Submissions Review of the Residential Tenancies Act 1999 to the Economic Policy Scrutiny Committee

27 November 2019

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 and civil 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 entirety of the Northern Territory to provide legal advice and advocacy.

NAAJA assists urban and remote public housing tenants with advice and representation where necessary. NAAJA also provides advice and representation to private tenants from remote communities.

Many of NAAJA's clients with tenancy and housing matters have significant vulnerabilities, including trauma, homelessness, mental and physical illness, and 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* (the Act);
- appealing alleged debts to the Department of Local Government, Housing and Community Development (Territory Housing), 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 Housing.

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.

Our submissions with respect to the *Residential Tenancies Legislation Amendment Bill 2019* (the Bill) are contained in the following two parts which:

1. Make comment with respect to the limited scope of reform contained within the Bill; and

2. Make submissions and suggestions of the actual amendments contained within the Bill.

Part 1: Concerns with respect to the limited reform contained within the Bill

The extremely limited scope of reform contained within this Bill is disappointing and misses an opportunity to allow for safer and more affordable housing, not only for our client base, but all Territorians.

NAAJA has had the opportunity of viewing the Darwin Community Legal Service (DCLS) submissions and we **whole heartedly** support their concerns with respect to the limited scope of reform contained within this Bill, especially given:

1. this Committee recommended in May 2018 that "the Government undertake a comprehensive review of the Residential Tenancies Act to identify opportunities for improvement and propose amendments to contemporise the Act";

2. the Attorney-General, Ms Fyles has previously stated "we need that to make sure Territorians have access to safe, affordable housing, particularly in relation to the key issues of domestic and family violence"; and

3. More than 50% of Northern Territorians rent their home, suggesting that it would be undemocratic not to do a compressive reform of the *Residential Tenancies Act 1999* (the Act) which, in our submission, does not strike a fair balance for tenants.

We wholly endorse DCLS's request that the Committee make recommendations, or seeks a commitment on, the following key areas of reform:

- Establishment of an Independent Bond Board;
- Elimination of arbitrary evictions without reason;
- Regulation of bills and charges;
- Provision for fair and reasonable rents;
- Extension of protection/coverage of Act to ensure that housing is dealt with comprehensively and consistently;
- Facilitation of longer-term lease provisions;
- Establishment of minimum standards of habitability;
- Prohibition of discrimination in renting; and
- Better regulation of co-tenancy arrangements.

We also consider that there is a considerable amount of "low hanging fruit" for reform that would not be controversial, are priorities, are simple and could easily be added into this Bill. Enclosed with these submissions are NAAJA's submissions to the Attorney General's Department who previously sought consultation on potential reform. We consider that the following suggested reforms, which are further elaborated on in those submission, as that low hanging fruit:

1. That either the Act of the Housing Act (or both) should be amended to ensure that it is clear that it is the purpose of these Acts that evictions of public housing tenants are only to be as a last resort;

2. that subsections paragraphs 54(b) and (c) be repealed and replaced on one provision that prohibits a tenant from repeatedly causing a nuisance to a person residing in the immediate vicinity of the premises (paragraphs 100(1)(a) and (b) should be repealed and replaced to be consistent with this change);

3. That either the Act or the *Housing Act 1982* is amended to ensure that if a public housing tenancy is declared uninhabitable, then the tenant must be offered another an equivlant tenancy as soon as possible after the declaration;

4. Section 96B and subsection 97(1) of the Act is repealed so that only specific breaches of the Act are grounds for termination;

5. Paragraph 12(3)(c) be repealed to reduce liability for victims of domestic violence;

6. Amend the Act to ensure that in practice it operates so that as a gas leak, serious flood damage or a dangerous electrical fault is repaired within 8 days;

7. That subsection 57(3) is repealed to allow for repairs to be made on maintenance issues that predate the tenancy;

8. Amendments to sections 52 and 53, and we recommend they be amended so that:

    a. Those sections explicitly state that the physical safety of the tenant (whether it be domestic violence or otherwise) is a reasonable excuse for the purposes of those sections
    b. The tenant is not required to provide the landlord with the key in the event that the landlord is the perpetrator of that violence.

9. That prescribe advance rent is set as one week's rent, but absolutely no more than two weeks rent;

10. The repeal of section 99A to avoid future Governments could not place increasing reliance on section 99A;

11. Section 85 of the Act is repealed so that irregularities in notices of terminations render them invalid;

12. With respect to section 82:

    a. section 82(2) of the Act should be repealed so that a public housing tenancies are not terminated on the death of a tenant, allowing for the recognised occupants to be able to take over the tenancy;
    b. Insert a whole new section into the legislation that deals with the death of a tenant, consistent with the law in NSW and includes provisions to allow access to the property for the purpose of searching for a copy of a Will or personal papers; and
    c. Insert a section about how a legal representative goes about claiming the bond from a deceased person's tenancy.

13. Paragraph 105(2)(b) is amended so that the Tribunal only has to be satisfied that that there are circumstances that make it likely that the tenant will be able to pay all outstanding and future rent in relation to the premises.

Part 2 – Submissions on the amendments proposed by the Bill

The following submissions are made with respect to the proposed amendments contained within the Bill

Clause 4 – condition reports generally

1. We support the amendment contained within this clause.

Clause 6 – Keeping pets

2. We share DCLS' concern that a possible unintended consequence is that the current wording could be interpreted to mean that a tenant could be breached for having a pet visit their property temporarily.

3. A possible solution to this concern would be to define "keep a pet on the premises" in a way to ensure that animals that are only temporarily or incidentally on a premises will not result in a breach of the tenancy agreement and or will not have sections 65A and 65B apply to those circumstances.

Clause 7 - Tribunal may order tenant to let landlord enter premises

4. We reiterate our previous submissions to the Attorney General's Department, that being we consider that section 77, for the most part, is sufficient to ensure that a landlord is able to enter into a premises.

5. We note that in practice, if there are concerns that a tenant will try to resist the landlord entering the premises, the landlord can register the order of the Tribunal with the Local Court and then the bailiff of the Local Court can then enforce the order. This is the appropriate way that such a matter should be dealt with. This does not require any legislative change.

6. We share DCLS' concerns that excluding the landlord or Agent from civil or criminal responsibility is unprecedented and potentially dangerous, especially given that the exclusion is on the incredibly weak standard of "acting in good faith". This is an unbelievably short cited amendment especially given that the bailiff of the Local Court can be the person to enforce any order of entry.

General comments on proposed Part 15, Division 2

7. While it appears that the impetus of this of Part 15, Division 2 is to facilitate the "Room to Breathe" program of the Department of Local Government, Housing and Community Development (Territory Housing), which we wholly support, we do not support the inclusion of Division.

8. Our objection is because:

    a. There is nothing in this Part, the Bill, Explanatory Statement or other documentation to suggest that this Part is limited to facilitating the Room to Breathe program;

    b. Other mechanisms could be used, such as entering into a deed with a tenant to effect the needs of the program, that would avoid the need to terminate a tenancy and thereby also avoiding the risk that a tenant would become homeless.

9. We wholly accept that it would not be the intention of Territory Housing to use this Division as a means to permanently terminate a tenancy and that this Part is for the purpose of facilitating a beneficial program, however, much of NAAJA's case work involves disputes with various departments of the Northern Territory Government about what is or is not excessive use of government power. In our experience, seemingly begin and contained provisions of Northern Territory legislation have been relied upon beyond what was the initial intention of those provisions to the disadvantage of our clients. We are therefore of the view that the fewer provisions that could result in a reduction of our clients rights, such as a power to terminate tenancies, the less chance

that this will negatively impact our clients.

10. Further, and as discussed below, the security of the tenancy is undercut by provisions in the Part that only require "reasonable steps" to consult on a termination or an "undertaking" to enter into a new agreement. These watery words increase the chances that our clients will be negatively affected by these provisions.

Proposed section 139

11. Paragraph 139(1)(a) only requires the CEO (Housing) to take "reasonable steps" to consult on a potential termination under this Part.

12. To ensure minimal protections for tenants, "reasonable steps" should be defined so that, in the least, Territory Housing is required to write to the tenant requesting a face to face, give 2 weeks notice for the meeting, and then otherwise put in writing what is proposed as per subsection 139(2). This must be separate correspondence to the notice of termination as envisaged under subsection 139(3).

