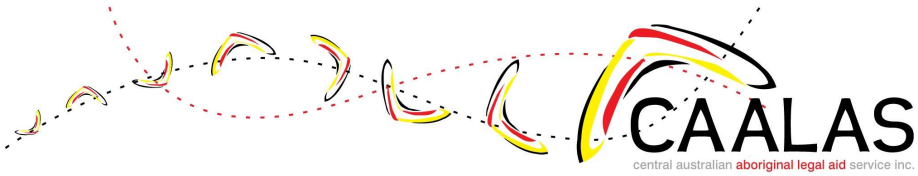

Central Australian Aboriginal Legal Aid Service Inc
and
North Australian Aboriginal Justice Agency Ltd

Response to the *Residential Tenancies Act* Issues Paper of May 2010

July 2010

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INTRODUCTION

Central Australian Aboriginal Legal Aid Service Inc (**CAALAS**) and the North Australian Aboriginal Justice Agency Ltd (**NAAJA**) welcome the opportunity respond to the Northern Territory Department of Justice's *Residential Tenancies Act* – Issues Paper of May 2010 (**Issues Paper**).

Our services

CAALAS is the Aboriginal and Torres Strait Islander Legal Service (**ATSIL**) servicing the urban and remote areas in the Southern Zone of the Northern Territory. The Southern Zone encompasses approximately 90,000 square kilometres from the South Australian border north to Marlinja, stretching from the Western Australian border across to the Queensland border. Over 50 communities and 20 town camps are situated within this area. CAALAS has offices in Alice Springs and Tennant Creek, attends the bush court circuit and conducts outreach visits to remote communities.

NAAJA is the ATSIL chartered to provide high quality and culturally appropriate legal aid services for Aboriginal and Torres Strait Islander people within the Northern Zone of the Northern Territory. NAAJA serves urban and remote areas from north of Elliott right through the Top End, with offices in Katherine, Darwin and Nhulunbuy.

NAAJA and CAALAS work extensively with Aboriginal people living urban and remote communities in Central and Northern Australia providing legal advice, representation and community legal education in the areas of criminal, civil, welfare rights and family law.

CAALAS regularly provides advice and representation to people in relation to tenancy and housing issues, including private tenants, Territory Housing tenants and remote tenancies. NAAJA has had only limited capacity to assist in these areas.

EXECUTIVE SUMMARY

The role of tenancy law in closing the gap in Indigenous housing

In relation to the areas canvassed in the Issues Paper, our submission is confined to those which have the potential to diminish or otherwise affect the tenancy rights of Aboriginal people in the Northern Territory, based on the issues commonly experienced by our clients and in line with our knowledge and expertise as advocates for tenants and tenants' rights.

However, our comments also go beyond the areas identified in the Issues Paper, to highlight those areas where we see the potential for improvements to the current regime.

After years of neglect of Aboriginal housing, thousands of Aboriginal people are living in unsafe, substandard and sometimes even uninhabitable housing. There is now the opportunity for the Commonwealth Government and the NTG to build on their stated commitments to reduce homelessness, address social inclusion and to close the gap in Indigenous housing.

We recognise that closing the gap requires more than additional infrastructure, an increase in housing stock and improvements in the quality of housing. It also requires building on our existing system for the regulation of residential tenancies to transform it into a first-class, progressive legislative regime that will provide a firm foundation for a system of secure and sustainable tenancies into the future; a system that will support and suit the Territory's unique geography and population.

In remote areas this means taking account of the particular issues faced by the thousands of new tenants who will live in remote community homes managed by Territory Housing on behalf of the Commonwealth within the RTA.[1]

In urban areas, the balance between the respective powers and rights of tenants and private landlords remains critical, particularly given the current perilous state of the rental market in the Northern Territory. The lack of rental property stock and skyrocketing rental prices places tenants, and Indigenous tenants in particular, at a distinct disadvantage in the tenant/landlord relationship, particularly as more and more tenants jostle for the limited number of rental properties available. For significant numbers of Aboriginal people, access to the private rental market is limited by high rents and the scarcity of available properties.

It is within this context, which is unlikely to ameliorate, that amendments to the RTA should be considered. It is now more important than ever to ensure that tenants' rights are enshrined and protected in legislation. Tenants need – and deserve – security of tenure, stability of rental rates, the right to live in quiet enjoyment in tenanted property, and the right to be treated by landlords with dignity and respect.

For many Aboriginal tenants, the previous decades have seen thousands of families condemned to live in substandard and often unsafe housing. The current review, the National Partnership Agreement on Remote Indigenous Housing and the investment in remote housing infrastructure provide opportunities to bring the RTA up to best practice to meet the needs of both Indigenous and non-Indigenous tenants.

Issues arising in relation to Indigenous and remote tenancies

The Department of Housing, Local Government and Regional Services (**Department of Housing**) has advised that all tenants living in new or refurbished dwellings in prescribed areas of the Northern Territory will be required to enter into residential tenancy agreements. This will mean that a significant number of Aboriginal people living on remote communities will become subject to the *Residential Tenancies Act* (NT) (**RTA**) for the first time.

The Department of Housing has advised that tenancy agreements have already been entered into with tenants from some Alice Springs Town Camps, Maningrida and the Tiwi Islands.

It is vital that the current review takes into consideration the particular issues that will be faced by remote tenants subject to the RTA. These include:

- difficulties complying with time limits, because of a lack of reliable access to tools of communication in remote communities, such as telephone, internet and facsimile, which will have a negative impact on tenant's pursuing their rights, in particular appeal rights.

- physical remoteness from the offices of the DoJ, the Department of Housing and the Court, which will impact on remote tenants' ability to apply to the Commissioner of Tenancies (**the Commissioner**) for, for example, orders that emergency repairs be undertaken.

- lack of advocacy support: currently, there is no legal advice or advocacy service funded to provide independent, culturally appropriate advice and legal assistance to tenants in remote communities in the Northern Territory at any effective level of service.

[1] Under the National Partnership Agreement on Remote Indigenous Housing there is provision for 10,000 new and refurbished homes across Australia, all of which are to be subject to formal tenancy agreements: http://www.facs.gov.au/sa/indigenous/progserv/housing/Pages/RemoteIndigenousHousing.aspx

- the lack of literacy and numeracy skills experienced by a large proportion of Aboriginal people living in the Northern Territory will adversely impact on their ability to understand the tenancy arrangements they are entering into and to enforce their rights as tenants; and

- social problems, such as mental and physical health issues, substance abuse, overcrowding, and domestic and family violence, which may compromise the ability of some tenants in remote communities to pursue their rights and comply with their obligations under the RTA without assistance.

We consider the above will compromise housing justice for Aboriginal tenants in remote communities.

Key recommendations relating to Indigenous and remote tenancies

To reduce homelessness among both urban and remote Indigenous tenants, to promote stable families and communities, and to ensure strong and sustainable tenancy systems that fairly serve the needs of all tenants, we recommend the RTA be amended to include:

1. Inclusion of a right to legal and other representation at the request of respondent or applicant tenants;

2. Removal of provisions for no-grounds terminations;

3. Inclusion of fair and adequate notice periods in relation to evictions;

4. Limits and clarification on when and in what circumstances tenancies terminate;

5. Amendment of provisions relating to notices of termination in order to strengthen and clarify the rights of parties;

6. General review and improvement of provisions relating to emergency and non-urgent repairs;

7. Provision for public housing tenancies to pass to a close relative on death of the tenant or co-tenant;

8. Limit on rent increases to one increase per 12 months and not within a fixed term tenancy; and

9. A mechanism for determining whether a rent increase is excessive based on housing cost and cost of living percentages.

Why an issues paper?

The Department of Justice (**DoJ**) has acknowledged that 'key stakeholders' such as the Real Estate Institute of the Northern Territory, Territory Housing, and Real Estate Agents have identified areas of concern with the operation of the *Residential Tenancies Act* (**RTA**). These key stakeholders are either landlords or representatives of the interests of landlords, which are a well resourced and historically powerful lobby. To date, only the Darwin Community Legal Service, operating on very small budget and endeavouring to service the needs of tenants across the entire Territory, has been invited to comment on the Issues Paper.

