unable to secure public housing due to the length of the waiting list. She had no friends or family to stay with and had no idea where she would go once the tenancy was terminated.

By comparison, in similar international jurisdictions such as France, Germany and Ireland, tenancy laws do not permit landlords to issue 'no grounds' notices. Termination must be justified by a legitimate reason, such as the need to sell, renovate or occupy the property.

These comparisons illustrate that security of tenure operates effectively in other jurisdictions in order to strike a balance in rights and obligations between landlords and tenants. Security of tenure provides a meaningful protection to allow tenants to pursue their rights without the threat of retaliatory termination.

Legal Aid NSW submits that 'no grounds' terminations undermine the right to secure housing, and that such notices are contradictory to human rights principles. Indeed, the UNHCR states, 'forced evictions are often linked to the absence of legally secure tenure, which constitutes an essential element of the right to adequate housing'.⁴

⁴ United Nations Human Rights Office of the High Commissioner at <http://www.ohchr.org/EN/Issues/Housing/Pages/ForcedEvictions.aspx>

Recommendations

- 10) Repeal sections 84 and 85 of the Act
- 11) Amend section 93 of the Act to require expressly stated grounds of hardship, or,
- 12) Amend section 86 of the Act to include other grounds a landlord may give to end either a fixed term or period tenancy agreement.

Retaliatory evictions

In our experience a large proportion of tenants are dissuaded from asserting tenancy rights because of the risk of an adverse response from their landlord. Legal Aid NSW submits that section 115 of the Act is inadequate and should be amended.

Currently, even if NCAT is satisfied the landlord was motivated to issue the notice in response to the tenant asserting their rights, the power to decline to terminate the tenancy is discretionary. In order for tenants to have the confidence to assert their rights, they need to be protected from retaliatory eviction in all circumstances.

It is currently unclear whether section 115 applies to all 'no grounds' notices, including those issued pursuant to section 84 of the Act (end of a fixed term agreement). Legal Aid NSW submits that all retaliatory evictions should be unlawful. We submit that if 'no grounds' terminations are not removed then section 115 should be strengthened to provide adequate protection to tenants.

Case Study

In the case of *Gandangarra Local Aboriginal Land Council v Thatcher (2012)*, the tenant challenged excessive rent increases on a number of occasions. The Tribunal was satisfied that there were some elements of retaliatory conduct by the landlord in response to the tenant pursuing their tenancy rights. However, at the time the 'no grounds' notice of termination was issued there had been no litigation between the parties for 6 months. The Tribunal found that, based on this lapse of time, the history of the retaliatory conduct was too remote to refuse to make a termination order, even though the landlord offered no reason for requiring vacant possession.

Recommendations

- 13) Amend section 115 of the Act so that it expressly applies to section 84 notices of termination.
- 14) Amend section 115 of the Act to provide that if the landlord's actions are found to be retaliatory the Tribunal must not evict.

Social Housing providers using 'no grounds' provisions

The 2010 amendments to the Act removed the Tribunal's discretion as to whether to terminate based on a 'no grounds' notice. Before this, the Tribunal was required to consider the circumstances of the case before ordering termination. In practice, the Tribunal rarely exercised this discretion in the tenant's favour. However, the potential for judicial oversight provided an important safety net to ensure that the most vulnerable tenants were not evicted in unjust circumstances. Under the current legislation, termination based on 'no grounds' notice is mandatory and consequently NCAT has no power of inquiry into the circumstances of the termination.

One unintended consequence of the 2010 amendments is that social housing providers are able to rely on 'no grounds' termination notices to evict vulnerable tenants. Social housing tenants have complex needs which are not usually met in the private rental market. Termination for social housing tenants will often result in homelessness. Legal Aid NSW submits that the law should operate to prevent homelessness and deter evictions from social housing. NCAT should be empowered to make inquiries to ensure that the eviction is justified.