13. To further ensure protections for a tenant, subsection 139(4) should be amended so that instead of giving a written undertaking for a new tenancy, the CEO should just enter into a new tenancy agreement with the tenant. There is no reason why this could not occur, and it would ensure that a tenant would always have the legal right to a tenancy. It is unclear what the legal effect would be if Territory Housing gave an undertaking to enter into a new tenancy, but ultimately did not enter into a new tenancy agreement. It is also unclear if this breach would be justiciable, given that section 8 of the *Crown Proceedings Act 1993* prohibits a mandatory injunction against the Crown, suggesting that there may be limited remedies for such a breach. In our submission, it is much more simple, and protecting of rights, if the CEO were required to actually enter into a new tenancy agreement with the tenant.

Proposed section 143

14. We **strongly object** into this proposed section which would effectively remove any ability to have a termination reviewed by the Tribunal. If the Government is intending to be able to unilaterally take away the rights under a tenancy agreement, then as a matter of fairness, then the Tribunal must be able to review these terminations. Further, if these provisions work in the way they are intended, there should be very few applications that would be made to invalidate these terminations.

General comments on proposed Part 15, Division 3

15. The provisions in Part 15, Division 3 appear to give a legislative basis for the kinds of transfers that already occur through Territory Housing's internal policies.

16. In our view, those policies are reasonable and work reasonably effectively to ensure that tenants can transfer for the same reasons as outlined in proposed sections 144.

17. We therefore submit that there is no need to include these provisions, and it is concerning these provisions would allow Territory Housing to terminate tenancies and, for the reasons outlined 9, this creates an unnecessary risk to the security of a tenancy.

18. As an illustration, currently if a tenant and their family are in a house and have an extra child, it may mean that they would be entitled to a larger house. They would then notify Territory Housing. In due course, Territory Housing would advise the tenants of their new premises and would enter into a tenancy agreement for the new premises. Once the tenant enters into their new tenancy, they would effectively relinquish their old tenancy. Importantly, at no point in time would that tenant be with a tenancy agreement being in place, and thereby always having enforceable rights under the *Residential Tenancies Act 1999*. The proposed Part 15, Division 3 terminates those rights and putting the tenant at risk of insecurity.

19. Further, and while we acknowledge that Territory Housing is required to consult with the tenant, this Division allows Territory Housing to decide to terminate tenancy which might be a particularly disruptive process that may be contrary to the tenants needs and wishes.

20. For example, a tenant may be in a tenancy where either the neighbours or premises might pose a risk to that person. Currently in these circumstances the tenant would consider all the benefits of seeking a transfer against the negative aspects of a transfer and then make a decision as to whether to apply for a transfer. In the case of a house that is in disrepair, they may still wish to stay in the house because they are close to their children's schools or are otherwise content with the neighbourhood. In that circumstance, they might choose to seek emergency repairs rather than seek a transfer which would avoid the disruption of a move and avoid a situation where the tenant is moved into what they might consider a worse neighbourhood.

21. The provisions of this Division take away that agency, and may lead to an outcomes where a tenant is placed in a worse area or social circumstance.

Proposed section 145

22. For the same reasons as outlined in paragraph 13 above, paragraph 145(1)(b) should be amended to require Territory Housing to enter into a new tenancy, rather than merely just give an undertaking to enter into a new tenancy.

Submissions Review of the Residential Tenancies Act 1999

25 August 2019

Introduction

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Scope of this Submission

We note that the Discussion Paper: Review of the *Residential Tenancies Act 1999* (the Discussion Paper) focused on some issues with respect to the Act, however, these issues did not necessarily co-relate to the concerns that NAAJA comes across in their day to day practice.

In which case, the first part of these submissions concentrate on

1. NAAJA's concerns of how the Act should be improved for the benefit of our key tenancy clients – Aboriginal people in both remote and urban Northern Territory who are either homelessness, in public or community housing or are in low income private tenancies; and

2. How the Act should be improved in a way to ensure that there security in the tenancy and ensuring those homes are able to be well maintained.

The second part of these submissions directly respond to the Discussion paper. In the development of these submissions we have had the benefit of being able to review Darwin Community Legal Service's (DCLS) submissions. The second part of these submissions outlines where NAAJA endorses those submissions.

The Policy Context

As stated above, our submission focuses ways in which the Act can be improved to ensure that there are protections to the security of tenancies and

The Importance of maintaining tenancies and avoiding Homelessness

For the overwhelming majority of NAAJA's client who are subject to eviction proceedings, the consequence of their eviction is being exited into homelessness. An incredibly disproportionate number of our clients, and people who live in remote Northern Territory are currently homeless.

In practical terms the consequences of homelessness are significant and detrimentally affect a person's health, physical security, education, ability to seek and maintain employment and privacy:

1. **The health consequences of homelessness include depression, poor nutrition, poor dental health, substance abuse and mental health problems**. Homeless people also experience significantly higher rates of death, disability and chronic illness than the general population[1].

2. **The physical safety of a person who is homeless is often under constant threat.** Lacking a safe living environment, homeless people are more vulnerable to crime and personal attacks. These risks are greater for children and women, who are at greater risk of violence and sexual abuse and are often forced into harmful situations and relationships out of need[2]**.**

3. **For homeless Aboriginal and Torres Strait Islander women in Darwin, there is an increased likelihood of being forced into transactional sex, sexual assault and rape[3]**.

4. **Homeless persons are more likely to re-offend** as they are likely to be in situations where tensions, such as the need to survive or negative influences from other people, can lead to criminal re-offending[4]**.**

5. **Financial difficulty and insecure housing conditions make it hard to access education and training facilities on a sustained basis**. In addition to problems meeting the associated costs of education, such as for books, clothes and social activities, many homeless people are forced to frequently move around, which can cause disruptions in schooling, particularly for children[5].

6. **Homelessness creates barriers to gaining and maintaining employment**. Many homeless people lack basic education and skills training, due to disrupted or incomplete schooling. Lack of knowledge about employment rights and lack of bargaining power make homeless people particularly vulnerable to exploitation and discrimination at work. Homeless people may also face discrimination in the employment process on the basis of their inability to provide a fixed address. It is also more difficult to maintain employment because of unstable living arrangements, managing mental illness or substance addiction, and managing more immediate needs, such as caring for children or finding a place to sleep[6].

[1] E. Harris, P. Sainsbury and D. Nutbeam (eds), Perspectives on Health Inequity. Australian Centre for Health Promotion, University of Sydney, Sydney, 1999; A. Lucy, 'South Eastern Sydney Area Health Service Homelessness Health Strategic Plan 2004-09' in Parity, vol 17, no 8, 2004, pp6, 7.)
[2] M. Gleeson, 'Obstacles to Surviving Homelessness' in Parity, November 2000)
[3] Dr C Holmes and E McRae-Williams ('Captains' and 'Selly-welly': Indigenous Women and the Role of Transactional Sex in Homelessness, December 2012)
[4] Willis, M (2005) *Ex-Prisoners, SAAP, Housing and Homelessness* , Australian Institute of Criminology
[5] Australian Human Rights Commission Homelessness is a Human Rights Issue (2008) at 6.5
[6] Australian Human Rights Commission *Homelessness is a Human Rights Issue* (2008) at 6.6.

Homelessness has impacts on a person's privacy, with people experiencing homelessness possibly being forced to carry out their personal activities in public, such as sleeping, urinating, washing and eating[7].

We therefore submit that the key areas of social reform will be advanced if there is greater provision of housing. Those key areas of social reform are:

1. Domestic violence;
2. Prevalence of violence against women and sexual assault;
3. Recidivism;
4. Health (both physical and mental);
5. Education;
6. Employment; and
7. Youth justice.

We further submit that for housing to be able to provide the maximum amount of benefit to the above mentioned policy areas, the houses must be functional, not over-crowded, and allow for a healthy space for all tenants.

For these reasons, we note that:

1. it is vitally important to ensure that tenants have security over their tenancy to ensure they avoid homelessness;
2. the houses themselves need to be functional and allow for a healthy environment; and
3. The following submissions provide how the Act can amended to help ensure that security and functional outcomes.