We strongly support and encourage the Northern Territory Government (**NTG**) to seek the views of the wide range of services which represent and advocate on behalf of tenants.

Consultation with other government agencies, non-government organisations which provide support to tenants and community groups whose members comprise high numbers of tenants will ensure that any changes to the RTA conform with community expectations and meet and serve the needs of tenants as much as they do landlords and agents.

We endorse the recommendations presented by the National Association of Tenancy Organisations (**NATO**) in its publication *A Better Lease On Life - Improving Australian Tenancy Law* (April 2010) and commend this report to the DoJ in its review of the RTA.

We ask the DoJ to have regard to the following:

> "The primary purpose of tenancy law should be to counterbalance the structural imbalance in the landlord-tenant relation. This imbalance is in the landlord's favour. Landlords enjoy considerable monopoly power in relation to tenants. Generally speaking, landlords are able to offer rental housing to prospective tenants on a take-it-or-leave-it basis, and once a tenancy is entered a landlord feels little competition from other landlords".[2]

It is also relevant to note that recent research confirms that equity growth or capital gains are the key motivations for investors and that subsequently intentions to invest or disinvest are driven by economic factors and not by tenancy law.[3]

A Better Lease on Life recommends reforms to better protect tenants' rights across Australia with the aim of mitigating homelessness and alleviating major deficiencies in the quality of tenancy protections.

We ask that the DoJ to closely examine the report's contents and recommendations, particularly in light of the fact that the Northern Territory has the highest rate of homelessness in Australia with a rate of 272 per 10,000 people compared to the national rate of 53 per 10,000.

It is incumbent on the NTG improve the protections of the RTA should it wish to adhere to its stated commitment to reduce homelessness. A key way to ensure the RTA meets the needs of those it purports to protect is to properly consult with these groups, their advocates and representatives.

We also ask that the DoJ have regard to the National Indigenous Law and Justice Framework (**NILJF**)[4] in its review of the RTA. The Commonwealth and all State and Territory governments (including the NTG) endorsed the NILJF in November 2009. NILJF is a national approach to addressing issues surrounding the interaction between Aboriginal people and the justice systems in Australia.

The NILJF "articulates a vision that Australian governments, Aboriginal and Torres Strait Islander peoples, service providers and other relevant stakeholders can close the gap in law and justice outcomes experienced by Indigenous people." If it is serious about achieving this vision, it is imperative that the NTG incorporate the goals, strategies and actions identified in the NILJF when contemplating changes to legislation such as the RTA that affect the rights and interests of Indigenous people.

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[2] NATO "A Better Lease on Life – Improving Australian Tenancy Law", April 2010, p 15.

[3] *A Better Lease on Life,* p 16.

[4] See National Indigenous Law and Justice Framework at:
http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~IPS+-+National+Indigenous+Law+and+Justice+Framework+-+NILJF+-+FINAL+-+Word+version.DOC/$file/IPS+-+National+Indigenous+Law+and+Justice+Framework+-+NILJF+-+FINAL+-+Word+version.DOC

RESPONSES TO THE ISSUES PAPER

1. Application of the Act (Part 2 of the RTA)

The charitable purposes exclusion - Response to Question 1

Section 6(f) excludes "premises provided for the use of homeless, unemployed or disadvantaged persons for charitable purposes or for the purposes of providing emergency shelter or accommodation" from the operation of the RTA.

This exclusion is a source of confusion and provides a mechanism by which any organisation that deems itself to be a 'charity' can arguably exclude itself from the operation of the RTA in the provision of housing and housing services. This has potential to deny rights and protections under tenancy law to those most vulnerable to exploitation – the homeless, the unemployed and the disadvantaged.

The main confusion surrounds the definition of a premises provided for "homeless, unemployed or disadvantaged persons for charitable purposes". The RTA provides no guidance as to who, or what, may be considered to be providing premises for charitable purposes.

It remains open to interpretation as to whether the term "charitable purposes" in section 6(f) is intended to refer to the nature of the broader business conducted by the charity (i.e. if it is a Public Benevolent Institution) or if it is intended to refer to the nature of the housing service provided by the charity (i.e. if housing is provided on a free, or heavily subsidised basis).

We are unaware of any matters raising a dispute under section 6(f) being brought before the Commissioner. Accordingly, no further guidance exists as to the interpretation of this section.

Case study: Sammy

Sammy, a 19-year-old Aboriginal woman, was living in accommodation provided by an organisation which provides accommodation and support services to at risk and homeless youth in Alice Springs.

The housing provider had asked Sammy to sign a 'housing agreement' which did not comply with the RTA. Sammy paid rent of $61 per fortnight through Centrepay. After living in the premises for 3 months and abiding by rules stipulated in the housing agreement, Sammy was given a notice of eviction.

The notice was not complaint with the termination provisions in the RTA.

The housing provider maintained that because it was a listed Public Benevolent Institution, it was excluded from the operation of the RTA. It considered that this classified it as providing accommodation 'on a charitable basis'.

The housing provider is funded under the Federal Government's National Affordable Housing Agreement (and was previously funded under the Supported Accommodation Assistance Program), uses housing stock provided by Territory Housing, and was charging Sammy rent at a comparable rate to the Territory Housing subsidised housing rate.

These factors raises questions as to whether it was proper for the housing provider to characterise itself as a provider of housing for "charitable purposes".

As the matter was settled between the parties, the opportunity did not arise to seek a determination of the Commissioner as to whether the housing provider was in fact providing accommodation for charitable purposes.

We are further concerned that housing in remote areas will be characterised as 'housing for charitable purposes', and so the requirement that premises are habitable and maintained in a reasonable state of repair, will be avoided. This is of particular concern considering that "legacy dwellings" and "improvised dwellings" that do not meet Territory Housing's Remote Public Housing Standards will not be governed by the new remote leasing arrangements.

Resolving the uncertainties around this clause is critical to ensuring that residents in Aboriginal communities can enjoy rights and protections as tenants. In keeping with the recognition by the NTG and the Commonwealth Government "that housing standards need to be improved to help close the gap on Indigenous disadvantage in the Northern Territory"[5] bringing all remote Aboriginal housing under the purview of the RTA is a necessary requirement to ensure an improvement in housing standards.

We urge the DoJ to make resolving this uncertainty a priority.

Recommendation: that section 6(f) be amended to remove the reference to "charitable purposes" and instead provide an exemption based only on the provision of emergency shelter or accommodation in the following form:

> *6(f) in respect of premises provided for the purposes of providing emergency shelter and accommodation for under 14 days.*

Boarders and lodgers - Response to Question 2

We are currently not in position to make detailed comment on this question. We would ask, however, that the DoJ take into account the need for boarders and lodgers (as distinct from to sub-tenants) to have clear rights and protections under the RTA.

Those who live in boarding houses, halfway houses or other non-traditional housing situations, should not be subject to arbitrary termination of their tenure nor to be subject harsh, onerous or unfair terms and conditions of occupancy. People facing eviction or removal from such premises should enjoy certainty that the RTA will protect and enforce their right to shelter on fair and just terms.

In relation to this point, we refer you to NATO's recommendation for the provision of "tenancy law protections, relative to the tenure type, to all Australian renters".[6]

2. Tenancy Agreements (Part 4 of the RTA)

Section 22 - Harsh or Unconscionable Terms

We suggest that section 22 be amended to reflect the recent amendment to the *Trade Practices Act 1974* which proscribe unfair contract terms in standard form contracts pursuant to the *Australian Consumer Law*. Unfair contract terms in relation to residential tenancies may include those terms that impose obligations on a tenant that go beyond those imposed by the RTA.

For example, section 51(2) of the RTA states that "It is a term of a tenancy agreement that at the end of the tenancy the tenant must give the premises and ancillary property back to the landlord in a reasonable state of repair and in a reasonably clean condition allowing for reasonable wear and tear".

[5] http://www.facs.gov.au/sa/indigenous/progserv/housing/Pages/newremote_housing_system.aspx

[6] *Better Lease on Life*, pp 4, 5, 21-23.

It is common practice for landlords to insert a term into the tenancy agreement which requires the tenant to steam clean carpets, irrespective of whether carpets are "reasonably clean" at the end of the tenancy. This practice clearly imposes an obligation on the tenant which goes beyond the obligations imposed by the RTA, which we consider to be unfair and contrary to section 20 of the RTA.

