

10 June 2020

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Select Committee on the COVID-19 Pandemic Response
Office of the Legislative Assembly
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By email: danton.leary@parliament.act.gov.au

Dear Committee Members,

RE: ACT Tenancy Policy Reform

The following advice and recommendations are provided in response to Legal Aid ACT's undertaking, made at the meeting of 23 April 2020, to furnish the ACT Legislative Assembly Select Committee on the COVID-19 Pandemic Response ('the Committee') with recommendations for tenancy policy reform.

Legal Aid ACT provides tenancy law advice, legal information and assistance to tenants through its Tenancy Advice Service. It also receives a number of calls from lessors seeking information through its Helpline service and makes appropriate referrals for legal advice when requested.

Legal Aid ACT supports the following policy reform to afford greater security, protection and certainty for tenants, upholding their human rights while being sufficiently flexible to appropriately respond to the complexities of share housing and modern living arrangements.

COVID-19 Related Rental Arrears

The first interim report by the Committee recommends that the ACT Government "develop a framework for the repayment of any rental arrears accrued during the COVID-19 eviction moratorium."¹ The report also recommends that the ACT Government "develop a plan to prohibit a lessor or grantor from seeking termination solely on the basis of rent arrears accrued during the period covered by the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020*."²

Legal Aid ACT supports these recommendations and proposes reform aimed at requiring lessors to enter into good-faith negotiations with tenants before seeking rental arrears via compensation orders or bond release disputes.

Legal Aid ACT receives numerous calls from persons who have been significantly impacted by COVID-19. Some callers express that they have tried to negotiate a rental reduction that reflects the financial impact on the household. Some callers express that they've had success in the negotiations, others state that they are having difficulties.

The following solutions are grounded in the understanding that even though tenancy agreements are private agreements, they impact on the basic human right to shelter, and there is a significant public

¹ Select Committee on the COVID-19 Pandemic Response, ACT Legislative Assembly, *Interim Report 1* (May 2020) 3 ('Interim COVID-19 Report').

² *Ibid.*

interest in ensuring people have access to shelter. Legal Aid ACT also considers that when a lessor purchases or lets out an 'investment property', there should be greater recognition around the lessor's 'investment' in the arrangement—i.e. there are inherent risks associated with investments and tenants should not be the sole bearer of the risks associated with the lessor's investment.

Proposal 1 – Legal Aid ACT proposes that lessors be required to enter into good-faith rent reduction negotiations: before a lessor can issue a notice to vacate for rental arrears, before a lessor can seek a compensation order in ACAT for rental arrears, or any time a tenant requests ACAT make a rent reduction order of at least 25%.

This recommendation could be implemented administratively through the procedures related to bond disputes and rental arrears proceedings—ACAT could simply require the lessor to disclose whether a rent reduction request was made and what steps they took to negotiate the request in good-faith. This could either be a threshold issue (e.g. ACAT must be satisfied the event occurred before they list it for hearing), or it could be a matter to be considered by ACAT when hearing bond disputes and rental arrears applications.

In addition to the above, if a tenant applies to ACAT for a temporary rent reduction of at least 25% (see legislative reform proposal below), and the lessor has not engaged in good faith negotiations as requested by the tenant, ACAT could order a mandatory conciliation between the parties before it hears the matter with a condition that both parties conciliate.

Proposal 2 – Legal Aid ACT proposes amending the *Residential Tenancies Act 1997* (ACT) ('the RTA') to provide express authority to ACAT to order temporary rent reductions if a tenant can demonstrate significant financial hardship.