[7]Australian Human Rights Commission *Homelessness is a Human Rights Issue* (2008) at 6.4

Part 1 – NAAJA's concerns not covered in the Discussion Paper

Legislative enshrinement of evictions as a last resort

1. The right to housing is a fundamental human right, which is recognised by article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and requires state parties (such as Australia) to take appropriate steps to ensure the realization of this right.

2. In practice, access to adequate housing is a fundamental necessity to ensure that health, education, employment and employment are realised to their fullest potential and to minimise risks to personal safety, domestic and family violence and destruction or threat to property rights.

3. For these, and a multitude of other reasons, evictions from public housing should be a measure of last resort.

4. This should not be controversial and, is in fact, a policy of Territory Housing that eviction of a tenant should only occur as a matter of last resort[8].

5. *Commissioner for Social Housing in the ACT v Radovanov (Residential Tenancies) [2011] ACAT 12 (14 February 2011)* (*Radovanov*) gives a clear and fair indication of what should be considered a "last resort" in the context of public housing. In that the decision, the Tribunal found:

   Evictions are a last resort to be employed only in those cases where there is clear repudiation by a tenant. Repudiation does not occur where the tenant has fallen on unexpected adverse circumstances that make compliance with the terms of the residential tenancy agreement impossible. Repudiation arises where the tenant has determined that he or she will not comply with the terms of the agreement. Thus there is a basic distinction between the case of 'cannot' and 'will not' comply with the terms of the residential tenancy agreement.

6. While we submit that the proposition in *Radovanov* is something that be given weight when the Tribunal considers its discretion when terminating public housing tenancies[9], we note that the in *Edwards v Chief Executive Officer [No 2]* [2016] NTCAT 317 the Tribunal decided that there is nothing in the subject matter, scope or purpose of the Act or the Housing Act:

   a. to support the above mentioned proposition; or

   b. that eviction should be regarded as a last resort[10].

7. It is also noted that these findings were made despite the fact that Territory Housing's policies provided that evictions should be a matter of last resort.

8. To Territory Housing's credit, in NAAJA's experience, the number of clients we have represented in eviction proceedings from public housing has been very few since around October 2017 (compared to an increadibly high point of early 2014). On that basis, it appears that Territory Housing are currently complying with their policies, we are simply seeking that this policy position is legislated so that it is protected beyond this current Government's policies.

9. To put this matter beyond doubt, **we recommend that either the Act of the Housing Act (or both) should be amended to ensure that it is clear that it is the purpose of these Acts that evictions**

[8] See paragraph 6.2 Territory Housing's Termination of a Tenancy Policy.

[9]

[10] *Edwards v Chief Executive Officer [No 2]* [2016] NTCAT 317 at [117]. Further, we respectfully disagree with this decision for a number of reasons, including that at the time the Northern Territory Government was receiving Commonwealth Funding under the Intergovernmental Agreement on Federal Financial Relations under the National Affordable Housing Agreement, which had objectives that could give rise to a basis for the presumption in *Radovanov*, and consistently with Brennan, Deane and Dawson's finding in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethic Affairs* (1992) 176 CLR1 at 38, allowing such an interpretation of the Act would favour a construction which accords to Australia's obligation under Article 11 of the ICESCR.

of public housing tenants are only to be as a last resort. This should be done in a way that makes it clear that whether or not an eviction is of last resort is a consideration that is open to the Tribunal and to put the matter further beyond doubt the explanatory statement to the amending legislation should reflect

Duplication of nuisance

10. Paragraphs 54(b) and (c) provide that a tenant must not:

    (b) cause or permit a nuisance on the premises, ancillary property or on land adjacent to or opposite the premises; or

    (c) cause or permit ongoing or repeated interference with the reasonable peace or privacy of another person in the other person's use of premises or land in the immediate vicinity of the premises to which the agreement relates.

11. As a corollary, paragraphs 100(1)(a) and (b) provide that the Tribunal may terminate a tenancy and order vacant possession if it is satisfied that a tenant has:

    (b) repeatedly caused a nuisance on or from the premises or repeatedly permitted a nuisance to be caused on or from the premises; or
    (c) repeatedly caused or repeatedly permitted an interference with the reasonable peace or privacy of a person residing in the immediate vicinity of the premises.

12. We note that that in *Chief Executive Officer (Housing) v Steiner* [2008] NTMC 9 (21 February 2008)[11] the Local Court held that to establish nuisance the landlord:

    must show there has been a substantial degree of interference with their enjoyment [*of a neighbour's house*]*. What constitutes such a substantial degree of interference must be decided according to what a reasonable standards for the enjoyment of those premises. What are reasonable standards must be determined by common sense, taking into account relevant factors, including what the Court considers to be the ideas of reasonable people, the general nature of the neighbourhood and the nature of the location at which the alleged nuisance has taken place and the character, duration and time of occurrence of any noise emitted and the effect of the noise.*

13. We therefore consider that the substance of the prohibitions paragraphs 54(b) and (c) are duplications of each other (and therefore so is paragraphs 100(1)(a) and (b)). Having this effective duplication creates some level of confusion for both tenants and landlords around their rights and obligations, and we submit that this should be rectified.

14. Additionally, we consider that the conduct that should reasonably be regulated here is nuisance caused to neighbours (and in fact, by definition, nuisance can only be caused to neighbours). This is proper public policy and would not overreach to try and regulate (and therefore allow an eviction for) the making of noise that does not actually effect a neighbour in the vicinity of the premises.

15. On that basis **we recommend that subsections paragraphs 54(b) and (c) be repealed and replaced on one provision that prohibits a tenant from repeatedly causing a nuisance to a person residing in the immediate vicinity of the premises (paragraphs 100(1)(a) and (b) should be repealed and replaced to be consistent with this change)**.

Termination of a tenancy when the premises are uninhabitable

16. Section 86 of the Act allows the landlord to terminate a tenancy in the case of flooding, where the continue occupation of the premises is a threat to the health or safety of a person or where the

[11] at [73] citing Oldham v Lawson (1) [1976] VicRp 69; [1976] VR 654

premises have become uninhabitable.

17. This provision is entirely justified, however, in NAAJA's experience, particularly with respect to housing in remote Aboriginal communities, there is sometimes some concern with our clients that their tenancies are in such a state of disrepute that if they seek repairs, their landlord might deem the house uninhabitable, and the tenants could be evicted. We are aware of occasions in the past where this has made tenants reluctant to agitate for repairs.

18. To be fair to Territory Housing, NAAJA is not aware of a time when this has occurred (or at least without them providing another tenancy in substitution), and we would be less concerned of this under their current policies than we would have been 5 years ago, but the fact remains that if a house uninhabitable, the tenant no longer has any right to a tenancy, and therefore has no security.

19. **We would therefore recommend that either the Act or the Housing Act is amended to ensure that if a public housing tenancy is declared uninhabitable, then the tenant must be offered another an equivlant tenancy as soon as possible after the declaration**.

Eviction on the basis of any term of an agreement and serious breaches of a tenancy agreement

20. Currently subsection 96B(1) allows for a landlord to seek eviction based on:

    a. a breach of a term of a tenancy agreement that is a term of the agreement by virtue of the Act; or

    b. if it is a term which permits the landlord to terminate the agreement under the agreement

    which is not remedied in accordance with the subsections of section 96B

21. Our view is that evictions should only be carried out as a matter of last resort, and for breaches of the tenancy agreement that would justify an eviction. We consider the only justifiable basis for evictions are:

    a. Failure to pay rent;

    b. Where the tenant has engaged in illegal nuisance[12]/illegal conduct;

    c. Where the premises are flooded, unsafe or uninhabitable[13]; and

    d. A serious breach of the tenancy agreement[14].

22. Each of the above mentioned grounds for termination already have specific provisions in the Act that allow for termination.

23. To allow for an eviction for any other kind of breach of the agreement would not be a fair balance between the rights and responsibilities of tenants and landlords. A breach outside of the above mentioned grounds is best remedied through compensation. In short, tenancy agreements should operate much in the same way that contract law operates: the above mentioned terms are conditions, and can be remedied by termination, where every other term is a warranty and is most appropriately remedied through compensation.

