

28 November 2011

**Committee Secretary
Standing Committee on Health, Community and Social Services
By email: committees@parliamentact.gov.au**

**Re: Submission to the Standing Committee on Health, Community and Social Services
in response to its inquiry into the provision of Social Housing in the ACT**

Introduction

The Welfare Rights and Legal Centre is a community legal centre providing legal advice and advocacy to people on low incomes, facing significant disadvantage or with disability within the ACT and local region.

The WRLC runs four in-house programs:

- **Social Security and Tenancy service (SS&T)** – a telephone advice and advocacy service for people on low incomes. This service provides tenancy assistance to public and community housing tenants in the ACT and social security assistance to people in receipt of (or seeking) social security and family assistance benefits in the ACT and the NSW SE area;
- **Street Law** – an outreach-based general law advice, referral and advocacy service aimed at people who are homeless or at risk of homelessness;
- **Disability Discrimination Legal Service (DDLS)** - a telephone advice and advocacy service for people with disability. This service provides advice about disability discrimination law for people in the ACT; and
- **Night Time Legal Advice Service (NTLAS)** – a generalist legal advice service providing one-off legal advice with the assistance of volunteer lawyers and students.

All four of the above services provide advice to HACT tenants or applicants. However, it is the SS&T service which most regularly interacts with HACT and provides the most advice and advocacy to clients in cases involving HACT.

In the 2010/2011 financial year the SS&T service gave just under 1000 telephone advices. Of these advices about 83% were in the area of tenancy and the vast majority of these involved public housing issues. Between them, the SS&T and Street Law services opened 163 cases and minor assistance matters involving tenancy law. The vast majority of these cases involved Housing ACT. The SS&T service also undertook approximately 117 Court/Tribunal appearances, the majority of which were before the ACT Civil and Administrative Tribunal (ACAT).

The majority of the SS&T advice work this year has revolved around problems of getting into public housing and avoiding eviction from public housing. Homelessness and the threat of homelessness are the presenting issues and mean that many callers are in a state of crisis, are often difficult to reach again by phone and require follow up face to face advice.

General submissions relating to the state of public and community housing in the ACT

The WRLC's primary submission to the Committee is that there is insufficient public and low cost housing stock in the ACT to meet demand. Despite the lowering of the income barriers for public housing in 2006, the number of eligible applications still outstrips availability by a significant margin. The results for those waiting for housing can be disastrous in terms of physical and mental health, family cohesion and future prospects.

It is clear from our dealings with HACT that the pressure of extended waiting lists and dealing with desperate applicants is having a significant effect on HACT staff. Some of our submissions below regarding failings in document management, record keeping and general administration could be at least partly the result of this pressure on staff.

There is also clearly insufficient crisis accommodation and transitional accommodation in the ACT. The lack of transitional housing is particularly a problem, as it results in crisis accommodation being used as transitional housing, thus compounding the lack of crisis accommodation. We have been told by a number of clients that First Point has advised them to relocate to South Coast NSW, where accommodation is easier to obtain. As a result, the only available crisis accommodation is in regional centres in NSW. When people in crisis take up this accommodation they are removed from their supports, their family, their doctors and other medical practitioners and are in danger of falling foul of the ACT residency requirements for public housing in the ACT.

Submissions arising from the terms of reference

Regarding the findings of the 2011 ACT Ombudsman's Report in relation to the ACT Housing priority housing waiting list, Assessment of an Application for Priority Housing, June 2011

Recommendations 1 and 4

The WRLC agrees that there is a serious need for greater clarity about the application process generally and the high needs and priority categories in particular.

It is our experience that applicants for public housing are usually unclear about the process by which their applications will be assessed especially for priority. Indeed, we have also noted that, at times, HACT staff appear unable to articulate the exact process. It is possible that this arises from the fact that the process has been the subject of a degree of internal review and reform over the last year or so, which may create a level of uncertainty about the process for staff. However, it also seems that the sheer complexity of the process and the high level of subjectivity involved in the decision-making process are factors in the confusion and lack of clarity.