Recommendation: that section 22 be amended to reflect the provisions of the *Australian Consumer Law* with respect to unfair contract terms.

Fees and charges - Response to Question 3.

We note that despite the broad intention of section 24, in practice landlords levy charges on tenants other than rent or security deposits.

For example, Territory Housing regularly charges a 'no access fee' of $40 to tenants who are not present at the premises when repairs are scheduled to be completed. This is despite the clear rights of entry for the purpose of repair detailed in sections 71 and 76(2)(c) of the RTA.

Territory Housing's *Common Provisions No. 372011* ostensibly authorise this charge at 20.4:

> *"The Landlord may allow its servants or agents enter the Premises to effect any repairs or maintenance and, if such repairs or maintenance result from the Tenant's failure to maintain the Premises, the Landlord shall be entitled to recover from the Tenant all costs incurred by it to make such repairs or maintenance."*

As Territory Housing manages an estimated 5275 properties Territory wide[7] with this number set to increase with the changes to remote tenancies, this is a widespread practice which should be addressed immediately.

We submit that the RTA be amended to specifically exclude such fees.

Recommendation: that the RTA be amended to reflect section 52 of the *Residential Tenancies Act 1997* (Vic) to prevent a person from demanding or receiving from a tenant a charge or indemnity for a charge that is not rent or bond:

- in relation to the making, continuation or renewal of a tenancy agreement that is a premium, bonus, commission or key money;
- from a tenant under a proposed tenancy agreement a charge in relation to the inspection of the premises by a tenant;
- for the first issue of a rent payment card under a tenancy agreement;
- for the establishment or use of direct debit facilities for payment of rent under a tenancy agreement; or
- for any other purpose.

Payment of rent by legal tender - Response to Question 4

We are concerned about the practice of landlords' refusing to accept legal tender from tenants in payment of rent. CAALAS is aware of a number of real estate agents in Alice Springs who have removed the ability of tenants to pay rent in cash, by cheque or by direct bank deposit, and now require payment by direct debit or BPay transfer only.

[7] 2009-10 estimate of quantity of urban public housing dwellings, NTG Department of Local Government and Housing, *2008/09 Annual Report,* November 2009, pg 65, accessed at http://www.dlgh.nt.gov.au/__data/assets/pdf_file/0005/85145/dlgh_annualreport_09.pdf

We consider that the RTA should be amended to prevent landlords and agents from refusing to accept legal tender in payment of rent. Further, all landlords and agents should be compelled to provide a no-cost option for rent payment.

Under the Queensland *Residential Tenancies and Rooming Accommodation Act 2008*, lessors and property managers requesting tenants to pay rent by an agreed third party payment method, such as rent card or money order, are required by law to provide in writing to the tenant at least two other options that are listed in that Act.

The options provided for in that Act include cash, cheque (including bank cheque), deposit to a financial institution account nominated by the lessor, credit card, an EFTPOS system, deduction from pay, pension or other benefit payable to the tenant or any other method agreed on by the lessor/agent/provider and the tenant/resident.[8]

Recommendation: that section 35 be amended to state that the landlord cannot refuse rent paid with legal tender.

Recommendation: that a provision similar to that of section 84 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) be incorporated into the RTA.

Lease break costs - Response to Question 5

We propose that the terminology of lease break 'fee' be abandoned in favour of the term 'lease break cost', to properly characterise the nature of the charges being levied against the tenant.

We are aware that real estate agents and landlords routinely charge lease break costs which are not substantiated and may not have actually been incurred by the landlord.

If a lease break cost is deemed to be permitted as a legitimate cost to the landlord, the calculation of the amount of lease break cost should be regulated under the RTA.

Specifically, the RTA should set out the types of costs able to be recovered by the landlord as a lease break cost, and provide a cap on the amount able to be charged by the landlord for each "expense". The RTA should also include a positive duty on the landlord to mitigate their loss by actively seeking new tenants, to prevent the breaching tenant from being subjected to ongoing and unreasonable fees. In line with other jurisdictions, for example, the Australian Capital Territory, lease break costs should be capped at a maximum of one week's rent.[9]

The above charges should only be payable by the tenant if they are actually incurred by the landlord. The landlord should be required to substantiate any loss suffered before the tenant accepts liability for the costs.

We submit that the current reliance on the compensation provisions in section 122 of the RTA causes unnecessary confusion as to what amounts to a legitimate lease break cost, and puts tenants at a distinct disadvantage to landlords and agents who may choose to take advantage of the lack of clarity to charge exorbitant or unwarranted lease break costs.

Regulating the application of lease break costs under the RTA would ensure that tenants are protected, and that landlords are only able to claim the legitimate, substantiated costs of readvertising and re-tenanting their property.

[8] *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld), section 83(4).

[9] *Residential Tenancies Act 1997* (ACT), section 84.

Recommendation: that the RTA be amended to include a specific provision addressing lease break costs which strictly limits the costs that can be incurred by a tenant on breaking a lease. Lease break costs should be limited to:

- the reasonable, substantiated, costs involved in reletting the premises (e.g. advertising, reimbursement of legitimate agent's costs) and capped at a maximum of one week's rent; and

- the loss of the rent that the landlord would otherwise have received had the tenancy continued to the end of its fixed term, provided the landlord had exercised its duty to mitigate its losses.

3. Bonds and Condition Reports (Part 5 of the RTA)

Condition reports – manner and form - Response to Question 6

A condition report should not be able to made solely via images. There should be a requirement that a condition report also be in writing.

Problems with images include that a tenant may be presented with a rough or fair copy for sign off or vice-versa and then be held accountable in relation to print outs of a different quality – emphasising or disguising new or pre-existing damage – at the end of tenancy.

For example, a poor quality photograph may be used as evidence to support that walls were unmarked at the start of a tenancy. A good quality photograph at the end of the tenancy may show marks, but reference to the earlier photographs would not show whether those marks were present at the start of the tenancy.

Videos may give a more accurate representation of the state of premises, but, equally, differences in lighting, quality of equipment, etc, can give a different impression of the state of premises at a given time. Further, neither still nor moving images alone can be relied upon to show whether such things as fixtures or fittings are in proper working order.

The advantage of images is that they can provide a more comprehensive basis on which to assess the condition of a property at a point in time. They can also provide a helpful basis for those who do not have good literacy to agree on the condition of the property.

To counteract the problems many tenants encounter in grappling with overlong and detailed written reports, we recommend the DoJ consider a standard form of condition report, the use of which should be required in the RTA, and the form itself to be included in the regulations to the RTA. We recommend that the DoJ review the condition report used in the ACT.[10]

Recommendation:

- that images alone cannot form the condition report.

- that images used for the purpose of evidencing a condition report should be kept for the duration of the tenancy and be properly identified by date, address of property, photographer, room and item.

- that the landlord be required to provide good quality copies of images at the beginning of a tenancy to all parties for sign off, and at the end of the tenancy to all parties for sign off.

[10] The condition report used in the ACT can be viewed at: http://www.courts.act.gov.au/magistrates/tribunals/rtt/Condition%20Report.doc

- that the RTA and regulations provide for a form of condition report modelled on the condition report used in the ACT.

Establishment of a Residential Tenancies Bond Authority - Response to Questions 7, 8, 9

Currently, section 29(3) of the RTA provides that the landlord must hold the security deposit in trust for the tenant.

Tenants regularly experience difficulties in obtaining their bond back from their landlord.

We consider that a Residential Tenancies Bond Authority (**RTBA**) be established in the Northern Territory, modelled on the Victorian RTBA. This would ensure that an independent body had control over the administration, control and return of bonds.

Recommendation: that a Residential Tenancies Bond Authority be established in the Northern Territory.

Consistency of terminology

Recommendation: that the term 'security deposit' be abandoned in favour of the term 'bond'.

Statement of security deposit to be given to tenant

A tenant will often not be aware of the location of their security deposit. This may become problematic when a landlord leaves the jurisdiction for any period of time. In the absence of a RTBA and in order to provide tenants with security as to the location of their security deposit, the landlord should be required to provide the information detailed in section 32 of the RTA as a matter of course.