24. With respect to "serious breach of the tenancy agreement", and consistently with our position above, we consider that the only other breach that should give rise to termination is the grounds of eviction under subsection 97(2), where the tenant has caused or permitted or is likely to cause or

[12] As per the meaning of nuisance as outlined in *Steiner*
[13] Subject our submissions in paragraph 40 to 43
[14] Subject to our submissions in paragraph 48 to 50

permit serious damage to the property or personal injury to the landlord or a person on the vicinity.

25. This is a justifiable basis for eviction in private tenancies as there may be circumstances where an eviction may be necessary to protect a person and the asset of the landlord.

26. **We therefore recommend section 96B and subsection 97(1) of the Act is repealed**.

Protection from vicarious liability for Domestic and Family Violence survivors in Public Housing

27. Subsection 12(3) of the Act allows for an immunity for the tenant against vicarious liability for damage caused by a third party as an act of domestic violence. Paragraph 12(3)(c) however only provides this immunity if it is "reasonable in all circumstances" that the tenant is not considered responsible for the damage.

28. It is our view that it will always be reasonable for a tenant who has suffered damage due to domestic and family violence to be immune from liability for that damage.

29. **We therefore recommend that paragraph 12(3)(c) be repealed**.

30. We note that if this paragraph is repealed, this would not affect the rights of the landlord to seek compensation for the damages against the perpetrator, and we would submit that that the perpetrator would always be the most appropriate defendant to any claim for compensation by the landlord.

31. Even if such a repeal would be considered too cumbersome on private landlords, in the very least, paragraph 12(3)(c) should not apply to tenancies entered in under the *Housing Act 1982* as it could not be said that this would be too cumbersome for the Northern Territory Government.

Periods of time for emergency repairs

32. The effect of section 63 of the Act is that all a landlord has to do is make arrangements for repairs within 5 days (ie the landlord does not have to do anything up to that point) and then ensure that the repairs are made within 14 days of the notice. This is in circumstances as extreme as a **gas leak, serious flood damage or a dangerous electrical fault** in a tenancy.

33. We have no doubt that ***no*** Member of Parliament would stand for such limited service in their own homes or any one of their constituents' homes.

34. On this basis, and to reiterate the CAALAS/NAAJA's 2010 submissions, there should be **no controversy** in **amending section 63 so that the landlord must make arrangements for the repairs as soon as possible after receiving the notice and making the repairs the repairs within three days of the notice**.

35. While this would be a considerable change to the way that this section operates, it is not unreasonable and would more fairly reflect a balance of rights between the tenant and the landlord, especially when you consider a realistic time table of how an application to the Tribunal would work. As an example, we would consider the following would likely be the quickest that the matter could be heard (i.e. assuming that the applicant moves as quickly as possible to apply and there are no adjournments):

    i. Day 1 – the Notice is provided to the landlord;

    ii. Day 4 – the first day on which the tenant can apply to the Tribunal for an order for repairs;

    iii. Day 6 – most likely the earliest day the Tribunal could hear the application;

iv. Day 8 – the repairs are made.

36. We submit that it should not be controversial to amend the Act to ensure that in practice it operates so that as a gas leak, serious flood damage or a dangerous electrical fault is repaired within 8 days.

Landlord's obligation to repair pre-existing damage

37. Subsection 57(3) of the Act is that pre-existing damage to a property that is known to the tenant at the time will not be in breach of the Landlord's obligation to repair, so long as they are not emergency repairs, the tenant waives their rights to have the repairs made and the property is otherwise habitable.

38. Given the massive power imbalance between the landlord and tenant (especially those in public, community or low rent tenancies) we are greatly concerned that this subsection means that desperate prospective tenants will unduly sign away their rights and entrench significant maintenance and repair issues for the life of the tenancy.

39. We assume that the legitimate policy intent of this provision is to ensure that desperate tenants, who are willing to forgo minor maintenance issues, can access housing. This might be a reasonable intent, and we are not advocating that a desperate tenant could not move into a tenancy where they are aware of some outstanding maintenance issues, but that should not prohibit the tenant from seeking to have the property repaired once they have entered into the tenancy agreement.

40. **We therefore recommend that subsection 57(3) is repealed**.

Harsh, unconscionable or unfair terms

41. Section 22 of the Act allows for the Tribunal to rescind or vary a term of a tenancy agreement if it is satisfied that it is harsh or unconscionable.

42. There is no definition or guidance on what is considered "harsh".

43. We are also concerned that the term "unconscionable" may be interpreted to mean that the term of the tenancy agreement would need to reach the high bar of something akin to "unconscionable conduct" before the Tribunal would consider rescinding or varying a term of a tenancy agreement. We say that it is a high bar, because the applicant would need to show:

    v. the relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee;
    vi. the donee's unconscionable exploitation of the donor's disadvantage; and
    vii. the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interests.

44. This would be a difficult claim for an applicant to make, especially if they were unrepresented, and we would assume that it was not really the intent to only regulate conduct that was so unacceptable as to arise to being "unconscionable".

45. To resolve these two concerns, we reiterate CAALAS/NAAJA's 2010 submissions and **recommend that section 22 be amended so to reflect the provisions of the *Australian Consumer Law* with respect to unfair contract terms, specifically section 24 and 25 of that Law.**

Payment of rent

46. We reiterate the concerns raised in CAALA/NAAJA's 2010 submission regarding some landlord refusing to accept cash payments for rent.

47. **We recommend that section 35 be amended so that it specifically states that rent can be paid in any form that is legal tender.**

Regulation of Advance rental payments

48. Section 39 of the Act prohibits requiring more the payment of more than "one rental payment period's rent under a tenancy agreement before the end of the first rental payment period of the tenancy".

49. It is correct and equitable to regulate a maximum advance payment. Our concern is that the "one rental payment period's rent" is defined by the tenancy agreement. This could mean that the actual number of weeks rent could be any number of weeks rent, and probably most likely, between 1 and four weeks rent.

50. For prospective tenants, a larger advance payment will create further barriers to securing stable and adequate housing and, in NAAJA's experience, an advance payment has often resulted in a prolonging of homelessness while the prospective attempts to gather the money for the advance rent. This can be significant given that the prospective tenants also need to acquire sufficient funds for a bond[15].

51. **We therefore recommend that section 39 is amended so that the actual amount of weeks of rent in advance is prescribed as the maximum advance payment. We further recommend that this is prescribed as one week's rent, but absolutely no more than two weeks rent**.

52. We are further of the view that it is counterproductive to require rent in advance for protective tenants of public housing. This is because any prospective tenants are homeless and therefore there is an acute need to house these people as soon as possible but, as mentioned above, requiring advance payments in addition to a bond can create a significant delay in being housed.

53. **On this basis we additionally recommend that tenancy agreements that are made under the Housing Act are prohibited in seeking an advanced payment of rent.**

Notice for Public Housing Tenants of Rent Increases

54. Subsection 41(5) of the Act operates, in part, so that public housing tenants are not given the standard 30 days' notice of an increase in the market rate of rent they are being charged (as determined by the Minister) or notice of the date from which the increase takes effect.

55. We do not see a justifiable reasons as to why public tenants should not be afforded the same rights of notice as any other tenant, and in fact, we argue that it is beneficial to Territory Housing if they were subject to such a requirement as it would ensure that their tenants are fully informed and they have time to be financially prepare for the change. We in fact consider that 90 days' notice might be more appropriate for public housing tenants.

56. We also consider that while it reasonable that public housing tenants are not required to be given 30 days' notice of the increase of the rent payable due to a cancellation or adjustment of a rent rebate (as this may occur any time an induvial does not file a rental rebate application or their income changes, therefore making it administratively prohibitive to require 30 days' notice of the change in rent), we do consider it vitally important public housing tenants are provided at least 30 (and preferably 90 days) notice of change of notice if the method of calculation of the rebate changes which results in the increase of a rebate. By way of example, in October 2018 the calculation of the rebate went from 23% of a new tenant's income being payable as rent to 25% of a new tenant's income being payable as rent. We consider that notice of such a change is justifiable and should be

[15] In fairness to Territory Housing their policies do allow for 50% of the bond to be paid by an agreement to pay, but not the advance payment, and generally only if the tenant has attempted to obtain financial assistance from service providers.

required as:

a. This is significant information for tenants;

b. It is change that presumably will only occur once over a period of a number of years (meaning that it would not be cost prohibitive to inform tenants of this change)

c. This fundamentally changes the way that rents are calculated and the future of the payable rent (meaning that all rents will be going up except in short term and irregular periods where a person's income has dropped).