The process for assessing applications, as we understand it, is as follows:

1. an application is initially assessed for eligibility.
2. When an applicant is assessed as eligible for housing assistance, the assessing officer makes a decision as to whether the application fits the criteria for high needs or standard.
3. The applicant is then sent a letter advising them which list they have been placed on - that is, high needs or standard - and advising them that they have a right of appeal. We note that the decision letter does not contain any reasons for the decision and in particular any reasons for why in the case of placement on the standard list they have been found not to meet the criteria for high needs. Moreover when we request copies of the applicant's files under FOI, there is no record of any consideration of relevant human rights under the *Human Rights Act 2004 (HR Act)*.
4. If the assessing officer is of the view that the application may fit the priority category, the applicant is still sent a letter which states that they have been placed on the high needs list. Occasionally, we see cases where this letter contains a further paragraph indicating that the application is being considered for priority, but in most cases, the applicant is not informed that s/he is being considered for priority until s/he makes contact with HACT and speaks directly to the assessing officer. The decision to put an application forward for consideration for the priority list does not seem to be recorded and there is no information on the file about the reasons for the decision, the evidence taken into consideration or any consideration of relevant human rights under the *HR Act*.
5. The assessing officer (possibly following consultation with a more senior officer) then prepares a 'brief' which sets out the reasons why the application should be placed on the priority list. At this point, we often see applications disappear into a black hole as assessing officers appear to perform an informal triage, preparing briefs which are considered urgent ahead of applications which the officer considers less urgent. This can lead to serious delays for applicants. We acted in a case in 2010 where we were informed that the application would be referred to the Multi-disciplinary Panel (MDP) on 1 July, but the brief was not completed until mid December. The brief finally came before the MDP at the end of December, more than 6 months after the application was made. In a more recent example, HACT indicated on 8 March 2011 that they would refer a matter for priority. The brief to the MDP was not completed until July and the matter did not go to MDP until 25 August 2011.
6. The matter is then listed for a MDP meeting. Decisions made by the MDP are recorded on the file. However, we have never seen any MDP decision record the fulfilment of HACT's obligations under section 40B of the *HR Act*.

As noted above, there are significant flaws in the decision making process and there are no records kept of at least one level of administrative decision making in this process. In addition, there is no information available about the criteria used for triaging applications. The use of subjective criteria in administrative decision-making is always of concern. However, it is doubly worrying where the criteria are not clearly articulated. We have seen cases where the assessing officer has agreed with WRLC staff that an application demonstrates that the

applicant meets several of the criteria for priority, but has still refused to refer the application to the MDP without explanation.

We submit that HACT should consider introducing time frames for decision making (eg 28 days). Even if no time frames are introduced, we recommend that applicants are given far greater clarity about the likely time frame for the approval process and are kept updated regarding the progress of the application, particularly if there is a delay. Clients often report that they could be accepting of their situation (and the need to wait) if only they were given some certainty about where they stand. The lack of clarity / communication around this area is often identified by clients as the biggest cause of stress in the application process.

It is also important that the information given to applicants is not misleading. At the moment, it is publicly understood that people on priority are allocated within an average time of 90 days. However, this time frame only covers the period from approval for priority, whereas most applicants assume that it starts at the time of application. We frequently see cases in which applicants wait 6-12 months from the time of application until approval for priority, only to have to wait a further 3 months to be allocated a property. This misunderstanding is a significant cause of frustration for applicants, who are already coping with personal situations which are sufficiently serious to merit consideration for priority. The frustration and anxiety of applicants in turn increases pressure on HACT staff and perhaps contributes to the reluctance of staff to stay in regular contact with applicants, which then increases the frustration of the applicant.... and so on.

Recommendations 2 and 3

The WRLC supports these recommendations, and notes that one of the main difficulties associated with review of decisions / reassessments is that the decision making process itself is not clear.

It is not clear which of the decisions identified in the list above is a reviewable decision. Only one of the various decisions is recorded in writing and, as identified by the Ombudsman, it appears that informal processes of 'reconsideration' have emerged as an alternative to review. In our view, the best course would be to formalise the application and eligibility for priority allocation process in a policy document. The policy needs to identify the points at which a reviewable decision is made and specify that the reasons for the decision must be recorded in writing, along with the necessary consideration of relevant human rights under section 40B of the *HR Act* and make a summary of that document available to applicants.

