

North Australian Aboriginal Justice Agency

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14 March 2018

BY EMAIL: EPSC@nt.gov.au

Mr Russell Keith

First Clerk Assistant

GPO Box 3721

DARWIN NT 0801

Dear Mr Keith,

Submissions on the Residential Tenancies Amendment Bill 2018

Thank you for providing the North Australian Aboriginal Justice Agency (**NAAJA**) with the opportunity to comment on the Residential Tenancies Amendment Bill 2018 (the Bill).

We have set out our comments with respect to the above policies in the **attached** document.

We trust the comments and recommendations provided will assist the Economic Policy Scrutiny Committee to work towards finalising the Bill in a way that best balances the rights of landlords and tenants with due regard given to the circumstances of the vulnerable tenants that we service.

Should you have any queries, or require any further information, please contact myself or Clara Mills on 8982 5100.

Yours sincerely,

Priscilla Atkins

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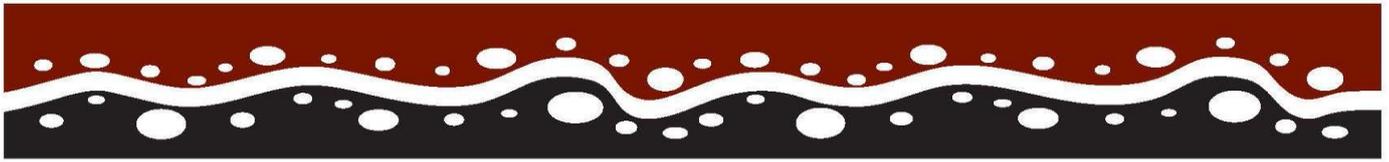
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Economic Policy Scrutiny Committee – Legislative Assembly of the Northern Territory

14 March 2018

Contents

Introduction	3
<i>About NAAJA</i>	3
The Policy Context.....	3
<i>Tenancy Databases and the Importance of Avoiding Homelessness</i>	3
<i>Scope of Policy Review</i>	4
Endorsement of DCLS' submissions.....	5
1. <i>Listing can be made only for particular breaches by particular persons</i>	
2. <i>Time limitation to when a listing may be made</i>	
3. <i>Restriction on who can make a listing</i>	
4. <i>Landlord's obligation to correct the database</i>	
5. <i>Abolition of fees for access to personal information listed</i>	
6. <i>Powers of the Tribunal</i>	
7. <i>Compensation for improper listings</i>	
8. <i>Allowing tenants to challenge listings during the transitional periods</i>	
NAAJA's additional submissions	8
1. <i>The Bill should prohibit listings with respect to tenancies entered into with the Chief Executive Officer (Housing)</i>	
2. <i>Personal Information</i>	
3. <i>Definition or guidance on "reasonable enquiries"</i>	
4. <i>"Out of date" should extend beyond amounts paid within 3 months</i>	
5. <i>Empowering tenants to ensure the quality of the listing</i>	
6. <i>Removal proposed section 136</i>	

Introduction

About NAAJA

The North Australian Aboriginal Justice Agency (**NAAJA**) provides high quality, culturally appropriate legal aid services for Aboriginal people across the Northern Territory in the areas of criminal, civil and family law, prison support and through-care services. NAAJA is active in systemic advocacy and law reform in areas impacting on Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Top End to provide legal advice and advocacy.

Due to the lack of a tenancy advice service that is able to meet the current and increasing demand for tenancy advice and representation in the Northern Territory, NAAJA assists urban and remote public housing tenants with advice and representation where necessary. NAAJA's civil lawyers assist mostly public housing tenants and clients seeking public housing in urban and remote areas. NAAJA also provides advice and representation to private tenants from remote communities.

Many of NAAJA's clients with tenancy and housing or homelessness matters have significant vulnerabilities, including trauma, homelessness, mental and physical illness, experience domestic violence, sole parenthood, and old age. NAAJA's housing casework and litigation focuses on:

- defending evictions from public housing;
- assisting public housing tenants who are at risk of eviction;
- assisting with requests for emergency repairs and applications for compensation for the failure to repair premises in accordance with the *Residential Tenancies Act* (NT);
- investigating alleged debts to the Department of Housing and Community Development (DHsg), for example maintenance and rental debts;
- assisting clients with applications for public housing, including priority housing; and
- addressing barriers to public housing, for example seeking reinstatement of cancelled applications and appealing unproven debts to DHsg.

NAAJA also plays a role in advocating for the rights of tenants with a specific focus on public housing tenants and homeless people in a range of forums. NAAJA identifies and provides solutions to systemic issues in housing law, policy and practice.

The Policy Context

Tenancy Databases and the Importance of Avoiding Homelessness

NAAJA's chief concern with respect to tenancy databases are their ability to prejudicially affect a person's ability to secure stable accommodation. For many of NAAJA's clients, a prejudicial listing in a tenancy database may mean that the person is subjected to homelessness.

