CAWLS
Women's Legal Service

Level 2 Winlow House 75 Woods Street
GPO Box 3180 Darwin NT 0801
phone: 8982 1111
freecall: 1800 812 953
fax: 8982 1112
email: info@dcls.org.au
website: www.dcls.org.au
abn: 42 840 626 724

DARWIN COMMUNITY LEGAL SERVICE

Residential Tenancies Amendment Bill 2018

Darwin Community Legal Service

Submission to the Economic Policy Scrutiny Committee

9 March 2018

Introduction

Darwin Community Legal Service ("DCLS") is a free, confidential service. We assist disadvantaged members of the community to protect their legal rights. We work towards a community where everyone has access to legal advice and support. We seek to challenge unjust laws and procedures, and to ensure that people are aware of their legal rights.

The Tenants' Advice Service ("TAS") operates within DCLS as a Northern Territory wide, community-based advice and advocacy service for residential tenants.

Rationale for submissions

A strong *Residential Tenancies Act* ("RTA") is vital to the investment and long-term growth of the rental sector within the Territory. With already the highest portion of renters in Australia, at 50.3%, it is essential to the economic prosperity of the territory that the NT is seen as a safe, affordable and secure place for people to rent.[1] Renters who are not able to secure housing in the Territory because of a 'blacklisting' are more likely to move interstate where they have family and other connections or opportunities. TAS has seen time and time again, this exact scenario occur, as a high number of our clients who have been blacklisted have felt no choice but to leave the Territory.

Lack of regulation in this area has often excluded people unfairly from the pool of available and acceptable tenants looking to rent properties in the Northern Territory. There is currently a high vacancy rate for rentals in Darwin and the Northern Territory. Having a greater pool of tenants available will provide an incentive for landlords to invest in properties within the Territory and utilise them as rental investments. It is therefore fundamental that strong protections exist for tenants so as not to dissuade potential renters from relocating to the Territory to re-energise the sluggish rental market and attract people from interstate. It is also noted that due to housing affordability issues in Australia further protections to ease stresses on those in the private rental market has been identified as important for future reform.

The recent report on '*Housing affordability: re-imagining the Australian Dream'* recommended that State governments should both amend tenancy laws to make renting more attractive and change tenancy laws incrementally to enable tenants to make their rental property feel like their home. [2] We submit that greater security for renters and freedom from unnecessary or disproportionate obstacles to accessing rental accommodation, such as subjective blacklisting, will increase the viability of renting as a real solution to issues of housing affordability.

This Bill provides an opportunity to reduce homelessness within the Territory. Currently, the NT has the highest rate of homelessness in Australia per capita, at 731 homeless persons per 10,000 persons.[3] By tightening up the legislation around database listings, it would greatly reduce some of the existing impediments for tenants acquiring accommodation due to incorrect or inaccurate listings. This would reduce the strain on services already dedicated to tackling homelessness within the Territory and enable a more tailored approach in this area.

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[1] *Australian Bureau of Statistics, Census 2016.*

[2] Grattan Institute, *"Housing Affordability- Re-Imagining the Australian Dream"* March 2018, see recommendations.

[3] *Australian Bureau of Statistics, Census 2016.*

We believe that the Bill and our suggested additions are compatible with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). We propose that the Bill with the additions outlined here will greatly advance Article 17 of the International Covenant on Civil and Political Rights in protecting the unlawful interference with privacy and Article 11 of the International Covenant on Economic, Social and Cultural Rights relating to the right to adequate standard of living and the continuous improvement of living conditions.

As stated in the Committee's overview, the Bill sets out the minimum level of rights, obligations and limitations in relation to databases. However, we submit that to truly assist with the objectives for the right to adequate, secure housing and the right to privacy, the Bill should go further than the minimum to ensure the Territory, with its unique characteristics, is at least on par with other jurisdictions. However, this ambition should extend further and put the NT at the forefront of the Australian rental market.

In continuing this momentum, the enactment of the following key reforms are vital in enhancing the security and economic viability of the Territory's rental market and ensuring the NT delivers best practice in this area;

- **An Independent bond board**. To act as an independent umpire, reducing the risk of misuse of bond funds and to oversee disputes regarding the return of security deposits.

- **Domestic and family violence reforms**. Given the incidence of domestic violence in the Northern Territory, secure housing tenure is a critical element in addressing the problem. Other states have taken the lead in providing consideration for these circumstances such as removing the perpetrator or the victim from the lease agreement and separating liability for damage.

- **Longer notices periods and substantiated reasons to terminate tenancies**. 14 days for fixed-term tenancies and 42 days for periodic tenancies is far too short a minimum period for a tenant to pack up their lives and find alternate accommodation. Stronger protections are needed to decrease the risk of homelessness.

- **Protections for co-tenants**. Given the sharp increase in share housing arrangements, currently no protections exist for disputes between co-tenants and certainty and clarity in this area would greatly enhance the appeal of renting within the Territory.