57. **On this basis we recommend that section 41 is amended so that Public housing tenants are given 90 days' notice of:**

    a. **an increase in the market rate of rent they are being charged (as determined by the Minister); and**

    b. **a change in the overall calculation of the rental rebate.**

58. We make this recommendation partially on the basis that some of our clients were unaware or confused about the October 2018 changes to their rental rebates and payable rent.

Periods of time between inspections

59. Subparagraph 70(2)(b)(i) allows tenancies to be inspected as regularly as every three months (unless the tenancy agreement provides for longer periods of time).

60. As outlined in DCLS' submission, there is a noticeable trend that more people are renting as tenants for longer periods of time. In circumstances where a tenant has been in the same premises for more than a year, especially where there has been no issue previously, a three monthly inspection is contrary to a tenant's right to quite enjoyment of the premises. Inspections can require persons to take time off work and be unnecessarily stressful.

61. Further, given the landlord's power to enter the premises under section 69, 71, 74 and 75, there does not appear to be any justification that would require a landlord to inspect the premises any more than once every three months.

62. Additionally while there is a theoretical possibility that a tenant could negotiate with the landlord for a longer period of time between inspections, this is less likely to occur due to the power imbalance between tenant and landlord, especially for tenants in public, community and low income tenancies.

63. **We therefore recommend that subparagraph 70(2)(b)(i) is amended so that inspections can only occur once every six months.**

Need to reinstate the power for the Tribunal to hear an application

64. Former section 126 of the Act allowed either a tenant or a landlord to make an application to the Commissioner of Tenancies if:

    a. a breach of the tenancy agreement or of a provision of this Act is alleged to have occurred; or
    b. a provision of this Act permits the application to be made to the Commissioner; or
    c. a tenancy dispute has arisen between the parties to a tenancy agreement or between tenants.

65. Currently there is no such power. Without such a power, the Tribunal cannot adjudicate on applications such as:

    a. Whether or not a term of tenancy agreement is harsh or unconscionable (pursuant to subsection 22(1)); or

    b. Whether or not it was reasonable excuse for the purposes of section 52 for a tenant to alter locks to avoid an incidents of domestic violence.

66. **We therefore recommend a reinsertion of the former section 126 to allow the Tribunal to hear applications.**

Part 2 – Consideration of the Discussion Paper

Issue 1: Application of the Act

Boarders and lodgers

67. We support of DCLS' position that such kinds of arrangements should potentially be considered a tenancy agreement. We recommend:

    i. If this is accepted - it will be necessary that the Commissioner updates their fact sheets;
    ii. If it is not accepted - we would recommend that the Commissioner update their fact sheets; and
    iii. In either case - have them translated into the major Indigenous languages spoken in the Northern Territory.

Amending section 6 of the Act

68. We support DCLS' position that a broader range of accommodation arrangements should be considered tenancy agreements for the purposes of the Act.

69. We support DCLS' recommendation that:

    i. all accommodation arrangements should be deemed to be a tenancy agreement for the purposes of the Act.

    ii. Any party to the agreement wishing to exclude such operation can apply to the Tribunal to have the matter determined.

70. Because we also support DCLS' recommendation that rooming/boarding houses or motel accommodation should be considered tenancy agreements if more than 30 days consecutive occupation, we would suggest a slight change to the factors that the Tribunal should have regard to, that being (where the bolded is our amendments):

    i. The nature of the accommodation arrangement;
    ii. **The length of the accommodation arrangement**[16];
    iii. whether some form of bond or security paid has been paid;
    iv. an intention by the parties that it is to be long term;
    v. whether there have been regular and consistent rental payments; and
    vi. whether the dwelling occupied by the tenant is being used for residential purposes despite other services or activities undertaken on the property.

71. We would like to stress, however, that this amendment should be worded in such a way so that the absence of one of the above mentioned factors by themselves should not by itself mean that the accommodation arrangement is not a tenancy agreement. If this was not the case, persons leasing the premises could simply not charge a bond, for example, just to ensure that they are therefore not bound by the provisions of the Act.

72. We also support DCLS' recommendation that:

    iii. long term supported accommodation and on and off campus accommodation provided and operated by tertiary educational institutions are considered to be tenancy agreements;
    iv. retirement villages are not considered tenancy agreements for the purposes of the Act;

[16] We would also recommend that the explanatory statement to such an amendment would provide guidance explicitly stating that it would be expected that rooming/boarding houses or motel accommodation that extends beyond 30 days should be more likely be considered a tenancy agreement, and other forms of accommodation arrangements should more likely be considered tenancy agreement if they extend for more than 30 days.

v. North Flinders (International House) is omitted from section 4 of the *Residential Tenancies Regulations 2000* (the Regulations).

73. We further support DCLS' recommendation that charities that provide accommodation for charitable purposes should be considered a tenancy agreement for the purposes of the Act, but they can impose additional "house rules" that are not harsh or unreasonable.

Issue 4: Additional Fees and Charges

74. Similarly to DCLS, we recommend that "lease break clauses" are prohibited.

75. We also agree that any actual loss suffered by the landlord for an early break of a lease can seek compensation under section 122.

76. We also agree with DCLS and recommend that after a consideration of the factors in section 122, a maximum amount of compensation that can be sought for an "early release" should be imposed as per section 107 of the *Residential Tenancies Act 2010* (NSW).

Issue 5: Condition reports

77. We support DCLS' recommendation that Condition Reports, Information Sheets and Tenancy Agreements are mandated in the legislation to be of a standardised form and form part of the Regulations of the Act. We would seek that prior to legislation these standardised documents that the Government must allow for meaning consultation prior to their enactment.

78. We also support DCLS' recommendations that:

    a. photographs are not solely relied upon as a basis for a condition report;
    b. timeframes for tenants to complete an incoming condition report extended to 14 days after moving in and moving out; and
    c. Mandating that any strata title or body corporate rules or regulations are included information in any lease that intends to bind tenants by said rules.

Issue 6: Co-tenants and Sub-tenants

79. In the event that a co-tenancy needs to broken, a balancing of rights would allow for:

    a. The exiting tenant to no longer be liable for rent or damage after the end of their time in the tenancy and (subject to paragraph b below) have their portion of the bond be returned; and

    b. The other tenant(s) to be able to consider termination of the tenancy overall without being liable for any financial loss of the landlord[17], ensure that any rent arrears or damage caused by the existing tenant can either be taken out of the exiting tenant's portion of the bond and or that liability be determined be owed by the exiting tenant; and

    c. The landlord to be able to be compensated for any rent arrears or damage owning from the exiting.

80. On this basis, we recommend that that the Act be amended so that:

    a. An existing tenant can provide notice to the landlord and other tenants apply to have themselves removed from the tenancy and have their portion of the bond repaid to them;
    b. the other tenants are able to provide their own notice of termination of the tenancy without being liable for any financial loss;

[17] We consider that it would be inequitable to hold the other tenants liable for the cost of a termination when they have no control over the action of the exiting tenant.

c. After receiving the notice referred to in paragraph a above, the other tenants and landlord can apply to the Tribunal to seek an order for compensation payable to the landlord for any damage (either by way of the portion of the existing tenant's bond being retained by the landlord or paid as compensation or both); and
d. In the absence (or dismissal) of any application contemplated under paragraph d above, the exiting tenant is to be returned their portion of the bond.

81. In further support of the recommendation that an existing tenant should be relatively easily able to end their portion of the tenancy, we note that this kind of provision could be relied upon by persons avoiding domestic violence.

Issue 7: Rent Increases

82. We consider that it is inequitable that rent increases can occur if a tenancy agreement allows for an increase, especially if the tenant does not have the option to then terminate the tenancy. We note that the *Australian Consumer Law* prohibits one party varying the price payable under a contract without the right of another party to terminate the contract[18]. **We would therefor expect that the Parliament would afford Territorians the same protection with respect to their tenancy agreements**.

83. We further note that given the desperation of some tenants to enter into any agreement to secure accommodation, the Parliament should not take any comfort in this inequitable practice on the basis that the tenant "freely" entered into an agreement to allow for rent increases.

84. We therefore recommend that section 41 is amended so that a tenant can elect to terminate their tenancy without any form of penalty[19] if rent is increased.