While ACAT is empowered to make a wide range of orders,³ the section of the RTA specifically addressing rent reduction orders refers solely to a diminishment in use or enjoyment of the property.⁴ This section could be legislatively amended (or a section added) to reflect that ACAT has express authority to order a temporary rent reduction on application by the tenant if satisfied a temporary rent reduction is justified. A similar assessment takes place when a tenant applies to terminate a tenancy for significant hardship.⁵

Increased Options for Impacted Households to Terminate Tenancies

Legal Aid ACT further supports the Committee's recommendation that the ACT Government "explore a method for renters in fixed-term leases to terminate their tenancies during the COVID-19 emergency, such as by using the same mechanism available to people on periodic tenancies, i.e. by providing three weeks' notice."⁶

Proposal 3 – Legal Aid ACT proposes temporarily amending the Standard Tenancy Terms in the RTA to allow 'Impacted Households', as defined by the *Residential Tenancies (COVID-19 Emergency Response) Declaration 2020*, in fixed term tenancy agreements to terminate their tenancies on

³ "Without limiting the orders the ACAT may make, the ACT may make the following orders..." *Residential Tenancies Act 1997* (ACT) s 83.

⁴ *Residential Tenancies Act 1997* (ACT) s 71.

⁵ "On application by a tenant, the ACAT may terminate a fixed term agreement ... if satisfied that—(a) the tenant would suffer significant hardship were the agreement to continue; and (b) the level of hardship is such that it is appropriate and just to terminate the agreement during its fixed term." *Residential Tenancies Act 1997* (ACT) s 44(1).

⁶ *Interim COVID-19 Report* (n 1) 4.

giving three-weeks' notice accompanied by proof of Impacted Household status such as a signed statutory declaration.

Easier Pathways for Tenants to Sub-Let and Assign Interests

Legal Aid ACT further supports the Committee's recommendation "that the ACT Government establish a tenant transfer system to allow for easier and more convenient change of tenants and retrieval of bonds for members of group homes."⁷

Legal Aid ACT receives numerous calls from persons in co-tenancies who want to vacate their fixed-term tenancy before it expires, or are the co-tenant of someone who is planning to vacate or has already vacated.

Residential tenancy agreements bind all co-tenants jointly and severally in liability—if one co-tenant vacates and stops paying rent, the remaining co-tenants are liable to cover the vacating co-tenant's rent as a result. It is often the case the lessor will pursue rental arrears against remaining co-tenants who are easy to locate rather than against vacating co-tenants who may be difficult to find, leaving the remaining co-tenants to pursue their own civil claims against the vacating co-tenant for their unpaid portion of the rent.

While sub-letting or assigning rights and obligations under the agreement are viable solutions in theory for vacating co-tenants, they are complex and difficult in practice.

Sub-letting and assigning both require the lessor's written consent, which the lessor is under no obligation to provide. Furthermore, even if the vacating co-tenant sub-lets, they are still ultimately liable for any compensation that stems from the tenancy after their sub-tenant moves in—they are still legally tied to the tenancy and may want to extricate themselves entirely. Finally, even if a vacating co-tenant is able to assign or sub-let, there is no mechanism in place to allow the bond filed in the vacating co-tenant's name to be transferred to the assignee or sub-tenant. The only way to have a bond lodgment that accurately reflects the new tenant composition of such a tenancy is to terminate the tenancy, apply to have the bond refunded, sign a new tenancy agreement and lodge a new bond.

Proposal 4 – Legal Aid ACT proposes amending the RTA to include a section expressly stating that a lessor cannot unreasonably withhold consent when a tenant applies for an assignment or sub-let.

A similar section appears in Victorian residential tenancy legislation.⁸ Having unambiguous language in the Act itself provides clear guidance and empowers tenants to negotiate assignments with lessors.

Proposal 5 – Legal Aid ACT further proposes amending the RTA to permit a co-tenant to terminate their own interests under a tenancy while preserving the tenancy for the remaining tenants, and expanding ACAT's powers in its Residential Tenancy jurisdiction to resolve disputes between co-tenants, including the power to order an outgoing co-tenant to pay compensation to the remaining co-tenants.

Proposal 6 – Legal Aid ACT further proposes that the ACT Government prepare standard assignment and sub-let forms that tenants and lessors can use to more easily make assignments and sub-tenancies.

⁷ *Interim COVID-19 Report* (n 1) 3.

⁸ "A landlord must not unreasonably withhold consent to the assignment or sub-letting of the whole or any part of the rented premises." *Residential Tenancies Act 1997* (VIC) s 81(2).