Recommendation: if an RTBA is not established, that section 32 be amended to require the landlord to provide the statement of security deposit within 2 business days of receiving the security deposit.

4. Rent (Part 6 of the RTA)

Rent increases during fixed term tenancies - Response to Question 10

Section 41 of the RTA should not be amended to include a provision which allows the parties to agree in writing to an increase in rent.

Allowing for an agreement to be made regarding rental increases outside of the terms of the tenancy agreement may have the effect of placing vulnerable tenants in a position where they feel they must comply with a request from the landlord to sign such an agreement, or risk being refused a tenancy or losing their rented property.

If it is deemed reasonable to include such a provision, then it must specifically exclude the ability for parties to agree to increases that do not comply with the notice periods set out in the RTA. The ability to "contract out" of the RTA must be prohibited in all circumstances.

To enable tenants at the end of a fixed term agreement adequate time to adjust their budget or find alternative accommodation, the landlord should be required to provide notice of its intention to increase the rent prior to the end of the fixed term.

This should not pose any difficulty or additional cost on the organised landlord.

Recommendation: that the RTA be amended to prevent the inclusion in a tenancy agreement of any term which provides for a rent increase during a fixed term lease.

Recommendation: that a notice of rent increase is to be provided 60 days prior to the end of a fixed term lease if a new fixed term agreement is to be entered into which includes a rent increase.

Limits and notices for rent increases - Response to Questions 11 and 12

It is our view that 60 days' notice of a rent increase should be required, and that rent increases should be limited to every once every 12 months.

Currently the notice period in the Northern Territory for the increase of rent is 30 days. This is the shortest notice period in Australia. Providing a 60 day notice period would bring the Northern Territory into line with the requirements of the residential tenancies legislation in all other Australian jurisdictions.[11]

It is reasonable to allow a tenant to know and rely upon the rent payable for the duration of the fixed term or in a 12 month period, particularly given the vulnerability of many tenants in the Northern Territory. Providing a 60 day notice period, and limiting rent increases to every 12 months, will provide tenants with certainty and allow them to budget accordingly to meet their rental obligations.[12]

In addition it is unclear at present whether the notice provisions apply to both fixed term and periodic tenancies. Clarification in the legislation is required.

Recommendation: that the notice period for rent increases be increased to 60 days.

Recommendation: that the RTA be amended to state that 60 days notice of rent increases must be provided to tenants in both fixed term and periodic tenancies.

Excessive rent increases - Response to Question 13

CAALAS and NAAJA submit that the amount of rent increases should be regulated.

In the ACT, the Housing Consumer Price Index (**HCPI**) is used as a basic benchmark of an acceptable rent increase. A rent increase is considered to be not excessive if it is less than 20% greater than any increase in the HCPI since the previous rent increase or the start of the lease (whichever is later). Likewise, a rent increase is considered to be excessive if it is more than 20% greater than any increase in the HCPI since the previous rent increase or the start of the lease (whichever is later).

The onus is on the tenant to prove a rent increase of less than 20% greater than the HCPI increase is excessive. Conversely, the onus is on the landlord to prove that a rent increase of more than 20% greater than the HCPI is not excessive.[13]

The RTA currently requires the tenant to challenge and prove a rent increase is excessive. As landlords gain the benefit of an 'excessive' rental increase, it is fair to place the onus of justifying an increase on the landlord.

[11] Queensland (2 months), Victoria (60 days), NSW (60 days), SA (60 days), WA (60 days), Tas (60 days) and ACT (8 weeks)

[12] *Better Lease on Life*, p 36

[13] *Residential Tenancies Act 1997* (ACT), section 68.

Providing a maximum rental increase based on the HCPI is fair for both the tenant and landlord, and provides much needed certainty as to what can be considered to be a 'reasonable' rent increase.

Implementing a HCPI-based rental increase regime will have the positive effect of moderating the constant, and often large, increases in rent seen across the Northern Territory, which can currently be justified through an assessment of market rent at comparable premises in a given locality – a self-fulfilling prophecy.

5. Repairs and maintenance (Part 7 of the RTA)

CAALAS and NAAJA are strongly of the view that this is an area of the RTA which requires extensive review and reform. The current provisions requiring the landlord to carry out repairs should be strengthened and clarified for the benefit of all parties.

The current scheme does not provide a clear path of action with finite timeframes for the repair of tenanted properties. Critically, these deficiencies attach even to the remedy of emergency repairs.

The RTA is silent on whether the breakdown of hot water is an emergency repair.[14] Hot water is an essential service and is defined as an emergency repair in the residential tenancy legislation of NSW, Victoria and Tasmania. It should be explicitly provided for in the RTA.

We also note that breakdown of essential services for heating or cooling are not incorporated in the definition of emergency repairs. Given the Northern Territory is subject to extreme weather and temperatures, we consider the breakdown of heating and cooling services to constitute an emergency repair. In Alice Springs, the temperature drops below zero degrees in winter and reaches 45 degrees in summer. These temperatures make services for heating and cooling essential to the health and safety of the tenant.

Procedures for emergency repairs

Section 58(3) provides that if a landlord requests that a tenant provide a notice of need for repairs in writing, the tenant is not taken to have given notice until it is given in writing.

For many remote tenants or tenants with literacy problems, such a requirement may delay or deny the tenant the ability to give notice and achieve remedy within a suitable timeframe.

Scenario: Bernard

Bernard pays $200 per week in rent for a bed-sit in Alice Springs.

Bernard is new to Alice Springs and does not have family or friends that he can stay with. Bernard's toilet has blocked and overflows. He cleans up as much as possible and calls his landlord to let him know.

Bernard's landlord does not come to fix the problem that day or the day after. Bernard calls his landlord again and his landlord says that he wants Bernard to notify him in writing of the need for the repair.

[14] Section 63 defines emergency repairs as: a water service that provides water to the premises has burst; a blocked or broken lavatory system; a serious roof leak; a gas leak; a dangerous electrical fault; flooding or serious flood damages; serious storm, fire or impact damage; a failure or breakdown of the gas, electricity or water supply to the premises; a failure or breakdown of an essential service for appliances on the premises for water or cooking; a fault or damages that makes the premises unsafe or insecure; a fault or damage likely to injure a person, damage property or unduly inconvenience a resident of the premises; a serious fault in a staircase or lift or other area of premises that unduly inconvenience a resident in gaining access to or using the premises.

Bernard is confused, but is desperate to have the toilet fixed. He makes an application to the Commissioner of Tenancies for an order that the repairs be completed.

The matter is heard several weeks later. The Commissioner refuses to make the order for urgent repairs because the landlord has asked the tenant to put the need for repairs in writing and Bernard did not do so. The Commissioner also says that although the RTA says that you can notify the landlord orally or in writing, to get an order from the Commissioner, you need to do it in writing.

Bernard has to start all over again.

This provision does not provide any clarity as to when a request by a landlord for notice in writing can be made, leaving open the question of at what point or up until what point can a tenant's oral notice be cancelled out by a landlord's request for a written notice. A landlord's delayed request for notice in writing real potential to cause hardship for the tenant, by slowing down the process for a tenant seeking to have emergency repairs carried out.

We consider that the legislation should be clarified and simplified so as to provide transparency to both landlords and tenants as to the timeliness of emergency repairs and standing to obtain orders from the Commissioner.

Section 63(1)(c) prevents the Commissioner from hearing a tenant's application for emergency repairs where that request has not been made in writing or if the notice is not issued in accordance with section 58 generally.

Currently, a tenant in Victoria is able to apply to the Commissioner for urgent repairs if the landlord does not immediately attend to the repairs; the tenant cannot meet the cost of the repairs; the repairs cost more than $1000; or the landlord refuses to pay the cost of the urgent repairs if carried out by the tenant.[15] The Tribunal must hear an application under section 73 of the RTA (Vic) within 2 business days after the application is made.

It is an important safeguard for tenants that a similar amendment is made to section 63 to ensure that tenants are able to insist on their right to have emergency repairs promptly resolved on the basis of written or oral notification. By their nature, emergency repairs fundamental to the health and safety of the tenant and the utility of the premises.