Case Study

In late 2015 Legal Aid NSW was involved in four 'no grounds' terminations in either social or community housing. All four tenants had complex needs and were unlikely to be able to access or sustain a property in the private market. For example, Judy was an Aboriginal woman with two children, one with a significant disability. Ali was living in public housing for 10 years and was blind. Jose was a middle aged man with significant psychological and physical disabilities. Rose was an elderly Aboriginal woman whose family has been living in the same social housing property for over 40 years. Unfortunately Judy moved out of the property as a result of the termination notice so Legal Aid NSW was unable to pursue her matter. In the remaining three cases the landlord declined to pursue the 'no grounds' termination.

Recommendations

- 15) If sections 84 and 85 of the Act are not repealed then section 85(3) should be amended to restore NCAT's discretion to decline to terminate a tenancy for no reason.

Question 40: Do you have any suggestions to encourage the early resolution of tenancy disputes and reduce the number of tenancy disputes?

Tenancy disputes make up the bulk of the work of NCAT, which conducts approximately half of all the civil matters in NSW. In 2014, just over 100,000 civil actions were filed in

the Local Court,⁵ compared to almost 72,000 in NCAT for a similar period.⁶ The consumer and commercial division received over 80 percent of all NCAT applications⁷ and tenancy (private and social housing) accounted for approximately 75 percent of those matters.⁸ In comparison, general consumer matters represented only 10 percent of applications, and the corresponding figure for home building was around 5 percent.

The bulk of tenancy matters issued are for termination for rental arrears. In 2014 this represented 50.59 percent of applications in the private tenancy list and 57.6 percent of applications in the social housing list. Social housing providers are, in fact, disproportionately litigious, accounting for 46 percent of all tenancy applications, even though only 5 percent of NSW households rent in social housing.⁹

In our experience, social housing providers use termination actions in NCAT as an everyday arrears management tool, rather than an avenue of last resort. This creates a huge administrative burden for NCAT as well as unnecessary stress for tenants. The majority of arrears matters are settled with specific performance orders on the day. This observation is supported by NCAT figures that show 80 percent of tenancy matters are settled on the first occasion.

The current process of listing a number of matters in a group list and then referring all parties to mediation is stressful and in our view, tends to lead to poor outcomes for tenants.

In our experience, landlords often do not present the rental ledger to prove the arrears and tenants are signed up to unrealistic rental payment plans when facing the threat of termination.

Case Study

Barry is an Aboriginal man who came to a Legal Aid NSW outreach clinic. He has been a Housing NSW tenant for nine years and is in receipt of a Newstart allowance. At the last routine review, Barry submitted his rent subsidy forms with supporting documents showing that there had been no change to the household income. He continued to pay his normal rent. Barry then received a notice of termination for non-payment of rent stating he was in arrears of around \$1800.

⁵ Local Court of NSW Annual Review 2014

⁶ NCAT Annual Report 2014-2015

⁷ NCAT Annual Report 2014-2015

⁸ NCAT Consumer and Commercial Division Quarterly management report January to March 2015

⁹ Shelter NSW housing factsheet

Barry went into the Housing NSW office and they said that most of the arrears were created when they cancelled his subsidy. The subsidy was cancelled because the subsidy form was not signed in all the correct places.

Barry disputes the amount of the arrears. He went into the local office with all his receipts to try and work it out. Housing NSW have re-credited some of the rental subsidy for this period and say they will make further adjustments. Housing NSW has told Barry not to make any further repayments towards arrears until they work it out. Despite this, they will not withdraw their NCAT application for termination.

Recommendations

- 16) Require the landlord to include with the Notice of Termination a notice stating that if the tenant is experiencing financial hardship they can make a request for a repayment plan and can seek advice from a list of tenant's advice services and financial counsellors. The landlord should also have to include a rental ledger for the relevant period.
- 17) If the tenant submits a request for a repayment plan to NCAT, NCAT can then request a response from the landlord and the issue can be decided on the papers or in person.
- 18) Social housing providers be required to have engaged in formal mediation with the tenant before proceeding with termination for arrears or general breach at NCAT. A discrete IDR service should be established for this purpose.