In NAAJA's Response to the Housing Strategy Consultation Draft (February 2016), NAAJA outlined the crisis of homelessness and overcrowding in the Northern Territory.¹ NAAJA highlighted the severe lack of housing stock to meet increasing demand, and importantly, how the significant levels of homelessness impact upon other public housing tenants:

“The critical shortage of affordable housing and public housing in remote and urban Northern Territory is the primary driver of homelessness in the Northern Territory and contributes to the instability of public housing tenants, who feel pressured to provide shelter or refuge to homeless family members who simply have nowhere else to go. Unless this shortage is addressed, homelessness will only increase, with attendant consequences for mental and physical health, employment, school attendance and economic development.”

It is in this context NAAJA makes the submissions as outlined below and reiterates the importance of ensuring that there are as few as barriers possible for our clients, and other Territorians, from achieving stable accommodation.

Scope of Policy Review

NAAJA supports the regulation of tenancy lists which have to date been unregulated and have the potential to severely prejudice a tenant's ability to stable accommodation. NAAJA also welcomes the opportunity to provide feedback on the Residential Tenancies Amendment Bill 2018 (the Bill) and the opportunity to provide suggestions for improvement.

NAAJA has had the benefit of being able to review the submissions made by the Darwin Community Legal Service (DCLS) to the Economic Policy Scrutiny Committee (the Committee) and have endorsed many of their submissions (some with caveats) as outlined below.

NAAJA has also raised a number of submissions aimed at preserving as much privacy for tenants as possible, suggesting guidance around “reasonable enquiries” when attempting to contact former tenants who could be subject to a listing, expanding the definition of “out of date” listings to include listings with respect to all debts that have been fully repaid, empowering tenants to ensure the quality of the listing and allowing the Northern Territory Civil and Administrative Tribunal (the Tribunal) to review decisions in their review jurisdiction.

¹ Northern Territory Housing Issues Paper and Response to the Housing Strategy Consultation Draft – February 2016, p 6-9.

Endorsement of DCLS' submissions

This section details NAAJA's endorsement of DCLS' submissions.

Listing can be made only for particular breaches by particular persons

NAAJA shares DCLS' concern that the proposed paragraph 128(1)(a) could lead to tenants (the first tenant) being placed on a tenancy database for actions taken by their former co-tenants after the first tenant has terminated their tenancy.

We seek that this proposed paragraph is amended to make it clear that former co-tenants cannot be placed on a tenancy database for actions taken by their former co-tenants.

Time limitation to when a listing may be made

NAAJA shares DCLS' concern that proposed section 128 does not have any limitation period for when a listing may be made after a termination of a tenancy. Allowing an indefinite period of time for a landlord to submit a listing could mean that a tenant is prejudiced by a historical default by the tenant. DCLS provides the example that without a limitation period a tenant could be placed on a blacklist for 3 years in relation to a tenancy agreement that terminated 10 years beforehand.

Further, NAAJA is concerned that a tenant would be prejudiced in defending a more historical listing, and the longer the period of time between the termination and the listing, the greater the prejudice the tenant would suffer. NAAJA submits that following on from the above mentioned example, it would be extremely difficult for a tenant to defend a listing relating to a tenancy from 10 years before hand. Without a limitation period on listings, tenants will not be afforded proper procedural fairness.

NAAJA, however, would propose a shorter limitation period of 1 year. NAAJA believes that this is a more appropriate time limitation as:

1. It is too onerous on tenant to be required to retain their documents or other evidence they may rely on to defend their listing for a period of longer than a year, especially for those tenants who become homeless after their termination ; and
2. It is a reasonable balance of the rights of the tenants and landlords if a one year limitation is imposed for listing;
3. With a three year time limitation, it is theoretically possible that a tenant could be listed for a default that occurred up to six years prior to that point in time due to the operation of the limitation period, which we submit is too historical an incident for a tenant to still be prejudiced for.

Amounts owed to be substantiated by an order of the Tribunal or by admission

NAAJA wholly and emphatically endorses DCLS' proposal that amounts that are listed as a debt against a tenant are amounts that are either substantiated by an order of the Tribunal or by admission of the tenant.

NAAJA submits and reiterates that without such a safeguard there is a **high** risk that tenants will 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 *Residential Tenancies Act* or if the Tribunal decides that the landlord is owed less than the security deposit.

NAAJA makes this submission based on our experience in representing both private and public tenants at the Tribunal where it is routinely found that a landlord's initial estimate of what is owed on a rental debt is different to what the Tribunal finds to be the true rental debt or include improper charges prohibited by the *Residential Tenancies Act*.