Executive Summary

DCLS submits that the Assembly should pass the Bill with the following amendments to bring it in line tenancy regulation in other states and territories. The Bill supports the rights and liberties of individuals and the social and economic prosperity of the Northern Territory.

The Bill provides certainty and clarity as to the rights and responsibilities of landlords, agents, tenancy database operators and tenants in relation to tenancy databases. It assists in preventing landlords and agents using the threat and fear of blacklisting to inhibit tenants exercising their rights under the RTA. It also informs tenants when they have genuinely committed a breach of the tenancy agreement and have not acted to reasonably rectify the breach. For database operators, it will ensure they do not operate contrary to the principles of natural justice. Currently, tenants are frequently not notified of listings, no timelines are imposed on a person's listing, and excessive fees are charged for a tenants' request for information about their listing.

DCLS sees it as vital that the formal procedures and processes outlined in the proposed Bill are not undermined by informal communications that currently occur between various agents and landlords regarding tenants' personal information. The sharing of tenant's personal information should only be conducted in accordance with the provisions in this Bill.

DCLS particularly endorses the inclusion of provisions that provide:

- notice to tenants of database usage and where potential tenants are found on a database,
- recourse to challenge listings at the Northern Territory Civil and Administrative Tribunal ("NTCAT") and
- strict liability offences within the Bill.

DCLS also supports the secondary purpose of the Bill which appropriately provides NTCAT jurisdiction to hear matters relating to tenancy agreements originating under the former *Tenancy Act* and the implementation of other procedural matters.

Nevertheless, we submit that the Bill could provide stronger protections considering the high proportion of vulnerable renters and prospective renters in the Northern Territory, and the Government's strategy for transitioning homeless people from public housing into the private rental market as part of their Five-Year Action Plan.

Submissions

Amendments to the current wording under the proposed Bill

Section 128 Listing can be made only for particular breaches by particular persons

Under the current wording of section 128 could be rephrased to include a number of key protections that are needed in order to protect tenants against improper listings.

The first is an amendment to section 128(1)(a) to include protections for co-tenants who have terminated their tenancy. This amendment would ensure that someone who has ceased their co-tenancy as part of a tenancy agreement could not still be placed on a tenancy database for the actions of co-tenants who remain under the tenancy agreement. This is in line with the equivalent provision in the New South Wales *Residential Tenancies Act 2010* ("NSW Act"), section 212 which provides:

> '*A landlord or agent of a landlord must not list personal information about a person in a residential tenancy database unless: (a) the person was named as a tenant in a residential tenancy agreement that has terminated or the person's co-tenancy was terminated…*'

The second is an amendment of 128(1)(c) to include a restriction between when a listing may be made and when the tenancy agreement has terminated. We submit that listing should not be able to be made more than 3 years after the tenancy agreement has ended as this would be in line with the 3-year limit imposed under the Bill and 3-year limitation period that applies in the NT in respect to pursuing debts. Without this inclusion, it would be theoretically possible that a tenant could be placed on a blacklist at an indeterminable time after the termination of the tenancy agreement. For example, a tenant could be placed on a blacklist for 3 years in relation to a tenancy agreement that terminated 10 years beforehand. This is contrary to the purpose of the Bill.

In addition to this, we submit that the wording in 128(1)(c)(i) be amended to ensure that the amount owed is substantiated by either an order from NTCAT in the landlord's favour or there is an admission by the tenant that this amount is owed. We find this very important as without this amendment there still remains the risk for tenants to be listed for disputed debts arbitrarily decided by the landlord or agent even though that conduct may not amount to a breach of agreement under the RTA or if the Tribunal decides that the landlord is owed less than the security deposit.

Thirdly, we submit that 128(1)(d) be amended to include provision for the tenant to be given 14 days to respond to the proposed listing. The tenant should be provided a chance to make submissions against the proposed listing at this stage (in addition to s129(1)(b)) in order to give them a chance to prevent the listing happening at all. They can do this either by repaying any amount owed or if they dispute the issues raised, reaching a resolution with the landlord.

Section 129 Further restriction on listing

Under the current wording of this section, there is no clear restriction on who can list personal information about a person in a residential tenancy database. We submit that, in line with section 213 (3) of the NSW Act, personal information may only be listed at the request of a landlord or landlord's agent.

Further, we submit that s129(3)(a) be omitted as tenants should still be provided notice of the personal information to be listed regardless of whether the information is publicly available from court/tribunal records as they may not be aware that the matter ever proceeded to the tribunal or that it is published.

Section 130 Ensuring quality of listing – landlord's obligation

Under the current wording of this section, the landlord has an obligation to inform a tenancy database operator that personal information about a tenant, listed by the landlord, has become inaccurate, incomplete, ambiguous or out-of-date. What the section lacks, is a duty on the Landlord or the database operator to rectify the mistake, not merely notifying the database operator that one exists. We submit, that in line with section 214(3) of the NSW Act, section 130 be amended to include a positive obligation on the landlord not just to notify the tenancy database that personal information is incorrect but include a duty to insure the database is in fact corrected within 7 days.