A summary of the policy should be provided to all applicants. The summary should identify the points in the process at which reviewable decisions are made and the points at which further information can be provided to HACT. It should also provide an explanation of the time limits for seeking review and the advisability of providing evidence to support the request for review. Staff should routinely inform applicants of their right to seek review when communicating and refer the applicant to the summary information.

Where the information in the application or the interaction between the applicant and HACT staff makes it clear that the applicant will have difficulty requesting review without assistance, there should be some ability for staff to assist applicants to seek review. However, we note that there will be cases where a successful review will require the gathering of evidence. In these cases, the applicant should be referred to the appropriate legal or social support services.

2. The demand for social housing including an examination of the current waiting lists and eligibility criteria for priority and high needs housing;

We are seeing an increasing number of people who are seeking assistance to apply for housing from a position of homelessness. For a significant number of these applicants, the financial barriers to the private rental market are compounded by physical requirements which rules the private market out altogether. An increasing number of tenants have physical and psycho-social disabilities which mean that they have particular access requirements when seeking a home.

In two recent cases, we have represented or advised applicants on the priority waiting list who have been waiting for significant periods of time (in excess of a year on the priority list) for allocation to a property which meets the tenant's particular disability needs. In these cases HACT has explained the delay in allocation by arguing that they are waiting for a property which meets the needs of the applicant to become available. We have encountered resistance from HACT staff to the idea of modifying an inaccessible property to meet the needs of the applicant. This resistance seems to derive from the cost involved in modifying a property. It is also possible that it is difficult for HACT staff to justify taking a property out of circulation for long enough to complete modifications, when that property could be immediately allocated to someone further down the priority list with no disability requirements. The result is that highly vulnerable applicants are doubly disadvantaged in their wait for a property. We note that this might give rise to issues of indirect discrimination on the basis of disability.

3. The management of waiting lists, innovative strategies to reduce waiting lists and the development of the Social Housing Register (the new centralised waiting list for social housing in the ACT);

It is our view that there is very little which can be done by way of HACT management initiatives which will substantially reduce the length of the waiting lists. The lists are long because there is very limited availability of low cost housing in the private market in the ACT. There is a significant discrepancy between the numbers of people in the ACT seeking low cost accommodation and the available stock, in both public and community housing. Until this discrepancy is addressed either by effective initiatives to lower the cost of renting in the private market or increasing the public and community housing stock to a level which matches the level of demand, the waiting lists will continue to remain unacceptably long.

4. The current range, availability and suitability of social housing stock, including new models of social housing (such as the intentional village model designed for people with a disability and sustainable housing models) and any financial implications;

Beyond our comments above regarding the lack of available housing stock, there are significant problems arising from the general age and condition of the current housing stock.

It would be interesting to know whether HACT's maintenance costs are increasing. We have recently seen a spike in complaints by tenants about unacceptable levels of mould in HACT properties. A number of these cases have involved levels of mould deemed unsafe by

independent experts. Others have arisen in the context of long standing leaks which have been reported but not been repaired over a significant period of time.

We also see a significant number of individuals who have mental health issues which preclude living in high or mid-density areas. As HACT holds very few low density 1 bedroom properties, if these individuals are single and without children there is very little chance that their disability-related needs can be accommodated.

We note that HACT properties are often provided without curtains and older properties generally have limited or no insulation. This has a significant impact on energy consumption. We regularly see clients who report quarterly utilities bills in excess of \$1000.

5. The management and maintenance of social housing stock including the development of an asset management plan;

Comments about the relationship between HACT and Spotless have been made in the general section below.

6. The needs of social housing managers and all social housing tenants, including but not limited to:

- **current tenants;**
- **prospective tenants including those on waiting lists; and**
- **people socially and geographically affected by social housing allocation.**

In our experience, housing managers have at best a rudimentary understanding of the *Residential Tenancies Act 1997 (RTA Act)*. Housing level and senior managers also seem to have limited or no understanding of relevant legal concepts such as administrative law and indirect discrimination. The general understanding of HACT's obligations under the *Human Rights Act 2004* is also very poor and there is no evidence on HACT application, citizen or property files of any compliance with section 40B of the HRA. As a consequence of an apparent lack of understanding of administrative law principles, a new but worrying development of HACT refusing to consider fresh and additional supporting evidence on review appears to have crept into its internal review decision making processes. This flies in the face of clearly established and long standing principles of merits review.