85. We also support DCLS' recommendation that:

    a. Amend section 41 to reflect section 44(4A) of the *Residential Tenancies Act 1997* (Vic) and insert terms to abolish to common law right for parties to agree to an increase in rent outside of the legislated terms;
    b. Increase the notice period to 60 days for an increase in rent;
    c. Only one increase every 12 months; and
    d. Legislate to ensure reasonable caps on rental increases.

86. We further recommend that in terms of regulating reasonable caps on rental increases, we would reiterate the CAALAS/NAAJA's 2010 submissions' recommendation that section 68 of the *Residential Tenancies Act 1997* (ACT) is replicated in the Act.

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

Issue 8: Repairs, maintenance and security

88. We agree with DCLS' position on the need for amendments to sections 52 and 53, and we recommend they be amended so that:

    a. Those sections explicitly state that the physical safety of the tenant (whether it be domestic violence or otherwise) is a reasonable excuse for the purposes of those sections; and

[18] This is considered an unfair term under paragraph 25(f) of that law.
[19] I.e. that the landlord cannot seek a lease break fee or seek compensation under section 122 of the Act.

b. The tenant is not required to provide the landlord with the key in the event that the landlord is the perpetrator of that violence.

89. We support DCLS' recommendation that section 51 of the Act should be amended to ensure that the landlord must take all steps necessary to require the owners cooperation to make repairs to common property as quickly as possible.

Issue 9: Landlord's right to enter premises (breaking locks)

90. We consider that section 77, for the most part, is sufficient to ensure that a landlord is able to enter into a premises.

91. We note that in practice, if there are concerns that a tenant will try to resist the landlord entering the premises, the landlord can register the order of the Tribunal with the Local Court and then the bailiff of the Local Court can then enforce the order. This is the appropriate way that such a matter should be dealt with. This does not require any legislative change.

92. We do, however, support the Discussion Paper's recommendation that section 77 should be amended to that that if a landlord damages an item if the tenant while gaining entry, the landlord mist organisation and pay for its replacement or provide compensation, except where that item was used to prevent entry.

Issue 10: Termination

93. With respect to employment based tenancies, we support DCLS' recommendation that:

    a. Inserting standard clause that terminate lease agreement that relate to postings due to employment to include 8 weeks' notice and supporting letter from employer;
    b. Amending section 91 to reflect that all tenancies that are connected to employment have a notice period of at least 28 days and can be shortened only by mutual consent of both parties;
    c. This period of 28 days may be extended by application to the Tribunal and the Tribunal must consider other applications that may be in process under the *Fair Work Act 2009* (Cth) and cannot terminate tenancy before those actions are complete;
    d. Amend section 91(3) to state *Fair Work Act 2009* (Cth);
    e. Deletion of section 85 or rewriting to extinguish common law notification periods and have notification period for periodic tenancies as 42 days; and
    f. Amending section 96B to clarify that the test is that the landlord is to be reasonably satisfied that the tenant has (or has not) taken the required steps.

Issue 11: Roles of the Court or Commissioner on termination and other issues

94. We do not consider it necessary for section to be amended. Our understanding of that provision is that the effect of the termination order and vacant possession is suspended for the period of the order and the tenancy agreement remains operative in the mean time.

95. This means that if the tenant undertakes further conduct that would amount to conduct that warrants termination then the landlord would have the ability to apply to the Tribunal for the termination of the tenancy agreement. The Tribunal would then be at liberty to decide how quickly the matter should be brought on, and consider the new conduct in the context of the existing order of termination.

96. Further, we are not aware of any incidents or cases where termination has been granted, an order of suspension has been made under section 105 and then the tenant has further breached their tenancy agreement. Notwithstanding our comments above, we frankly do not consider that there is an actual need for changing this provision as proposed by the Discussion paper.

97. We are, however, concerned about unrepresented tenants who face eviction proceedings and the extent that they would know whether or not they could apply under section 105 for a suspension of an order of termination and vacant possession. We therefore support DCLS' recommendation that it

should be mandatory that the Tribunal consider a suspension under section 105 after any kind of termination (rather than relying on the tenant to seek an application under that section).

Issue 12: Service of Notices

98. We support DCLS' recommendations that:

    a. Section 154 is amended to include:
        i. 154 (a) ….last-known place of business or residence or postal address, where all reasonable attempts have been made to request a tenants new address.
        ii. 154(c) a copy of all correspondence is to be served to a tenant via the established method of contact, such as electronic means;
    b. Enact the recommendations put forth by the Paper at Recommendation; and
    c. Consideration should be given to adopting Victorian legislation, but amending to detail that preference should be given to using the usual mode of contact. This is to avoid landlords or Agents who want to ensure that the tenant does not receive a notice.

Issue 13: Condition Reports: Signatures and Ongoing Tenancies

99. We support DCLS' recommendations that:

    a. That a standard form inspection report be used for all tenancies; and
    b. That section 26(2) of the Act be repealed or amended to say that a signature will be required to prove acceptance of the report by the tenant; and
    c. That section 26(1) should be amended to read 14 days, replacing 5 business days; and
    d. A standard information sheet must be provided to all tenants at the time of signing the tenancy agreement and the condition report; and
    e. The use of an interpreter be compulsorily used when a tenant identifies that they speak English as a second language; and
    f. That section 28A of the Act remain unchanged; and
    g. That sections 25 and 110 are amended to reflect how the tenant is to be given the condition reports; and
    h. the independent bond authority hold copies of all condition reports and tenancy agreements.

100. We further note that with respect to interpreters, we understand that the Commonwealth's Translating and Interpreter Service is a free service that can be used by landlord/agents when interacting with tenants who do not speak English as their first language. It is therefore not unreasonable to request that interpreters are used when conducting condition reports (and more generally when entering into tenancy agreements.

101. Of particular importance to NAAJA and our clients, however, is that the Aboriginal Interpreter Service (AIS) is (to our understanding) not funded by the Commonwealth and not free for landlords/agents. We therefore strongly recommend:

    i. That the Northern Territory Government lobby the Commonwealth Government to extend funding to the AIS to provide their services in tenancy matters; and

    j. In the meantime – the Northern Territory should fund AIS to provide their services in tenancy matters.

Issue 14: Repairs generally

103. We support DCLS' recommendations that:

    a. sections 58 and 63(1)(c) are amended to remove the requirement that notification of the need for repair be in writing;

b. DCLS strongly agrees with the recommendation to amend section 63(2) to list water heaters, air-conditioners and household heaters as items which the emergency repair provisions apply;
c. Section 63 should be amended to include that the Tribunal has jurisdiction to make orders for ordinary repairs, where it is considered that the landlord has not responded or made arrangements for repairs to be conducted in a reasonable timeframe, such as the NSW legislation;
d. section 62 of the Act should be amended to reflect that the person or company nominated as the person for a type of repairs, that they should be able to show that they have the skills to affect those repairs;
e. section 58 be amended to reflect process of repairs as per Victorian and Tasmanian legislation which allows rents to be paid into a special rent account while request repairs are outstanding;
f. similar amendments to the Act are made to include provisions such as sections 77(3), 134(3) and 193(3) of the Victorian legislation and section 33 of the Tasmanian legislation;
g. neither a) or b) as proposed by Question 8 of the Discussion Paper should be enacted i.e. that the Act should **not** stipulate agents be responsible for repairs or required to disclose the level of their pre-authorisation to prospective tenants; and
h. DCLS recommends an improvement to the wording of 58 to 62 of the Act and an increase to the maximum amount able to be claimed by a tenant to $1,800, amending section 59 of the Act.

104. We do ***not*** support DCLS' recommendation that two new sections be inserted into the Act, outlining a process for repairs as a result of tenant damage that aligns with s 78 and s79 of the *Residential Tenancies Act 1997* (Vic) considering certain modifications to those sections.

105. While we do agree with the concerns as outlined in section 32 of their submissions, we consider that the Act operates so that regardless of how the damage is caused, the landlord has a responsibility to ensure the repairs and they have the ability to then seek their loss back under section 122 of the Act. We consider that this is how the Act should operate.

106. In which case, if we are in correct on this point, or if the Act appears unclear on this point, we recommend that the necessary amendments to the Act are made to ensure that regardless of who causes damage to the property, the landlord has the responsibility to ensure repairs and that the landlord can seek compensation after the repairs have been made.