Restriction on who can make a listing

NAAJA endorses DCLS' proposal that proposed section 129 be amended to ensure that personal information may only be listed at the request of a landlord or landlord's agent.

NAAJA submits that no other person has a legitimate interest in listing such information and therefore should be restricted from being able to request a listing.

Landlord's obligation to correct the database

NAAJA endorses DCLS' proposal that proposed section 130 be amended to ensure that landlords have a positive obligation to correct the database. In addition to the reasons outlined by DCLS and given that proposed section 128 allows a landlord, and not just an operator to list personal information in a database, it follows that a landlord should also be required to correct a listing, and not merely report it to an operator. This would provide an extra safe-guard for tenants against inaccuracies.

Further, and to ensure efficacy of these provisions, NAAJA endorses DCLS' proposal that penalties should apply to both landlords and operators if they do not correct the listing in the database (section 131).

Abolition of fees for access to personal information listed

NAAJA endorses DCLS' proposal that proposed section 132 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. We reiterate the reasons for this proposal as outlined by DCLS and note that Bill as currently drafted would not preclude the landlord or database operator to provide that information in a low cost way, such as via email.

Powers of the Tribunal

NAAJA endorses DCLS' proposal that proposed section 134 be amended to include guidance on what the Tribunal should consider when making an order in regard to listing personal information on a tenancy database. In addition to what DCLS have proposed as the considerations, NAAJA submits that some of the factors outlined in subsection 122(3) of the *Residential Tenancies Act* should also be considered, especially:

1. Whether the tenant has taken all reasonable steps to comply with his or her obligations under this Act and the tenancy agreement; and
2. Whether the landlord has consented to the failure to comply with obligations.

NAAJA also wholly endorses DCLS' proposal that victims of domestic violence have a specific power to apply to the Tribunal to remove a listing where the breach involved was caused by a perpetrator of domestic violence.

Further, we submit that the Tribunal should have as broad discretion as possible in exercising its power under proposed section 134 and therefore these factors for consideration should not be exhaustive.

Compensation for improper listings

For the reasons as they outlined, NAAJA endorses DCLS' proposed that the Bill should include a provision that would allow a tenant to seek compensation the listing of inaccurate, ambiguous, unjust or out-of-date information on a residential tenancy database.

Allowing tenants to challenge listings during the transitional periods

NAAJA wholly endorses DCLS' proposal to amend the Bill so that tenants can challenge current listings during the transitional period.

NAAJA submits that a tenancy database could cause the greatest amount of prejudice immediately after the termination of a tenancy when the tenant is still seeking accommodation. Allowing tenants to immediately challenge listings could greatly benefit tenants who are currently finding it difficult to secure housing due to an adverse listing.

NAAJA's additional submissions

This section details NAAJA's endorsement of DCLS' submissions.

The Bill should prohibit listings with respect to tenancies entered into with the Chief Executive Officer (Housing)

NAAJA are not aware of DHsg making listings in current databases against their former tenants. Given DHsg is the Landlord of last resort, and to avoid doubt, it is NAAJA's position that it would be inappropriate for the Department to make listings to tenancy databases.

We make this submission as tenants who exit Territory Housing either do this because:

1. They are seeking to enter into a private tenancy; or
2. They have been evicted and are likely to become homeless.

In either case, these tenants may find it difficult to find private tenancies given the stigma of previously living in public housing and there are strong social policy reasons to ensure that these tenants find housing as soon as possible.

We therefore submit that to ensure that there are as few barriers as possible for these tenants to obtain private rentals, tenancies entered into with the Chief Executive Officer (Housing) should be prohibited from being able to be listed in the tenancy databases.

Personal Information

It is noted that the operative information that is being listed in the tenancy databases is "personal information". For example proposed section 128 authorises a listing of personal information if all the provisions within that section are complied with.

The definition of "Personal information" is currently drafted widely and includes "means information or an opinion, whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion" and an individual's name.

On the assumption that the purpose of allowing for tenancy databases is to ensure that landlords can be informed about a tenant's past default of payments, then it is NAAJA's submission that the definition of "Personal information" is **entirely too** broadly drafted and would not provide a limit on a person's otherwise irrelevant personal information.

We submit that the definition of "personal information" should be redrafted so to only target the precise relevant information for the purpose of a tenancy database and to protect a person's personal information as much as possible.

We submit that this information should not include anything more than the person's name, the address of their former tenancy and the amount of money they are said to owe the landlord.

Definition or guidance on "reasonable enquiries"

Proposed subsection 129(2) provides that a landlord or database operator may list personal information about a person in a tenancy database even if they have not:

1. given the tenant a copy of the personal information;
2. taken other reasonable steps to disclose the personal information to the person;
3. given the person at least 14 days to review the personal information and make submissions objecting to its entry into the database or about its accuracy, completeness or clarity;
4. has considered any submissions made;

if the landlord or operator cannot locate the person after making “reasonable enquiries”.