The time frames provided for in section 63 in relation to emergency repairs are unnecessarily complicated. Currently the Commissioner can only make an order that emergency repairs be made if:

- the landlord has received the notice and the landlord has not completed the repairs within 5 business days; or

- the landlord has received the notice, contacted the tenant within 5 business days and arranged for the repairs to be made, and those repairs remain unmade 14 days after the date of the notice.

We consider that the time period for applying to the Commissioner for emergency repairs should be reduced from 14 days to 3 days. It is entirely unacceptable that a tenant should be without an essential service or live with a dangerous fault for at least 5 business days after the notice is received or at most 14 days after the date of the notice.

Further the current drafting of the legislation requires that the date go from "after receipt of the notice". The legislation should be amended to reflect when notice is given in fact or deemed to be given.

[15] Section 73 *Residential Tenancies Act 1997* (Vic)

Recommendation:

- Section 58(3) is highly problematic, especially when read in conjunction with s 63(1)(c) and we say should be dispensed with, at least in relation to emergency repairs.

- That the time period for applying to the Commissioner for an order for emergency repairs be reduced to 3 days notice to the landlord which may be oral or in writing or both; and

- That the Commissioner be required to hear applications made under section 63 within 2 business days after the application is made.

Procedures for non-urgent repairs

The RTA does not provide an effective mechanism by which a tenant can compel a landlord to complete non-urgent repairs to a tenanted property within a specified time period.

Section 57(2) effectively provides that a tenant can only apply to the Commissioner if the landlord "fails to act with reasonable diligence to have the defect repaired".

This does not provide adequate certainty for tenants. A definite time period should be inserted in the legislation to ensure the prompt repair of non-urgent repairs and provide certainty to the tenant as to when they will be at liberty to seek orders from the Commissioner.

Further, the process to address non-urgent repairs that have not been remedied by the landlord should be clarified in the legislation. Although there is provision in the RTA for a tenant to make an application to the Commissioner to order a landlord to remedy breach of the legislation, the process is not clearly set out.

We consider that this results in tenants not pursuing their rights to have repairs affected. This is reflected in the make up of applications to the Commissioner in 2008-09, of which a total of 762 inquiries were held, the majority of these resulting in orders for termination of the tenancy, possession of the property and compensation for unpaid rent.[16]

Recommendation: Specific provision needs to be made to empower tenants to issue a notice to remedy, which if not complied with within 14 days, will give rise to a right to either seek an order for repair from the Commissioner, compensation for breach and/or a reduction in the utility of the dwelling, and/or termination for breach.

Tenant-responsible maintenance - Response to Question 14

The suggestion that tenants be required to repair damage they have caused requires clarification, while the basic premise needs to be approached with a great deal of caution. In our view, it is hard to see any justification for such a clause and there is much to suggest it is entirely unnecessary.

Firstly, we submit that only damage caused by a negligent or intentional act of the tenant should be at issue. Any damage that is not negligent or intentional must remain the landlord's responsibility and in keeping with the landlord's responsibilities under the RTA, be rectified in order to ensure the property is maintained in a reasonable state of repair.

The RTA contains ample provisions to secure the adequate maintenance of the property, as follows:

[16]Annual Report of the Commissioner for Consumer Affairs 2008-09, p 13.

- Section 51(1) and 58 (1) require the tenant to notify landlord of the need for repairs;

- Section 51 (1) requires that the tenant not negligently or intentionally cause or permit damage to property;

- Section 57 requires the landlord to maintain the premises in a reasonable state of repair;

- Section 71 provides a power to the landlord to enter the premises for the purpose of carrying out repairs or checking that they have been satisfactorily completed;

- Section 96B provides a power to the landlord to terminate a tenancy in relation to breach; and

- Section 122 provides the Commissioner with the power to order compensation for loss or damage suffered by the applicant due to the failure of a respondent to comply with the agreement or an obligation under the RTA relating to the tenancy agreement.

Given the plethora of powers and options available to the landlord, we are strongly of the view that there is no need for any amendment to the RTA which would allow the landlord to compel the tenant to carry out repairs during the tenancy.

If the landlord is seeking compensation for loss arising from a tenant's failure to repair negligent or intentional damage, there is a duty on the landlord to invite the tenant to carry out or organise the repairs at their own expense in the first instance, so as to comply with the duty to mitigate under s 120. This of itself is sufficient.

Ultimately, the onus is on the landlord, as set out in section 57, to maintain the premises in reasonable state of repair throughout the tenancy. A term that gives a landlord the power to compel tenants to carry out repairs is open to abuse. There is a further risk that some landlords will endeavour to pass off to the tenant the responsibility for repair which is more rightly the landlord's.

Recommendation: That a term requiring tenants to be compelled to carry out repairs is unnecessary and should not be included in the RTA.

Lock changes and domestic violence: Response to Question 15

Sections 52 and 53 of the RTA should be amended to make clear that circumstances surrounding domestic and family violence constitute a "reasonable excuse" for the tenant to alter locks or security devices at the premises.

This should be expressed as "reasonable excuse" including, but not limited to, domestic and family violence to ensure that the term "reasonable excuse" can readily encompass other scenarios.

Recommendation: that domestic violence be included in a non-exclusive list of factors which comprise a reasonable excuse to alter locks or security devices at the premises.

6. Landlord's right to enter premises (Part 9 of the RTA)

Response to Question 17

We do not consider that the Commissioner needs the explicit power to authorise the breaking of locks, since we do not consider its occurrence to be common enough to warrant such a power.

Before such a measure is considered or deemed necessary, further detail needs to be supplied by the DoJ setting out the kinds of circumstances in which a landlord who has been granted an order to enter or take possession of premises would be liable for civil or criminal penalties.

7. Change of Landlord or Tenant (Part 10 of the RTA)

Termination of interest of a co-tenant who abandons a joint tenancy - Response to Question 18

CAALAS and NAAJA are not in a position to provide detailed comment on this question at this stage. In principle, we are supportive of any amendments which enable a tenancy to remain on foot if the remaining tenant/s so wish.

In making such amendments, we note, however, that these may need to account for whether the tenancy is fixed term or periodic, and in terms of the alleged abandoning tenant, questions of evidence and fairness arise.

Clarity on the formal ending of a joint tenancy would be welcome in terms of limiting the liability of the departing tenant for loss or damage caused by the remaining tenant. A clear process for a departing tenant to terminate their interest in the tenancy by way of a notice and vacation in compliance with that notice could be helpful in relation to periodic tenancies.

8. Termination (Part 11 of the RTA)

CAALAS and NAAJA believe there are fundamental and structural problems with RTA's scheme for termination of tenancies which require significant review and reform.

For Indigenous tenants, terminations and, in particular, without grounds terminations, can result in particularly harsh outcomes.

For many Indigenous residents of remote communities and outstations, the land upon which their community is established is the traditional country of their people. Most current residents are the recognised traditional owners (**TOs**) and custodians of that land.

The right to be recognised as TOs of land and to be granted inalienable freehold rights to that land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (**ALRA**) was the result of a very long and hard won legal battle. It therefore seems particularly harsh and unconscionable to enshrine in Northern Territory legislation the ability to force the eviction of tenants under an introduced residential tenancies regime, when those tenants are otherwise considered to own freehold interest in that land in accordance with the rights granted under the ALRA.

All community areas where such tenancies are to be imposed are areas which have been leased to the Commonwealth Government as a result of the Northern Territory Emergency Response Act (NTER), or "The Intervention". Concerns have been raised as to the legitimacy of the leasing arrangements and whether TOs had any real choice in accepting the Commonweath Government's demand for leasing arrangements to be entered into in order to secure housing and infrastructure development on communities. The proposed remote tenancy arrangements will see TOs being required to sign tenancy agreements which may result in them being evicted from houses built upon land they own and that has been occupied by their ancestors since time immemorial.

Connection to country and place are of particular importance to some Indigenous people. Cultural practices, such as burial customs, which mean important remains, sacred object and ceremonial items are kept on, in or near the premises, increase the harsh impacts of eviction. Family connections are also often very strong for Indigenous families and eviction from a particular place may see either the break up of a larger family grouping or the accommodation of the evicted family with nearby relatives, with overcrowding the result.