Standard forms would demystify assignments for tenants and empower them to negotiate such arrangements with their lessors. Making assignments a more viable option would also allow vacating tenants to fully extricate themselves from tenancies so they are not at risk of debt proceedings or being placed in a residential tenancy 'blacklist' due to co-tenants' actions after they leave.

Proposal 7 – Legal Aid ACT likewise proposes the implementation of a 'Tenant Bond Transfer' form and associated administrative process that would allow liabilities attached to a bond lodged with the ACT Revenue Office: Rental Bonds to be transferred from person to person more easily than in the current system.

The ACT Revenue Office: Rental Bonds already has a form that parties can use to transfer a bond across properties,⁹ but not an active form that can transfer the bond between tenants during a tenancy. Preparing a standard 'Tenant Bond Transfer' form and allowing tenants attached to the bond to be varied administratively would prevent the cumbersome and difficult process of having to terminate and restart a tenancy just to refund and then re-lodge a bond.

The 'Residential Tenancy Bond Authority' in Victoria has an online form which is used to transfer the rights attached to a bond when a tenant assigns their rights and obligations to another person.¹⁰ There are also several helpful guides provided by the Victorian government to assist parties with the process.¹¹

These reforms would solve another common problem Legal Aid ACT comes across. That is, sub-tenants in households paying bonds to their head-tenants which are not lodged, with the lodged bond for the main tenancy still having the head-tenant's name attached to it. When the bond is ultimately applied to be released, the head-tenant receives the original bond back and the sub-tenant is left having to pursue a civil action in ACAT to try and retrieve the bond they paid to the head-tenant.

The ACT used to have a 'Transfer of Tenant' form that performed the same function as the Victorian form referenced above.¹² Information obtained from the ACT Revenue Office suggests that the 'Transfer of Tenant' form ceased use in 2018, but that the process was changed at that time partly because the 'Transfer of Tenant' form "caused confusion", and that people were terminating their tenancies and having bonds refunded anyway to effectuate new co-tenancy compositions.

An information campaign around any new forms would be essential if one of the main reasons a past form/process was taken out of use was due to "confusion".

Rebuttable Presumption Favouring Co-Tenants

Proposal 8 – Legal Aid ACT proposes legislatively amending the RTA to create a rebuttable presumption that a resident of a property subject to a residential tenancy agreement is a co-tenant.

⁹ ACT Revenue Office: Rental Bonds (Web Page) https://www.revenue.act.gov.au/data/assets/word_doc/0005/1284611/Transfer-of-Rental-Premises.docx.

¹⁰ VIC Government: Residential Tenancies Bond Authority (Web Page) <https://rentalbonds.vic.gov.au/Bond/Lodgment/Begin>.

¹¹ Consumer Affairs Victoria (Web Page) <https://www.consumer.vic.gov.au/housing/renting/rtba-online-support/property-manager-guide-transferring-tenants>.

¹² https://www.revenue.act.gov.au/data/assets/pdf_file/0007/1079845/Transfer-of-tenants.pdf

Legal Aid ACT receives numerous calls from residents who are not aware of their rights and responsibilities in relation to co-tenancy arrangements. Legal Aid ACT submits that there needs to be greater protection afforded to vulnerable incoming residents (such as those who speak English as a second language, are from culturally and linguistically diverse backgrounds and young people under the age of 25) who have a clear intention to establish a co-tenancy arrangement and are of the view that they were doing so but are not aware of the requirement to seek consent from the lessor.

Legal Aid ACT is of the view that where an incoming resident intends to be a co-tenant but consent is not obtained from the lessor, this should not be a sufficient ground in and of itself to rebut the presumption that the incoming resident is a co-tenant, especially where the new co-tenancy arrangement does not cause detriment to the lessor.

Stronger Rental Legislation Enforcement

Legal Aid ACT receives numerous calls from tenants whose lessors are in flagrant breach of their agreements including multiple trespasses and failures to undertake urgent repairs in a timely manner.