Issue 15: Bond Holding Authority

107. To be frank, it is beyond belief that the Northern Territory is ***still the only jurisdiction in Australia*** not to have a bond authority, even after it has been called for after the 2010 review of the Act as well as the Issues Paper: 'Development of a Central Bond Holding Scheme in the Northern Territory Under the *Residential Tenancies Act*' where the majority of the stakeholders supported its establishment.

108. It appears that the only group that opposed a bond authority in 2015 was the Real Estate Institute of Northern Territory Inc. (REINT), who, according to the Discussion Paper claimed that there was a "lack of solid evidence that such a scheme was either necessary or required in the Territory at the time."

109. In rebuttal of this position we reiterate the issues raised by DCLS in their submissions that are caused by the lack of a bond authority.

110. We also note that REINT is the peak body representing the real estate profession across the Northern Territory and that under section 114 of the Act, the interest on a bond is not required to be returned to the tenant if the bond was paid to an account under section 50 of the *Agents Licensing Act 1979.* REINT therefore has a clear commercial interest in advocating against a bond authority. This interest should be weighed against the interest of an increasing number of Territorians who are tenants. The Government should correct the weakness displayed by the previous Parliament when they caved to

REINT and legislate for a bond authority.

111. We therefore **emphatically** agree with DCLS recommendation that the Act should be amended to include a bond holding authority. We also support DCLS' submission that the bond authority should also hold copies of ingoing and outgoing condition reports and lease agreements.

Issue 16: Termination

112. We support DCLS' recommendations that:

a. Recommendation 12 of the Paper for the purpose of clarity should be enacted;
b. section 82(1)(f) of the Act is amended to 'if a tenant gives up possession of the premises with the tenant/s and the landlord's consent;
c. a section be inserted in Division 3 of the Act to allow for the termination of a tenancy by the tenant without penalty, with a 14 day notice period to the landlord; and
d. section 99A of the Act be repealed.

113. In further support of the repeal of section 99A, this particular section is particularly draconian as:

a. A person can be effectively forced into signing the "agreement" on the basis that the CEO (Housing) reasonably believes a tenant of public housing premises, or a recognised occupier of those premises, is **merely** likely to engage in antisocial behaviour;
b. If they do not sign the "agreement", that in itself is a basis for eviction;
c. The agreement is breached if the person seriously or repeatedly commits "anti- social behaviour" which can be conduct as **low as annoying a neighbour or another person in the vicinity** (i.e. it could be just someone who is walking past);
d. It only applies to public housing tenants;
e. We understand that this kind of agreement only exists in the Northern Territory, South Australia and New South Wales, suggesting the other jurisdictions are able to manage their public housing tenancies without having to resort to such measures.

114. In short these agreements fast track evictions for public housing tenants as they create an incredibly low bar to allow for an eviction.

115. To Territory Housing's credit, we have had very few public housing clients who have been subject to eviction proceedings since approximately October 2017, and prior to that, very few applications for section 99A. We suggest, however, that this means that section 99A is redundant. We would, however, still strongly recommend the appeal of section 99A to avoid future Governments changing Territory Housing's policies/philosophy leading to an increased reliance on section 99A.

Issue 17: Notice Periods and 'No Grounds Evictions"

116. We support DCLS' recommendations that:

a. no-cause evictions should be repealed and that reasons need to be provided to avoid discrimination and to protect the tenant from unjust dealings; and
b. 120 day notice periods in the case of a grounds eviction.

Issue 18: Section 85 termination of period lease effective despite inadequate notice

117. On the assumption that section 89 is not repealed or amended to allow for some degree of a grounds for the basis of evictions, there are very few protections and for a tenant from this kind of eviction. Tenants should at least be afforded the right to be correctly informed of the day on which they are required to provide vacant possession.

118. For this reason we recommend that section 85 of the Act is repealed.

Issue 19: Occupant to remain as tenant where tenant has died

119. We support DCLS' recommendations that:

a. section 82(2) of the Act should be repealed;
b. Insert a whole new section into the legislation that deals with the death of a tenant, consistent with the law in NSW and includes provisions to allow access to the property for the purpose of searching for a copy of a Will or personal papers;
c. Insert a section about how a legal representative goes about claiming the bond from a deceased person's tenancy.

120. We have a slightly boarder recommendation with respect to paragraph 82(1)(e) which is that the group of persons who should be able to continue on with the tenancy after the death of the sole tenant is any person who was in occupation of the premises which the landlord had been notified of prior to the death.

121. We make this recommendation as many of our clients reside with family members who may not strictly fall within the category of "spouse, de facto partner or dependant". It also appears to us that it is arbitrary to allow occupants to continue with the tenancy but only on the basis that they fall into these specific categories. There does not seem to be any logical reason why this broader group of persons should be evicted if the tenant dies.

Issue 20: Enable persons under 16 to enter tenancy agreements

122. For the same reasons as outlined in paragraphs 14 to 18 above, we recommend that paragraph 8(b) should be amended to replaced "harsh or unconscionable" with "unfair contract terms" as per section 24 and 25 of the *Australian Consumer Law.*

123. We also support DCLS' recommendation section 8 should be amended to insert a safeguard any prospective tenant over the age of 16 and under the age of 18, to require legal advice to be given to the tenant prior to entry into the lease agreement.

Issue 21: Extend period of time to vacate sections 100A and 104(3)

124. We support DCLS' recommendations that:

d. Subsections 100A(3) and 104(3) are amended so that the minimum period of time after an order of termination for vacant possession is 14 days;

e. Paragraph 105(2)(b) is amended so that the Tribunal only has to be satisfied that that there are circumstances that make it likely that the tenant will be able to pay all outstanding and future rent in relation to the premises.

125. We further reiterate our previous recommendation at paragraph 92, that it should be mandatory that the Tribunal consider a suspension under section 105 after any kind of termination.

Issue 22: Inspections by prospective tenants or purchasers

126. We support DCLS' recommendations to:

a. Amend section 74 to state that:

i. Landlords must give a minimum of 48 hours' notice ;
ii. Inspections can only take place in the final 28 days of a tenancy, this applies to both fixed term and periodic tenancies;
iii. Inspections are limited to take place between 8 am and 6pm and should be within a set window of not more than 2 hours;
iv. No more than 3 potential purchasers or potential tenants per day; and
v. Maximum of three inspections per week not to be held on consecutive days.

b. The times, days, duration and number of prospective purchasers or tenants can be varied by agreement by the tenant in writing;
c. c. Add a section that mirrors the Victorian Act which protects the privacy of the tenants in the production of advertising material and any advertising material that is produced can only be used after being reviewed by the tenant and the tenants have given written consent for that material to be used; and
d. Section 70 of the Act is to be amended to include provisions similar in nature to what the Victorian legislation contemplates for the sale and leasing materials.

Issue 23: Effect of a drug premises order

127. We support DCLS' recommendation that section 88A of the Act is repealed.

128. In further support of the repealing of this section, NAAJA has advised and represented clients with respect to evictions under this provision. Our clients have usually not been the person who committed the conduct that has led to the tenancy being declared a drug premises, and this has been recognised by the landlord, however, this has not initially be enough to have Territory Housing with draw their application.

129. In these kinds of cases, innocent third parties who happen to be tenants of the premises can be effectively penalised for the conduct of others. This is incredibly inequitable, and potentially a way in which the tenants can effectively be punished twice.

Issue 24: Excessive rents and valuations

130. We support DCLS' recommendation that section 42A of the Act should stay in its current form.

Issue 25: Presence of tenants for inspection report

131. The concerns outlined in the Discussion Paper (i.e. that it takes a long time to fill out the condition report and therefore it is too much for the tenant) does not appear to be of an actual concern because currently the tenant does not have to be there and the requirement to fill it out in the presence of the tenant is only on the basis if it is practicable to do so.

132. We consider that it is an important right of the tenant to be present at the ingoing and outgoing inspections if they chose to be there. If a tenant does chose to be there, the inspection should occur regardless of whether or not it is practicable. We do, however, note that it may not be necessary that the tenant is present during the entire time that the document is being filled out, so long as they are present before it is finalised (i.e. signed by the landlord/agent) and they have an opportunity to consider the report against the premises prior to finalising the report.