It appears to us that housing managers and Gateway assessing officers carry case loads which are too large for adequate service delivery. We do not have clear information about the case loads carried by individual housing managers, but it appears that some deal with up to 200 properties at a time. We suspect that this contributes to poor file management and the failure to properly record decisions. We are also concerned that a high case load limits the manager's ability to keep track of tenants and makes it hard for managers to follow issues through within a reasonable time frame. Tenants in public housing have complex personal situations and needs. The proportion of people with disability in public housing is significantly higher than that of the general population, and there is an especially high proportion of people with mental health issues. These issues often affect the individual's ability to communicate and to cope with bureaucracy. Successful interaction between people with high needs and HACT employees requires patient trust-building and sufficient time to develop effective

communication. We have noted that there is a high degree of internal movement between HACT positions – we have observed that housing managers seem to shift to a new position every few months. This makes it much harder for the manager to build rapport or develop an understanding of tenants' issues.

7. Any other related matter.

The WRLC has concerns about the relationship between HACT and its maintenance contractor, Spotless. The main concerns are:

1. Neither Spotless staff nor HACT staff appear to have a clear understanding of the concept of 'tenant responsible maintenance' (TRM). Under the *RTA Act*, a tenant is only responsible for maintenance charges if the damage has been caused or allowed by the tenant. Repairs arising from fair wear and tear are not the responsibility of the tenant and the tenant should not be charged to them.

The standard process appears to be for Spotless to inform HACT of the charges for repairing damage at a property. HACT then raises a debt for the entire cost of the repairs and then relies on the tenant being able to appeal the charge if it is not owed. This represents a serious reversal of the onus of proof under the *RTA Act*. In a private tenancy, the landlord must demonstrate an entitlement to be compensated for damage. HACT demands compensation for all damage unless the tenant can prove that they are not legally responsible.

Where TRM debts are raised, there are no records on the HACT files of any consideration by HACT staff as to whether the debt is owed. We have seen examples where records held by HACT show that HACT is aware of causes of damage which are clearly not the tenant's responsibility and yet charges are still raised against the tenant. In one example, the record notes that the letter box was damaged by contractors sent to repair the roof of a property. This note is then followed by the sentence '[t]his is TRM'. In a dramatic example from several years ago, HACT referred a tenant to WRLC for advice and assistance in appealing a TRM debt which HACT was about to raise against her. The referral was made on the basis that HACT was aware of significant domestic violence towards the tenant over a 20 year period in the property, and was aware that some of the debt which would be raised would not actually be legally valid. There were also significant issues arising from the fact that the tenancy had lasted for more than 20 years and no major refurbishment had taken place during that time. It was clear to both HACT and WRLC staff that the majority of the debt would not in fact be TRM as it could be attributed to either domestic violence or fair wear and tear over an extended period. However, HACT's response to that situation was to refer the tenant for assistance to appeal the debt. It apparently did not occur to HACT staff that they could simply not raise the charges not owed. The practice was to raise a debt for the entire cost of returning a property to allocation standard and then wait for an appeal.

We note that in part this situation has now been dealt with by the implementation of a domestic violence-specific policy regarding TRM, but our subsequent experiences have raised concerns that the practice of raising a debt at first instance is still occurring in cases which don't involve domestic violence and the fundamental issue of the Territory as a matter of course raising debts without considering whether they are legally owed has not been resolved.

Few HACT tenants understand the concept of TRM and many would have limited ability to make legal arguments regarding liability. The process of making an appeal is often a highly complicated one involving the collation of evidence, as the tenant is, in effect, trying to prove a negative (that they did not cause or permit the damage). For applicants seeking allocation, the issue is even more serious because HACT will refuse allocation unless the applicant has agreed to start repayments on any vacated debts from previous tenancies. In practice, this means that people who are struggling financially have to make payments on debts which they may not owe in order to secure allocation. The stress and frustration caused by this arrangement is compounded by the fact that it can take more than 6 months for a decision to be made regarding a vacated debt appeal once it has been lodged with HACT. We have also been told by the vacated debts unit that they will no longer be considering requests for waiver of vacated debts, even where there are special circumstances justifying waiver. This is a major problem where a vacated TRM debt occurred several years previously and evidence of the cause of the damage is no longer available to form the basis of an appeal.