The current legal mechanisms for these types of breaches are primarily compensatory through self-help applications in ACAT. That is, the tenant's main recourse is to try and seek a reduction in rent or compensation for their loss of use and enjoyment of the property as a result.

While tenants are able to file in ACAT for an order restraining the lessor from engaging in breaching behaviour, a restraining order in and of itself does not have any punitive effect. Furthermore, if a lessor breaches a restraining order, the tenant is again burdened with having to go back to ACAT and prosecute a breach of the restraining order herself/himself.

Based on the number and severity of lessor breaches Legal Aid ACT is made aware of, the current scheme does not appear have a significant enough deterrent effect.

Proposal 9 – Legal Aid ACT proposes amending the RTA to create penalties for certain breaches of the RTA and the Standard Tenancy Terms.

Similar penalty provisions are assigned to a number of sections in Victoria's *Residential Tenancies Act 1997* (VIC).¹³

Proposal 10 – Legal Aid ACT further proposes empowering an administrative enforcement agency to investigate alleged breaches of tenancy agreements and issue infringement notices as appropriate.

The types of breaches which would empower investigations and incur infringements could be defined by way of assigning penalty units to the relevant section (see above). Consumer Affairs Victoria carries out this enforcement function in Victoria.

This would have a deterrent effect on lessors breaching tenancy agreements. It would also empower tenants to more widely report breaches of tenancy agreements to the ACT Government as they would have something more than complex and burdensome self-help remedies available to them.

Establishing a Non-Compliance Registry for Agents and Lessors

¹³ Consumer Affairs Victoria (Web Page) <https://www.consumer.vic.gov.au/housing/renting/penalties>.

Proposal 11 – Legal Aid ACT proposes legislatively creating a “Landlord Non-Compliance Register”. If a tenancy dispute is brought before ACAT, and ACAT makes a finding that a lessor or their agent has breached the RTA or their duties under a tenancy agreement, ACAT can order their name be placed on a publically accessible register.

This proposal would hold lessors and real estate agents accountable for their tenancy breaches just as a residential tenancy database holds tenants accountable for theirs. Such a database would also serve to inform tenants and allow them to avoid problematic lessors and agents.

The *Residential Tenancies Amendment Act 2018* (VIC) establishes a similar register in Victoria.¹⁴

Clarity of Rent Increase Processes

Section 64B of the RTA requires lessors to obtain ACAT or tenant approval before implementing a rental increase that exceeds ‘the prescribed amount’ set by the *Residential Tenancies Regulation 1998* (ACT). However, section 64C states that a tenant ‘may’ apply to ACAT for a review of a proposed rent increase, and that if they fail to do so by 2 weeks before the proposed increase date, they waive their right to contest, and implicitly consent to, the rent increase.

Proposal 12 – Legal Aid ACT proposes amending sections 64B-64C of the RTA to clarify that any rental increase proposed or implemented by the lessor that exceeds the prescribed amount is unenforceable unless the increase is agreed upon in the tenancy agreement, the lessor has ACAT approval or the lessor has express written consent from the tenant; absent any of these, that a tenant is able to contest such increase at any (or a defined period of) time after it is proposed and/or implemented.

This would involve legislatively reversing the decision in *Benson & Anor v Saweszuk & Anor* (Residential Tenancies) [2016] ACAT 154. In that matter, ACAT held that a tenant could only contest an illegally excessive rent increase before the rent increase took effect. The proposed reform is preferred as it recognizes the power imbalance between lessors and tenants, and that many times tenants do not seek out legal advice on their rights within the limited timeframes otherwise allowed for under the legislation.

Proposal 13 – Legal Aid ACT further proposes amendments that make clear that if a proposed rental increase does not exceed the prescribed amount, a tenant still has an option to contest the increase by operation of section 64C, noting that under the section a tenant can be held to have implicitly consented to the increase if they fail to contest it in ACAT by 2 weeks before the proposed increase date.