There is no definition or guidance on what is considered to be “reasonable enquiries”. Without an indication of what reasonable enquiries might mean, NAAJA is concerned that landlords and operators will develop inconsistent practises and standards in attempting to locate former tenants which creates unnecessary risk in tenants not being aware that their personal information is about to be listed on a data base.

To provide guidance and allow for a level of consistent practice, NAAJA proposes that the Bill should include provisions outlining what “reasonable enquiries” mean.

NAAJA further propose that these reasonable enquiries include, but are not limited to:

1. sending a letter to any known current residential address of the former tenant;
2. calling the tenant on any known telephone number;
3. sending a text message to any known mobile telephone number of the former tenant;
4. emailing the former tenant at any known email address.

NAAJA proposes that the Bill should operate so that a landlord or operator will have made “reasonable enquiries” if they are able to get in contact with the tenant through one method of communication as outlined above, or any other way that the Landlord or database operate can do so, but will **not** have undertaken “reasonable enquires” unless they have attempted the 4 above mentioned methods.

“Out of date” should extend beyond amounts paid within 3 months

Proposed section 130 provides that a listing will only become “out of date” if the tenant pays back an amount within 3 months of the tenant being found to owe that money.

NAAJA proposes that this definition is amended so that a listing will become “out of date” whenever the tenant repays the amount owed and not just being limited to those listings that are paid back within three months.

NAAJA makes this submission as the Bill should only allow for, and a tenancy database should only be concerned with, the listings of outstanding amounts, and should not include amounts that have been fully repaid. This is particularly so given that the listing will last 3 years from the time of listing and is would be particularly unfair for a tenant to be prejudiced for a debt they have fully repaid.

Further, by allowing all listings to become “out of date” once the amounts have been repaid, this provides an ongoing incentive to repay the amount even beyond the initial three months of the amount being owed. There would be little or no incentive for a tenant to repay a debt after the initial three month period as they will continue to be stigmatised by the listing for the next three years regardless of whether or not they repay the amount.

Empowering tenants to ensure the quality of the listing

NAAJA submits that as the landlord has the ability to report inaccuracies with the listings in the data base, the tenant should also have a reciprocal ability, especially if the Bill is not amended to provide a positive obligation on the landlord to correct the accuracy of the data base.

The Bill should be amended so that the tenant can apply to a data base operator to change the listing in a way that mirrors the Landlord's ability to create a listing under proposed section 129, that being, the change in the database should occur after:

1. the tenant or database operator has given the landlord the proposed change to the personal information and the basis of the proposed change;
2. the tenant or database operator has taken other reasonable steps to disclose the personal information to the landlord;
3. the tenant and database operator has given the landlord at least 14 days to review the personal information and make submissions objecting to its entry into the database or about its accuracy, completeness or clarity; and
4. the tenant and database operator has considered any submissions made.

The benefit of including such a proposal is that it would allow tenants to safeguard their own listings and allow a mechanism for the tenant to have a listing corrected or removed without the need to go to the Tribunal. This will be a particularly effective mechanism if the landlord no longer wishes to maintain the listing or has passed away or is no longer contactable after a listing is made.

Listing should not be kept for any longer than three years

Proposed section 133 provides that the maximum period of time that a listing can be kept on a database is three years.

As NAAJA's position is that listings could adversely affect a tenant's ability to secure stable housing, and may lead to homeless, NAAJA would seek that a listing should only be maintained for a short a period as possible.

NAAJA's view that a listing period for more than 3 years would not fairly balance the rights of the landlords and tenants. In the event that the Committee receives submissions to the contrary, NAAJA submits that this provision should not be redrafted and 3 years should remain as the maximum period of time that a listing can be kept.

Removal of proposed section 136

Proposed section 136 means that there cannot be any review of a decision of the Tribunal when considering the removal or amendment of a listing.

NAAJA emphatically requests that this provision is removed to allow the Tribunal to consider the matter in their review jurisdiction.

NAAJA makes this submission as it is our view that a listing on the tenancy database can have a greatly prejudicial effect on a tenant's ability to obtain housing. For many of NAAJA's clients, a prejudicial listing could lead to our client remaining homeless indefinitely.

NAAJA therefore submits that given the potential consequences to our clients, there needs to be the appropriate mechanisms to ensure that the Tribunal make the correct and preferable decision. We submit that appeals to the review jurisdiction are especially necessary on these decisions as we anticipate that tenants will likely be unrepresented in these kinds of matters before the Tribunal which will typically result in a significant power imbalance against the tenant in prosecuting their case. NAAJA submits that this risk would be mitigated by allowing for the Tribunal to review these decisions in their review jurisdiction.