The Department of Housing's *Remote Public Housing Operational Policy Manual* states that "termination by the Department will only occur if the tenant has seriously breached a condition of the tenancy agreement in place with it".[17] This indicates that the Department of Housing will not proceed with without grounds terminations, although there is no guarantee of this.

Change of terminology

"Notice of termination" is the phrase currently used to describe notices which are used by the landlord or tenant to ostensibly end the tenancy.

We do not consider the phrase "notice of termination" accurately reflects the legal effect of the issue of such a notice; that is a tenancy is not terminated at the expiration of the time period provided in the notice in all cases.

For example, sections 96A and 96B require the landlord and section 96C requires the tenant to make an application to the Court or Commissioner to terminate the tenancy. That is, the tenancy does not automatically terminate pursuant to section 103 of the RTA.

In contrast, termination of a tenancy can occur at the expiration of the notice period pursuant to section 103, in respect of, for example, notices issued under section 86, 88a, 89, 90, 91 providing the notice conforms with section 101.

The use of this terminology (eg "Notice to Terminate Tenancy") leaves the reader of the RTA, and a recipient tenant, with no real idea as to when and in what circumstances their tenancy actually terminates.

We consider the terminology "notice to vacate" for the use of landlords and "notice of intention to vacate" for the use of tenants to be more appropriate and accurate descriptors of the legal effect of the issuing of notices of this kind.

Section 103

Section 103 states "if a notice of termination is given to a tenant in accordance with this Act and is not withdrawn or declared to be of no effect under section 84, the tenant ceases to be entitled to possession of the premises on the date specified in the notice as the date on which the tenancy terminates."

In effect, if a tenant does not vacate the premises in accordance with the notice of termination, the tenancy is terminated.

Fundamentally, in cases where termination is sought by the landlord, we do not consider that a tenancy should be terminated at the expiration of a notice of termination, which is currently provided for pursuant to section 103. We consider that the tenancy should remain on foot until the tenancy is terminated by the Commissioner or the Court upon the application of the landlord.

[17] The Department of Housing, Local Government and Regional Services *Remote Public Housing Operational Policy Manual,* policy objective 27.

This would provide more certainty to tenants as to when their tenancy is terminated.

When termination occurs – need for clarity

The various provisions which provide for termination by the landlord are confusing, such that it is difficult to readily understand when either:

- a tenancy may terminate following the service of and failure to comply with a termination notice; or

- when the Commissioner or Court is required to order the termination of the tenancy.

When the context is the purported ending a tenancy, that is, of a family's right to reside in their home, the utmost clarity and complete procedural fairness are essential.

Case study: Jacinta and Brian

Jacinta and Brian were living in a Territory Housing flat. They fell into rent arrears and Territory Housing gave them a notice of termination for rent arrears.

The day after the notice expired Jacinta paid half of the arrears and arranged to repay the rest of the arrears by instalments.

Despite the fact that their tenancy had terminated according to the RTA, Jacinta and Brian remained in their property. Territory Housing did not arrange for Jacinta and Brian to sign a new fixed term agreement. As a result, Jacinta and Brian's tenancy rolled into a periodic tenancy, which has less protection for the tenant, unbeknownst to them.

In the cases of termination for rent arrears, we endorse the recommendation of NATO that legislation be structured so as to "maximis[e] the chances for tenants to rectify rent arrears prior to eviction and restore the income stream of their landlord".[18] We further address the issue of eviction for rent arrears below.

Recommendation:

- That the RTA and Regulations are amended to adopt the terminology 'notices to vacate', and 'notice of intention to vacate' as more appropriate and accurate descriptors;

- That section 82(1)(f) be amended so as to provide for mutual termination (whereby a tenancy terminates where both parties agree in writing to the termination). This section does not currently contemplate the situation where a landlord may approach a tenant to seek a consensual end to the tenancy;

- That section 103 be repealed allowing a tenancy to remain on foot until such time as the tenant vacates in accordance with the notice, or the tenancy is terminated by the Commissioner or the Court upon the application of the landlord;

- That section 82 be amended so that a tenancy is terminated if a tenant vacates the premises in accordance with a notice to vacate.

Termination by tenant

[18] *Better Lease on Life*, p 4, and see 44-45.

The RTA does not provide for a notice when the tenant seeks to end at tenancy before the end of the fixed term. We ask the DoJ to consider adopting clause 84 of the ACT's Standard Terms pursuant to its RTA which allows a tenant to serve a notice on a landlord before the end of the fixed term.

In the ACT, the tenancy terminates on the date that the notice expires, provided the tenant vacates in accordance with the notice.

Where a tenant wishes to terminate a tenancy, there should be clear provision that if tenant provides notice to vacate and vacates in accordance with the notice, that the tenancy terminates on the day stated in the notice. The landlord is then at liberty to apply to the Commissioner in respect of any loss or damage suffered.

Recommendation:

- that the DoJ adopt clause 84 of the ACT's Standard Terms pursuant to its RTA which allows a tenant to serve a notice on a landlord before the end of the fixed term; and
- that the RTA be amended to clarify that a tenancy terminates when a tenant vacates in accordance with a notice of intention to vacate.

Limits on grounds for eviction

1. Terminations and Antisocial Behaviour Agreements

In line with the notion that security of tenure and procedural fairness for tenants is paramount, the preferable position is that section 99A (which provides for termination on grounds of refusal to enter or breach of an Acceptable Behaviour Agreement (**ABA**) should be removed from the RTA. Section 100 provides ample grounds for termination by a social housing provider.

More generally, we are strongly of the view that the highest degree of procedural fairness is required in relation to the termination of a tenancy. Any relaxation of process or procedure in relation to serious breach is entirely inappropriate, where so important and fundamental a right is at stake.

The *Antisocial Behaviour (Miscellaneous Amendments) Act 2006* introduced ABAs into the RTA.

Under these amendments, Territory Housing is able to compel a tenant living in social housing to enter into an ABA. If the tenant fails to sign an agreement, or the tenant seriously or repeatedly breaches the agreement, Territory Housing may seek an order from the court terminating the tenancy under section 99A of the RTA. Evictions from social housing providers in such circumstances can create profound hardship, including homelessness.[19] Social housing tenants are already at particular risk of homelessness, in large part because of the various forms of disadvantage they often face.

Serious repeated breaches of ABAs, which are often in practice unsubstantiated and accepted without due process, may lead to eviction. As reported by NATO, social housing providers sometimes use termination proceedings to deal with disputes about behaviour including "behaviour arising from mental illness, disability and social exclusion as well as rent arrears."[20] Further, urban Indigenous tenants are particularly vulnerable to receiving ABAs.

[19] *Better Lease on Life*, p 30.

[20] *Better Lease on Life*, p 45.

The RTA should not be used to enforce behaviour-management policies or to impose unfair burdens on social housing tenants. The restrictions on who is eligible for social housing has resulted in social housing now being allocated only to the most disadvantaged members of the community. The use of tenancy agreements to affect the behaviour of social housing tenants is not considered to be an effective housing management practice, given the risk of homelessness created.[21]

A person whose tenancy is terminated by Territory Housing due to a breach of an ABA must wait two years before being able to reapply for public housing in the Northern Territory. During the period of disqualification, the person is required to participate in the private rental market. Public housing rents are heavily subsidised by Housing Services rebates which are not available to tenants in the private rental market. Given the dearth of private rental properties available in the Northern Territory, particularly affordable private rentals, such tenants are unlikely to have capacity to fulfill this harsh criteria for making application for public housing after the disqualifying period.

This consequence of an ABA breach exacerbates disadvantage and contributes to the common problems of homelessness, severe hardship, and overcrowding.

The onus should be on Territory Housing to support and sustain the tenancies of this most vulnerable group. Alternative housing management practices to support social housing managers to address anti-social behaviour successfully should be implemented and encouraged at every opportunity.

More generally in relation to termination related to behaviour issues, it is recommended that Territory Housing always provide the tenant with the grounds for termination, the particulars of the case against them and give the tenant an opportunity to respond to the allegations. Territory Housing should not give without grounds notice at all, but in particular, to deal with allegations of breach of tenancy agreement or disputes about behaviour.