In our view, the practice of automatically raising TRM debts without HACT making a formal decision about whether the debt is owed is in many cases leading to the Territory receiving funds to which it is not legally entitled.

2. Record keeping by Spotless appears to be incomplete. We have seen instances of repairs requested by tenants not being recorded by Spotless or being recorded incorrectly. As we understand it, a call from a tenant regarding repairs is not recorded unless a job number is allocated to the call. We have seen cases where it appears that job numbers have not been allocated, particularly if the call is a second or subsequent report of the repair.
3. We have been told that HACT staff are not able to access all of Spotless' records regarding a particular property, as the electronic interface between the two organisations appears to only permit access to some form of extract from the Spotless records. WRLC understands that when a request to view documents about the maintenance of a property is made under freedom of information legislation, the only documents available are the documents held by HACT. Documents held by Spotless are never produced.
4. We have seen a number of cases where Spotless contractors have left cards saying that the tenant was absent when the contractor called in circumstances where the tenant was in the property at the time. In one of these cases, the tenant in question was agoraphobic and was unable to leave the property unless assisted by a support person. In that case, the card was left at a time when the tenant was aware that the contractor was scheduled to arrive and was actively anticipating the appointment. When the contractor did not appear, the tenant called WRLC to report the non-attendance, only to subsequently find the contractor's card in her letterbox.

Our other general concerns about HACT processes are:

- ✧ As mentioned above, we have been told by HACT staff that the vacated debts unit will no longer consider requests for waiver of vacated debts, even where there are special circumstances justifying waiver. In addition to the TRM debt

issues discussed above, this is particularly of concern in the case of vacated rent debts which arose from situations which would justify waiver (such as abandonment of a property due to domestic violence or mental health issues) and in cases where the current circumstances of the tenant or applicant make recovery of the debt counter-productive to the interests of the individual, the community and the territory by making the individual further reliant on support, health and other social services.

- ✧ A problem has emerged in the allocations process where an applicant challenges the validity of an offer made by HACT. HACT makes only two property offers to applicants on the waiting lists. If both offers are refused, the applicant is removed from the list and has to make a new application. Where an applicant has particular needs, HACT undertakes to make offers which are consistent with those needs. If an offer is made which is not consistent with the applicant's needs, the applicant is offered the opportunity to challenge the validity of the offer. However, in the case of a challenge to the validity of a first offer, HACT refuses to review the validity of that offer until after the second offer has been made and rejected. This amounts to making the right of review contingent on a future event, when such a right ought to be absolute under administrative law, and results in the applicant having to make a decision about the second property without knowing whether it is the first or second valid offer. We are concerned that applicants may enter into problematic or unsustainable tenancies in unsuitable properties because they fear that this is their last chance of allocation, when in fact the first offer may have been invalid. We strongly oppose any attempt to make rights of review contingent on future events – all reviews should be carried out as expeditiously as possible following the request. We also note that there are no guidelines explaining what is meant by the term 'valid', which has led to at least one case where the HACT manager asserts that an offer of a property in a high density complex to a couple with past drug issues and small children is considered 'valid'. We further note that the HACT website states (in the allocations policy) that "a total of two valid offers can be made to an applicant on the standard allocation list", but no mention is made of the limit on offers from the high needs and priority lists, which could be misleading.
- ✧ We also have concerns about the level of record keeping within Housing ACT. We have recently acted in a matter in which there was an exchange of emails between the tenant's lawyer at WRLC and HACT staff. Subsequent access to the file under FOI revealed that the correspondence had not been retained on file. Similarly, files obtained under FOI rarely contain files notes of telephone conversations with WRLC staff.

As noted above, we have found that those records of decision which are retained on file do not contain any reference to HACT's obligations under section 42B of the *HR Act*. Indeed, we have never seen any evidence of any consideration of relevant human rights in HACT files. On occasion we have written to HACT on behalf of tenants asking that a particular human right be considered. We very rarely receive a response to such a request.

We would welcome the opportunity to appear before the Inquiry to expand on the matters raised in our submission.

Should you have any queries regarding this submission, please do not hesitate to contact Ms Genevieve Bolton at our office on 6218 7922 (direct line) or gbolton@welfarerightsact.org.au

Yours faithfully,
WELFARE RIGHTS AND LEGAL CENTRE LIMITED

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