Further consideration of these discussion questions and options specifically for victims of domestic and family violence (DFV)

Legal Aid NSW funds and administers the Women's Domestic Violence Court Advocacy Program, which last year supported more than 22,500 victims of domestic and family violence at 114 courts. The program plays an integral role in the NSW Government's 'It Stops Here - Safer Pathway' framework for domestic violence reform.¹⁰ The Domestic Violence Unit (DVU) is a specialist unit dedicated to assisting clients who have experienced domestic and family violence with their legal and social needs.¹¹

In addition to assistance with Apprehended Domestic Violence Orders (ADVOs), the DVU also provides some legal services to clients in areas such as tenancy, Centrelink, credit/debt and victims services, as well as in relation to criminal law issues.¹² Legal Aid NSW submits that having access to safe housing is vital for women escaping from domestic violence.

¹⁰ Legal Aid 2014-2015 Annual Report tabled in the NSW Parliament on 11th November 2015.

¹¹ Verbals Issue 76 – December 2015.

¹² Verbals Issue 76 – December 2015.

The DFV provisions introduced into the Act in 2010 are rarely effective and, we submit, do not go far enough to assist DFV survivors. South Australia has led the way in amending existing tenancy laws to remove hurdles to escaping domestic violence and protect victims from unfair punitive action. Legal Aid NSW suggests that the Act be amended to reflect some of the changes made in South Australia.

In this context, Legal Aid NSW supports many of the submissions of Women's Legal Services NSW in response to this review. We would like to highlight and add to the following key areas set out below.

Termination

Section 79 of the Act currently provides that on the granting of a final ADVO excluding the perpetrator from the home, the perpetrator's tenancy is terminated. The perpetrator has no right to re-enter the home, and the victim can remain in the property under the same terms of the lease that was in place at the time. Legal Aid NSW submits that there are a number of practical difficulties which reduce the effectiveness of this provision in providing real protection and options for victims of domestic and family violence.

Firstly, obtaining a final ADVO with exclusion orders can take a long time and consequently the section is unable to provide early relief for the victim. If a perpetrator contests the ADVO it is likely that the final ADVO will not be put in place for a number of weeks. If there are related criminal proceedings or if the perpetrator cannot be served with the ADVO, the process can take over 12 months. In order to be meaningful, solutions to tenancy issues for victims of domestic and family violence need to be much more immediate and responsive.

Secondly, section 79 currently serves to exacerbate the financial hardship of the victim. On the making of a final ADVO, the perpetrator's lease is terminated, thereby releasing the perpetrator from liability for the ongoing rent, and rendering the victim liable under the lease agreement. Often the victim is not able to pay the entire rent and is left exposed to ongoing debt.

Legal Aid NSW recommends the Act should be amended to provide real financial relief to the victim and to allow the victim to terminate their own tenancy immediately where there is evidence of domestic violence. This could be achieved through the amendments suggested in the recommendations below.

Recommendations

19) Amend section 79 of the Act to include the following:

- If the termination of the perpetrator's tenancy occurs before the fixed-term period, that tenant must pay a break fee to the landlord in accordance with section 107(4) of the Act, to be credited to the rental account.
- If the termination is during a periodic agreement the perpetrator must pay 21 days rent to the landlord, to be credited to the rental account.

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- This section does not prevent the protected person from applying for termination of their own tenancy under any other section of this Act.

20) Amend Part 5 Division 3 of the Act, 'Termination by Tenant' to include new section, in the following suggested terms:

Section 105A: Termination based on domestic and family violence

1. *A tenant may give a termination notice for a fixed term agreement or periodic agreement where there is evidence that the tenant is a victim of domestic and family violence by a co-tenant or occupant or former co-tenant or occupant.*
2. *Evidence of the domestic and family violence must be included with the notice. Sufficient evidence includes:*
 - a. *an interim apprehended violence order, where a co-tenant or occupant or former co-tenant or occupant is the subject to the order or,*
 - b. *a letter from NSW police, or*
 - c. *a statutory declaration from a service provider, including but not limited to a WDVCS worker, doctor or social worker*
3. *The termination notice may end the residential tenancy agreement of the tenant giving notice, on the date that the notice is given.*
4. *The termination notice may specify a termination date that is before the end of the fixed term of the residential tenancy agreement.*
5. *The tenant is not liable to pay any compensation or other additional amount for the early termination or immediate termination of the agreement.*
6. *Notices are subject to section 111 to make any determination of the Tribunal (NCAT).*

21) If the above provisions are inserted into the Act, section 100(1)(d) should be repealed.