2. Termination for breach

The landlord may give the tenant a notice of intention to terminate a tenancy where a tenant breaches a term of a tenancy agreement by failing to pay rent and the rent has been in arrears for not less than 14 days.[22]

The landlord may also give a notice pursuant to section 96B requiring the tenant to remedy a breach of the tenancy agreement within 7 days. If the tenant does not remedy the breach the landlord is able to apply to the Commissioner or a Court for an order of termination.

Currently, the legislation provides that a landlord can seek an order of termination despite their being no breach at the time of application to the Commissioner or the Court.

It is likely that tenants being evicted for rent arrears are in a precarious position and at significant risk of homelessness. Thus, it is important that there are measures in place to maximize the chances for tenants to rectify rent arrears prior to eviction.

Case study: Tannia

CAALAS recently obtained instructions from Tannia who had been given a notice of intention to terminate for failure to remedy breach – rent arrears. Tannia is an Aboriginal woman. She lives in the house with her husband and her 16 year old child. Tannia is

[21] *Better Lease on Life*, p 31

[22] Section 96A

attempting to have her three younger children returned to her care having been removed by Northern Territory Families and Children.

Tannia did not receive the notice in time for her to remedy the breach. After the expiration of the notice, Tannia borrowed money from relatives to pay the arrears and remedied the breach.

Territory Housing initially indicated that it would persist with its application to seek an order of possession, despite there being no breach at the time of application to the Commissioner of Tenancies.

Territory Housing recently agreed to withdraw the application to the Commissioner.

The tenants and their child faced homelessness and the mother's attempts to have her three children returned to her care would have been devastated if the application for termination had proceeded.

We consider that the RTA should be amended to introducing provisions protecting tenants from eviction if they rectify a rent breach or enter a repayment plan or otherwise remedy a breach before a warrant for possession is enforced.

Recommendation: that section 96A and 96B be amended to restrict a landlord's right to apply under section 100A for an order for termination of tenancy and possession of the premises to circumstances where the breach is ongoing at the time of the application.

Recommendation: that an order for termination of tenancy and possession of the tenancy be abandoned if the breach is remedied before the landlord obtains possession of the premises.

3. Termination on death of a public housing tenant

Section 82 provides a tenancy does not terminate on the death of the tenant unless the tenancy is public housing tenancy. The exclusion on the passing of public housing tenancies is at 82(2), as follows:

> Despite subsection (1)(e), if the sole tenant in relation to a tenancy that is a tenancy within the meaning of the *Housing Act* dies, the tenancy is terminated whether or not a spouse, de facto partner or dependant of the sole tenant is left in occupation of the premises.

This provision unfairly and unreasonably discriminates against public housing tenants, many of whom in the Northern Territory are Indigenous. This provision may result in people who are eligible for housing assistance being made homeless. It causes family and community disruption at a time when families are also coping with the loss of a loved one.

Recommendation: Where the remaining occupant is a spouse, de facto partner or dependent of the deceased, and the housing provider has been informed that that person/s were in occupation of the premises, and where the remaining occupant/s are eligible for Housing Assistance, the tenancy should remain on foot.

4. Misuse of drugs

Section 88A of the RTA provides, in respect of premises to which a drug premises order relates, that a landlord may terminate a tenancy by 14 days notice to the tenant. Section 88A of the RTA further provides that the tenancy terminates in accordance with section 101. Essentially, tenancy terminates on the issue of a conforming notice, not by order of the Commissioner or the Court.

A Court may make a drug premises order on the application of a police officer who holds a "reasonable belief" pursuant to sections 11D and 11H of the *Misuse of Drugs Act*. Section 11H of that Act provides that an application for such an order is made in camera, with the

respondent, that is the tenant, specifically proscribed from attending and putting their case in relation to the application. An order which can made based solely on a Court's acceptance of a reasonable belief of a police officer, is not a sufficient basis to ground the termination of a tenancy on the issue of a notice by a landlord.

We consider that the power vested in the Court pursuant to section 100(1)(a) to be sufficient to enable a landlord to seek termination of a tenancy where the premises have been used for an illegal purpose.

Recommendation: that section 88A be removed from the RTA.

Without grounds evictions

Under sections 89 and 90 of the RTA, a landlord may terminate a tenancy without specifying a ground for the termination. A landlord may terminate a periodic tenancy with 42 days notice to the tenant[23] and may terminate at the end of a fixed term tenancy with only 14 days notice to the tenant[24].

In providing for termination of a tenancy without requiring reasons or grounds, the RTA exposes tenants to an ever-present threat of eviction and contributes significantly to tenants' insecurity.

Without grounds evictions are entirely inconsistent with developing security of tenure and the corollary of this, which is stable families and stable communities. The ability for landlords to terminate tenancies 'without grounds' also allows for retaliatory, arbitrary and unreasonable evictions. It creates opportunities for landlords to remove 'troublesome tenants' who insist on pursuing their rights as tenants such as the right to quiet enjoyment or the right to seek repairs.

Further, the incredibly short notice periods reduce tenants' likelihood of finding a property which suits their needs before they are evicted.

Ensuring tenants only have their tenancies terminated where there are grounds as prescribed by residential tenancies legislation will provide for secure tenancies and provide better protection from retaliatory eviction. Existing provisions within legislation ensures that landlords retain their ability to remedy rent arrears and breaches of the tenancy agreement, where these are the underlying issues that may motivate a landlord to issue without grounds notice of termination. Further, section 99 provides ample redress for landlord seeking return of their property for use by themselves or a family member where hardship is involved.

Without grounds termination provisions exist to the detriment of the whole notion of security of tenure. The ability for landlords to evict tenants without any grounds should be removed from the RTA. Rather, landlords should only be able to take action to terminate a tenancy where there are grounds as prescribed by the RTA.

Case study: Nolene

Territory Housing issued a 42 day no reason notice to our client Nolene, who is a mother of two young school aged children. Her youngest child suffered from severe asthma. Nolene was very worried that she would be evicted in winter and be made homeless. She instructed

[23] Section 89

[24] Section 90

that she would be forced to live in the creek bed, where on top of obvious hardship, her child's asthma would increase and she would find it difficult to get her children to school.

We assisted Nolene to lodge an appeal to the Territory Housing Appeals Board (**THAB**) against the issue of the no reason notice to vacate. Territory Housing advised that the tenant had been given the notice because of anti-social behaviour at the property. Although Territory Housing policy states that "eviction is a matter of last resort", Territory Housing had not entered into an ABA with our client or asked her to enter into an ABA prior to issuing the notice to vacate.

We advocated for our client to remain in the premises. She agreed to enter in to an ABA and has since been offered a fixed term tenancy agreement. That is, the landlord used mechanisms to resolve the underlying reason behind the "no reason' notice of termination and the tenancy of a vulnerable family at real risk of homelessness was sustained.

Recommendation: that sections 89 and 90 be removed from the RTA.

Without grounds evictions – notice periods

If sections 89 and 90 of the RTA are not removed, the notice period for without grounds terminations in the Northern Territory should be harmonised with other Australian Jurisdictions. These notice periods range from 26 weeks (in the ACT), to 120 days (Victoria), 90 days (SA), the equivalent of 60 days (NSW, Queensland and WA). The Tasmanian legislation specifically prevents the use of 'without grounds' terminations.

With the exception of WA and SA, all other jurisdictions require that a notice of termination at the end of a fixed term tenancy be given to the tenant. The length of time varies between jurisdictions, with the ACT providing the greatest protection to fixed term tenants, requiring 26 weeks notice. Queensland requires 2 months, and Victoria 90 days (if the tenancy more than 6 months) or 60 days (if the tenancy less than 6 months).

As set out above, CAALAS and NAAJA advocate for the removal of the provisions allowing landlords to evict tenants without grounds in relation to both fixed term and periodic tenancies. However, if this recommendation is not heeded, we submit that the notice periods for without grounds terminations under the RTA should be significantly extended.

Recommendation*:* If the above Recommendation is not adopted, that section 90 be amended to extend the notice period for 'without grounds' termination of fixed term tenancies to 26 weeks notice.

Recommendation: that section 89 be amended to extend the notice period for 'without grounds' termination of periodic tenancies to 26 weeks notice.