Clarity of Break Lease Terms

Prior to the November 2019 amendments to the RTA, the ‘Break Lease Clause’ in section 8 fixed damages for a tenant breaking a fixed-term early at 6 weeks if in the first half of the tenancy and 4 weeks if in the latter half. The November 2019 amendments added a condition to the clause that this amount could be reduced if the lessor was able to mitigate those damages by re-letting the premises within the relevant time frame (i.e., within 6 weeks or 4 weeks as applicable).

¹⁴ *Residential Tenancies Amendment Act 2018* (VIC) ss 309-310.

The pre-November 2019 'Break Lease Clause' gave clarity and certainty to lessors and capped potential damages for tenants, thus there was some incentive for both parties to agree to include it in their tenancy agreements. The current variation of the clause has removed the clarity and certainty for lessors and offers them no incentive to include it in tenancy agreements. In fact, by not including the clause, lessors can base a claim for damages due to a tenant's early abandonment in sections 62 and 84 of the Act which provide for up to the equivalent of 26 weeks rent in damages.

Ultimately, the interaction between the 'Break Lease Clause' and sections 62 and 84 of the Act has become confusing and contradictory.

Proposal 14 – Legal Aid ACT proposes making the current variation of the 'Break Lease Clause' part of the Standard Tenancy Terms that apply to all tenancy agreements and place a qualifier on it that it only applies if a tenant gives a notice of intention to vacate.

This would negate the need for section 84 of the Act. Sections 61 and 62 of the Act could still apply to tenants who abandon without giving notice thereby providing greater access to compensation for lessors in such circumstances.

Proposal 15 – Legal Aid ACT further proposes that section 61 should be rewritten to make it expressly clear that the tenancy ends with the lessor knows or ought to reasonably know that the tenant has abandoned.

Time Limitation on Water Usage Arrears

Proposal 16 – Legal Aid ACT proposes amending the RTA to put a 3 month limitation period on water usage arrears pursued by the lessor against a tenant.

A similar provision is found in the *Residential Tenancies Act 2010* (NSW).¹⁵

Increased Ability for Tenant to Undertake Repairs

Clauses 61-62 of the Standard Tenancy Terms in the RTA control when a tenant may organize repairs on a lessor's behalf when the lessor does not undertake repairs timely enough. However, most trades' people will not undertake work without the permission of the actual payer, which under clauses 61-62 is the lessor. Thus, the clauses do not offer any real relief to tenants suffering through unattended repairs in breach of the Standard Tenancy Terms.

Proposal 17 – Legal Aid ACT proposes amending the RTA to provide that if a lessor fails to undertake a repair as required under the Standard Tenancy Terms, a tenant may authorise and pay for such repairs and withhold a commensurate amount from future rent payments without penalty.

Abolishing 'No Cause' Evictions

Proposal 18 – Legal Aid ACT proposes abolishing no cause evictions in the ACT, noting that no cause evictions expose tenants to unfair termination (including retaliatory evictions), discrimination by lessors and greater insecurity of tenancy.

¹⁵ *Residential Tenancies Act 2010* (NSW) s 39.

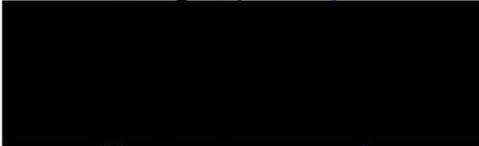
These adverse consequences are most acutely experienced by vulnerable tenants, such as people experiencing economic disadvantage and people in custody.

Tenants Permitted to Stay in Premises under Renovation

Concerning terminations where the lessor intends to renovate, Legal Aid ACT has observed situations where a lessor relies on the 'for cause' termination to end the tenancy when it is practicable for the lessor to undertake renovations while the tenant remains living on the premises. In some circumstances this could constitute a retaliatory eviction.

Proposal 19 – Legal Aid ACT proposes amending the RTA to require a lessor, before issuing a notice to vacate under clause 96(1)(e), take reasonable steps to accommodate the tenant within the premises while the renovations take place; and require the lessor to not unreasonably refuse the tenant's request to return the property upon completion of the renovations.

Kind regards,



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