133. We therefore recommend that subsection 25(3) is amended so that:

a. The landlord is to finalise the condition report in the presence of the tenant; and

b. The words "unless it is not practicable to do so" is removed from that subsection.

Issue 26: Long term leases

134. We support DCLS' recommendation that it would be beneficial to have specific legislative frameworks for longer term leases including:

a. A standard form tenancy agreement for leases over 24 months;
b. Specific regulation for rent increases for tenants during continuous occupation for leases over 24 months;
c. Specific allowances for reasonable modifications for leases over 24 months;
d. Regulation of the penalties a tenant is required to pay if they terminate a lease that is more than 24 months. This should be set at no more than 1 month's rent per full unused year of the tenancy to the landlord (e.g. terminating a 5-year lease during the second year will allow

landlord to claim 3 months' rent in compensation). The landlord would still be required to take reasonable steps to reduce their loss and must bring an action at the Tribunal to recover loss for unused period within 3 months as per current requirements under section 112 of the Act;

e. Introduce mandatory inspections every 24 months; and
f. Introduce specific sections within the Act that deal with leases that are longer than 24 months and reasonable framework around rent, bond, early termination and modifications.

Issue 27: Pets

135. We support DCLS' recommendations that:

a. a section be added to the legislation providing for pets to be accepted in to properties as a default and that both tenants and landlords, or their Agents, have the ability to apply for an order from the Tribunal to show that a landlord is, or is not, unreasonably refusing; and

b. This proposed section can be modelled on the recently passed Victorian legislation.

Issue 28: Picture hooks

136. 122. We support DCLS' recommendation that section 55 should be amended to be titled 'Modifications to Rented Premises' and amended in line with recent Victorian legislative changes.

Issue 29: Tenancy Trust Account Penalties

137. We support Recommendation 15 of the Discussion Paper.

Issue 31: Agent's authorisation of Repairs

138. For the same reasons outlined at section 30 of DCLS' submissions:

a. we do not recommend that agents are also made responsible for repairs and maintenance; and
b. we do not consider that it is necessary for there to be an obligation placed on an agent to disclose to the tenant, or prospective tenant, the level/nature of 'pre-authorisation' to undertake repairs and maintenance provided by the landlord to the agent under the agent/landlord property management agreement.

Issue 31: Application to Tribunal after lease has concluded

139. We support DCLS' recommendations that:

a. Legislation should provide that either party can bring an application for compensation during the course of the tenancy, or 3 years from the termination of the tenancy agreement; and
b. section 122 should be amended to allow either party to bring a claim for compensation despite not serving a breach notice at the time of contravention.

140. We would recommend a slight variation to DCLS other recommendation on this Issue and recommend inserting a term prohibiting arbitrarily termination on the basis of a periodic **or fixed term** tenancy, **or not renewing such a tenancy**, if a complaint has been made about repairs.

141. With respect to the recommendation in paragraph 127(a) above, and to avoid doubt, it is our view that section 12 of *Limitation Act 1981* would mean that currently a tenant would have 3 years from the day that the tenancy agreement is breached (as opposed to the day when the breaching party was given notice of their breach). In which case, it will be necessary for a legislative amendment to allow for a party to commence an action after the end of the tenancy.

142. With respect to the prohibition for terminating/not renewing a tenancy if a complaint has been made about repairs, we do not think that this is unreasonable and it is akin to the general protections under

the *Fair Work Act 2009* (Cth) which prohibits the termination of employment on the basis that a person has made a complaint about the work force[20].

Issue 32: Waving rights under the Act/Consent to breaches of the Act and Compensation

143. We support Recommendation 17 and support DCLS' additional recommendation that should the Tribunal be inclined to accept that the tenant had knowledge of their rights, whether they had received legal advice to support their decision.

Issue 33: Minimum Standards

144. We have had the benefit of considering a draft submission from the Housing for Health Incubator - University of Sydney in preparing these submissions and we support their recommendations that:

a. "habitable" should be defined as specified in subsection 48(1)**;** and
b. the Government should pursue further consultation about setting minimum standards in rental premises, with an emphasis on minimum health hardware requirements, considering issues of presence and functionality.

145. As a start to the consultation with respect to consultation with respect to minimum standards, we support DCLS' recommendation that the standards contained in the *Housing Improvement Regulations 2017* (SA) should be considered.

Issue 34: Tenancy Databases

146. We have not had enough enquires with respect to the tenancy database to provide a considered recommendation on this issue.

Issue 35: Alternative Bond Products

147. We support DCLS' recommendations that:

a. Bond Surety Products should be prohibited under the Act; and
b. For allowances for bonds to be paid off in instalments for those that can show that they are having difficulty raising the funds.

Issue 36: Mortgagee in Possession

148. We support DCLS' recommendation that the Tribunal should retain the jurisdiction as per section 107.

Issue 37:Standard form Condition Reports, Tenancy Agreements and Basic Rights Fact Sheets

149. We support DCLS' recommendation for:

a. The introduction of the compulsory provision of Information Sheets at the beginning and end of a tenancy;

b. A consistent approach in forms for break lease in the same manner that there are termination forms provided by Consumer Affairs and that these include the correct information about subjects such as paying rent after a tenant has handed back the keys and how much fees should be paid in all circumstances;

c. landlords and Agents that don't supply or use the correct precedent forms should be issued a fine of penalty units and three findings against an Agent or landlord will see them added to the 'Rental Non-Compliance Register' (as discussed at Issue 41).

[20] See section 340 and subparagraph 341(1)(c)(ii) of the *Fair Work Act 2009* (Cth).

Issue 38: Interpreters and Informed Consent

150. Reiterating our comments with respect to funding for AIS interpreters at paragraph 96 above, we support DCLS' recommendation for:

a. Information sheets to be used as a compulsory tool, along with the use of interpreters. If a prospective tenant indicates that they speak another language an interpreter should be used in all cases; and

b. Interpreters being compulsory when the tenant is entering into the lease agreement to ensure that they understand the agreement before signing, along with used when completing the condition reports.

Issue 39: Protection of Tenants against Discrimination

151. We support DCLS' recommendation for:

a. the insertion into the legislation a section that allows that prospective tenants may make an application to the Tribunal if they believe that they have been unreasonably refused a tenancy and the Tribunal can order a tenant is accepted or they can apply for compensation;
b. that the Government to proceed with recommendations made to a review of the *Anti-Discrimination Act 1992* (NT) commenced in 2017 and no further action has been taken; and
c. The insertion into the Act a section which reminds landlords/REA to not discriminate whilst they are in a tenancy.

Issue 40: Time limit for utility bills

152. We support DCLS' recommendation for:

a. the NT to adopt for all utility charges the legislative scheme as provided at section 39 under the *Residential Tenancies Act 1997* (NSW);
b. the same model should include all utility charges imposed by the landlord where bills are not in the tenant's name;
c. mandatory legislation for, when the bill is not in the name of the tenant, that a copy be made available to the tenant, acknowledging the removal of the landlord's postal address on the bill; and
d. there be compulsory concessions made by way of a standard clause inserted into multi dwelling rural property to allow additional concession for the main electricity payer.

Issue 41: Accountability for Landlords and Agents/Enforcement of Infringements of the Act

153. We support DCLS' submission that:

a. The Act be amended to insert:
    i. a. Landlords and Agents be prohibited in engaging in false or misleading conduct;
    ii. A section detailing establishment and rules concerning 'Rental Non-compliance Register for Landlords and Agents', like a Residential Tenancy Database, mirroring the Victorian legislation;
    iii. Offence for Landlords and agents to inserting detrimental addition term in tenancy agreements

b. a tenant that enters into a tenancy agreement that is subject to misleading information by an Agent, that they can make an application to the Tribunal to terminate their tenancy agreement.

Issue 42: Treatment of Family and Domestic Violence within the Act

154. We support DCLS' submission that:

a. all Agents have included in their training compulsory training on responding to family and domestic and family violence;
b. the introduction of legislation mirroring Division 2A of the *Residential Tenancies Act 1987* (WA).
c. the further amendment of section 154 of the Act to allow for the intervention of the Tribunal and the lessor to serve documents to the perpetrator co-tenant in FDV matters; and
d. the insertion of section 213A from the NSW legislation into section 129 of the Act.