To ensure a landlord's and database operator's obligations under this section are fulfilled, we submit that, similar to the Victorian *Residential Tenancies Act 1997* ("Vic Act") section 439G, a penalty should be imposed on a person or body corporate that fails to comply with section 130. This amendment would ensure tenants are protected from dishonest or negligent landlords who fail to rectify faults on a database which may be withholding a tenant from what may otherwise be a successful application for tenancy. This would reduce burden on tenants in following up inaccurate listings that should have otherwise been removed as a matter of course.

Section 131 Ensuring quality of listing – database operator's obligation

Under the current wording of this section, no penalty provision exists for database operators who fail to make the appropriate amendment to personal information stored on the database. Both

under section 215 and section 439H of the NSW and Vic acts respectively, a penalty is imposed on individuals who fail to meet the requirements under equivalent sections.

We submit that section 131 be amended to include a penalty on operators who fail to comply with this provision to ensure strict compliance and consistency with related provisions of the Bill.

Section 132 Providing copy of personal information listed

We submit that the current wording of this provision be amended to remove the option for a landlord or database operator to charge a fee to a tenant who wishes to access personal information about themselves. This would be consistent with the equivalent section 216(1) of the NSW Act. We firmly believe that the imposition of a fee is contrary to the spirit of the Bill. As a matter of basic procedural fairness tenants should have a right to know and access the information impinging them so that they can take the appropriate steps to either rectify the mistake, challenge the listing or at the very least, understand the breach it is alleged they have committed. Removing this fee would also be consistent with laws surrounding credit default listings.

Furthermore, reflective of the section 439I of the Vic Act, we submit that a penalty is imposed on a landlord and a tenancy database operator who fail to comply with this section.

Section 134 Powers of Tribunal

Tribunal Considerations

Under the proposed wording of section 134, no guidance exists for circumstances the Tribunal is required to consider when making an order in regard to listing personal information on a tenancy database. We submit that the section be amended to follow, section 217(2)(b) of the NSW Act which requires the tribunal to consider:

> *' (i) the reason for the listing, (ii) the tenant's involvement in any acts or omissions giving rise to the listing, (iii) any adverse consequences suffered, or likely to be suffered, by the tenant because of the listing, (iv) any other relevant matter.'*

We also advocate for a further consideration; whether the listing is unjust given the circumstances of the case. Our experience is that the majority of tenants contacting our service already listed on databases in the Northern Territory are there unjustly. E.g. claims for unsubstantiated debts, personality clashes, domestic violence victims or other extenuating circumstances. It is important that the Tribunal can consider factors that determine whether a listing or proposed listing is unjust in the circumstances.

The inclusion of such a provision into the proposed Bill will help ensure uniformity and consistency in Tribunal decisions in regard to tenancy listings that in turn will better help tenants and landlords alike understand the legislation and work within its newly defined parameters.

Compensation for improper listings

In addition to the Tribunal's powers under this section, we submit that additional powers be given to the Tribunal to order compensation for the listing of inaccurate, ambiguous, unjust or out-of-date

information on a residential tenancy database. This would be consistent with how compensation can be awarded to a party to a tenancy agreement under s122 of the Act.

Protections for Domestic Violence Victims

Finally, to ensure there is a holistic approach to domestic violence across the Northern Territory, we submit that it is crucial for database regulation to be modernised and include specific recourse for victims of domestic violence. Victims need to be able to challenge a listing or seek a specific order that prevents them for been listed where the breach involved was caused by a perpetrator of domestic violence. A similar provision exists under section 89(4)(d) of the South Australian *Residential Tenancies Act* which makes specific provision to protect the rights and interests of victims of domestic violence.

We propose the following addition should be inserted into section 134:

(4) If the Tribunal is satisfied that;

(a) the person did not cause or reasonably cause a breach of the tenancy agreement; or
(b) The nature of any breach resulted from an act of domestic violence under the *Domestic and Family Violence Act* to the person

They may make an order prohibiting the landlord or database operator from listing the personal information about a person in a tenancy database; or

Requiring a landlord or database operator to amend or remove personal information about a person that is, or is to be, listed in a tenancy database.

Section 173 Transitional Provisions

We support database operators being encouraged to comply with this part 14. However, as the amendment is intended to apply retrospectively, we submit the 3-month transition period could be prejudicial to tenants who have been previously listed and are seeking to challenge that listing. Tenants may have been listed for some time and should therefore not be prevented from seeking immediate recourse. An additional 3 month wait would unnecessarily delay obtaining suitable accommodation that might otherwise be provided. We therefore submit that a tenant who wishes to challenge an existing listing may do so at the commencement of this Bill, so not to delay their opportunity to re-enter the rental market.

Conclusion

We look forward to these much-needed reforms to residential tenancy databases starting the process of further and broader reforms of the *Residential Tenancies Act* to ensure fairer and safer tenancies in the Northern Territory.

Andrew Smith
Senior Tenancy Solicitor, Tenants Advice Service
DCLS on behalf of DCLS and CAWLS.