Section 85 - Inadequate notice and periodic tenancies

Section 85 allows a landlord to terminate a periodic tenancy by providing notice which falls short of the 42 days notice as required by section 89. In effect this means that a landlord is able to issue a notice of termination of periodic tenancy with no or minimal notice provided to the tenant.

We consider that section 85 should be abandoned as it places the balance of the tenant's right to secure housing with the landlord's right to terminate the tenancy too heavily in favour of the landlord.

As security of tenure is of manifest importance, we consider landlords should be required to strictly comply with the requirements of the RTA, particularly in regards to termination.

In the Northern Territory, the limited availability of rental properties at all levels of the rental market, but particularly affordable tenancies, would mean that a person not given the required notice would face homelessness and or hardship as a result.

Recommendation: that section 85 be removed from the RTA.

Order of possession – date of effect

Section 104(3) stipulates that an order of possession takes effect no later than 5 business days after the date of the order of possession.

Section 150(5)(a) states that an appeal must be made to the Local Court before 14 days after the date of the order, determination or decision.

Practically, this means that a tenant can lose possession of the tenancy, but still be within time to appeal the decision to terminate the tenancy. In effect, section 104(3) means that a tenant would need to seek and obtain legal advice, lodge an appeal and seek a stay of proceedings within 5 business days after the order of possession. This is not an adequate period of time and we consider that this unfairly impacts on tenants' ability to appeal orders of possession. The effective time limit of 5 business days to lodge an appeal will have particular impact on tenants living in remote areas.

It cannot have been intended by the drafters of the RTA that a right to appeal should have no real application or effect. This is an aspect of the legislation in urgent need of reform.

Recommendation: that the period for an order of possession to take effect under section 104(3) be extended to 14 days to coincide with the tenant's right to appeal the order.

Stay of order of possession upon lodgement of appeal

We consider the RTA should be amended to compel the Court to provide a stay of the order of possession upon lodgement of an appeal. A stay should be automatically provided for in the legislation.

Objective test for "reasonable satisfaction" in 96B and 96C - Response to Question 20

CAALAS and NAAJA support the suggestion that the test of what is "reasonable satisfaction" be an objective one.

Serious breach and unacceptable behaviour - Response Questions 21-29

We do not consider that the Court's discretion should be restricted by the incorporation of 'triggers' within the legislation. We consider that that the legislation currently provides sufficient guidance for the Court to determine what constitutes a serious breach or unacceptable behaviour.

As the termination of a tenancy is so fundamental, we do not consider it appropriate to extend the power to terminate a tenancy under section 99A(1) to the Commissioner. We do not think that it is a procedural matter as there may be circumstances which prevent the tenant from entering into an ABA which would not be ventilated if the matter were to be disposed of in an administrative manner by the Commissioner.

Further, we do not consider that Court processes should be watered down or accorded flexibility. In these matters, it is of utmost importance that a tenant be accorded due process - that is, that the tenant be given a fair hearing - which is subject to the proper rules of evidence. Tenants should not face eviction based on hearsay evidence or the unverified, untested statements of neighbors or other interested parties.

Such a relaxation would lead to an abuse of the process and cause further instability of tenure.

We consider that "interested person" be removed from the legislation as this currently provides a stranger to the contract to enforce its terms. This is entirely inappropriate and subject to abuse. The continued standing of "interested person" would be even more problematic if the rules of evidence were 'relaxed'.

10. Dispute Resolution (Part 14 of the RTA)

The importance of the right to legal representation

This right is of fundamental importance in applications to the Commissioner and to the Court, where real estate agents and landlords routinely refuse to consent to the legal representation of the tenant. This occurs despite the landlord and real estate agents being repeat players in the jurisdiction and with an infinitely better understanding of the RTA.

This is particularly important for our clients who often do not speak English as a first language, and will be of even greater significance as an increased number of Indigenous people become subject to the jurisdiction of the Commissioner and the Court following the roll out of remote tenancies.

A significant proportion of remote tenants will not have previous experience of the rights and obligations of a tenancy agreement; be familiar with the operation of the RTA; or be familiar with the appeal processes available under the RTA and the way these processes play out in practice. Further, as detailed above remote tenants lack access to legal advice and representation in tenancy matters.

Opportunities to sustain tenancies, both remote and urban, should not be lost by lack of access to timely intervention, representation and advocacy.

Language and interpreter issues

Approximately eleven percent of Aboriginal and Torres Strait Islander peoples speak an Aboriginal or Torres Strait Island language as their main language at home.[25] This percentage increases to 42 percent in many remote areas of Australia.[26] Almost one in five (19 percent) Aboriginal and Torres Strait Island language speakers report that they do not speak English well or at all.[27]

Often, when Aboriginal people sign documents and on the basis of their signing them, they are presumed to understand the contents contained therein. It is crucial that any difficulties surrounding a person's understanding of high-level concepts and technical legal terms be explicitly understood and addressed.

It is instructive in this regard to consider the implications of research undertaken by Aboriginal Resources and Development Services Inc (**ARDS**) as part of their '*An Absence*

[25] Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey* (2008) Australian Bureau of Statistics <http://abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4714.0Main%20Features52008?opendocument&tabname=Summary&prodno=4714.0&issue=2008&num=&view=#PARALINK4> at 4th May 2010.

[26] Ibid.

[27] Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* (2006) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/70E4BD21542AAD18CA257718002A7CC1?opendocument > at 4th May 2010.

of Mutual Respect' report[28] in which they surveyed 200 Yolgnu people about their understanding of 30 legal terms, which included such terms as "conditions", "consent", "undertake" and "oblige".

In analysing the results, ARDS note that "(t)he extent of the problems facing Yolgnu people when they have to interact with the Balanda legal system show clearly in the overall results below, with over 95% of Yolgnu surveyed unable to correctly identify the meaning of the 30 commonly used English legal terms 30 words which are commonly used in the legal context in the NT".[29]

The ARDS survey results graphically illustrate the scale of the problem that needs to be considered in assessing understanding of legal terms and concepts. In the present consideration of changes to the RTA, this is most glaringly seen in relation to the issue of Aboriginal people signing, but not necessarily understanding, tenancy agreements and property condition reports.

Unless the specific terms are explained, and explained back by the listener in such a way that it is clear that the person signing them clearly understands their contents, such agreements are not worth the paper they are printed on.

It is difficult to argue with the force of former Chief Magistrate Blokland's proposition that: "the use of interpreters or having the person explain back their obligations of reporting in their own words are two ways that would ensure the comprehension can be objectively assessed".[30]

It is incumbent upon the Commonwealth and NTG to ensure that an Indigenous person who is not as fluent in English as person who has a full and complete mastery of the English language is not only provided with a fully trained and qualified interpreter, but in the context of any action taken in relation to a tenancy agreement, that such people have a ready right of access to legal representation.

The RTA must be amended to provide tenants with the right to legal representation in all applications to the Commissioner and the Court. This right should not be conditional on the agreement of the other party to the tenancy agreement to which the proceeding relates, or be reliant on the discretion of the presiding Commissioner.

In addition, tenant advice, advocacy and support should be made more readily available to tenants to help sustain tenancies. The ability of tenants to access representation at Court and Tribunal hearings must be improved and is especially important for homelessness prevention. There should be special services and advocates provided for Indigenous tenants and tenants for whom English is not a first language.

Recommendation: that section 148(1) be amended to provide that a tenant has the right to legal representation in all proceedings before the Commissioner of Tenancies.

11. Notices (Part 16 of the RTA)

Delivery of notices – Response to question 31

[28] Aboriginal Resources and Development Services (Inc), 'An Absence of Mutual Respect'. Report can be viewed at: http://www.ards.com.au/print/Absence_of_Mutual_Respect-FINAL.pdf

[29] See at p 21.

[30] *Police v Balarka* [2009] NTMC 037 per Blokland CM at 6-7

Currently the RTA does not provide for time periods for service and deemed receipt of notices.

This is a deficiency which has significant rights-based consequences for tenants and landlords in respect of the service of notices of termination and notices of breach. This was highlighted in the recent case *Brown & Lemmers v Elenis & Elenis* [2007] NTMC 004.

Recommendation: that section 154 be amended so that the general presumptions contained in the *Interpretation Act* regarding the service of documents are adopted.