Liability that arises as a result of DFV

Legal Aid NSW recommends that if there is damage to the property as a result of the domestic and family violence, the victim should not be liable for the repair costs of that damage. Landlords can be indemnified against such damage through the landlord's insurance, or through actions for compensation against the perpetrator.

NCAT should be expressly directed to apportion liability for damage to the perpetrator where it appears that the damage was caused as a result of domestic and family violence. This should apply in both compensation and bond claims.

Recommendation

22) Section 166 of the Act should be amended to provide that a landlord is entitled to claim from the rental bond for the residential tenancy agreement the reasonable cost and repairs to, or restoration of, the residential premises or goods leased with the premises, as a result of damage caused by the tenant, an occupant or invitee of the tenant, other than:

- Fair wear and tear
- Damage arising as a result of domestic and family violence

23) Section 187(4) of the Act should have an additional sub-section, which states that where the Tribunal is satisfied the liability arose as a result of domestic and family violence, the perpetrator is solely liable for payment of any resulting compensation.

Tenancy databases

Section 212 of the Act currently allows tenants to be listed on tenancy databases where the person was a tenant (or co-tenant) under a residential tenancy agreement that has terminated and:

- Due to a breach of the tenancy agreement they owe more money than the bond covers, or
- NCAT has terminated the tenancy due to a breach of the agreement.

The current provisions do not explicitly protect victims of domestic violence if the liability (either rent arrears or damage to property) or termination occurred as a direct result of domestic and family violence. Legal Aid NSW is of the view that the Act could go further to place restrictions on listings where there is evidence that the issue arose as a result of domestic and family violence.

This type of amendment would ensure that victims of domestic and family violence are not excluded from future housing opportunities because of the violence. It would not have an adverse effect on landlords/agents as NCAT currently has the power to ultimately determine the matter under section 217(2) of the Act. We submit that the benefit would outweigh any possible limitations imposed on landlords/agents.

In Sydney, rents are unaffordable for low income households. There are similar issues with rental affordability in regional NSW. This leads to high levels of competition for lower cost housing. In such a competitive market, database listings are being relied on by agents more than ever. That means a listing will adversely affect applications of victims of domestic and family violence by frustrating their ability to leave the violent situation.

Recommendation

- 24) Amend section 213 of the Act to include a new sub-section to prohibit the landlord/agent from listing a person where a response given by a person includes evidence, including but not limited to:
- a. an interim apprehended violence order, where co-tenant or occupant or former co-tenant or occupant is subject to the order, or
 - b. a letter from NSW police, or
 - c. a statutory declaration from a specialist domestic violence service provider, including but not limited to a WDVCAS worker or social worker that demonstrates the person was not in breach of their agreement (for example for property damage) or other breaches, such as rent arrears, where the incident or liability arose as a direct result of domestic and family violence.

Case Study

Debbie moved into a rental property with her partner Matt. The property was close to Matt's workplace in a remote area of NSW, quite some distance from town and Debbie's family and friends. They were co-tenants under the lease for a 6 month fixed-term period. After living in the property for about a month Matt's aggression escalated, and his threats of violence and physical violence intensified. The relationship broke down completely and Matt left the home and stopped paying rent.

Debbie was left in the property, with another 5 months remaining on the lease. She does not have an ADVO but needs to end the tenancy because she needs to move back to Sydney to be close to support networks. She has no employment in the area and can't afford to pay the rent or compensation to the landlord for ending the agreement early. In addition, her ex-partner damaged the property in a number of violent episodes. She is worried she will have a large debt consisting of rent arrears and damage to the property, which exceeds the bond. Also, without her bond, she won't be able to afford to set up a new rental back in Sydney.