

19 October 2021

Civil and Regulatory Law
ACT Justice and Community Safety Directorate
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By email: civilconsultation@act.gov.au

RE: DISCUSSION PAPER – ENDING NO CAUSE EVICTIONS AND OTHER MEASURES

The ACT Law Society (the Society) appreciates the opportunity to comment on the Discussion Paper: Ending No Cause Evictions and Other Measures (the Discussion Paper).

We note the commitment to remove ‘no cause’ terminations from residential tenancies as part of the legislative reform agenda, set out in the Parliamentary and Governing Agreement for the 10th Legislative Assembly. The Discussion Paper also seeks views on other reforms including regulating rent bidding, introducing a right for tenants to grow food and prescribing minimum standards for residential properties.

We have sought input from the Society’s Property Law Committee and based on the feedback received, we provide the following comments.

Ending No Cause Evictions in Residential Tenancies

Clauses 94 and 95 of the Standard Residential Tenancy Terms (SRTT) under the *Residential Tenancy Act 1997* (ACT) (the Act) currently allow a landlord to terminate a tenancy without cause by issuing a tenant with a Notice To Vacate (NTV) 26 weeks before the tenancy end date. Tenants can challenge a termination if the NTV was issued in retaliation against them for having asserted their tenancy rights.

The Discussion Paper has elected to describe ‘no cause’ *terminations* by landlords as ‘no cause’ *evictions* which gives the impression that a landlord issuing a NTV is not acting fairly against the tenant. It should be emphasised, in this context, that the notice period in these circumstances is 26 weeks.

The Discussion Paper indicates that the removal of no cause evictions is necessary to:

- Prevent retaliation behaviour from unethical landlords and to give tenants greater confidence in enforcing their rights under a tenancy agreement; and
- Reflect community expectations that a landlord should be required to provide a reason in ending a tenancy.

We accept that removing the landlord’s right to terminate a tenancy, on expiry of or after the fixed term or during periodic tenancy, for no cause (i.e., no-cause evictions) is one way of preventing retaliatory behaviour by unethical landlords against complying tenants.

However, the proposed reform may have unintended effects on the rental market and future rental supply. Removing the right of termination for no-cause provides landlords with less certainty and flexibility in managing residential properties and may discourage investment and reduce rental supply in the longer term.

For example, if a tenant refuses to agree to a further fixed term tenancy and moves to a periodic tenancy, the proposed reform effectively means that landlords lose their ability to terminate the tenancy for no-cause (following 26 weeks’ notice), until such time into the future as a cause arises. In these circumstances, the tenant retains significantly more flexibility, with the ability to terminate on limited notice.

Furthermore, even in cases where there are grounds for termination with cause, landlords may choose to evict tenants without cause if they do not wish to disclose personal affairs to tenants. Removing no-cause terminations may affect landlords’ right to privacy. With no-cause termination removed, landlords are also more likely to look for another existing ground to evict tenants, which may leave tenants with an even shorter notice period to secure alternative living arrangements than the current 26 weeks’ notice. It is also inconsistent with other jurisdictions that permit termination in these circumstances following appropriate notice.

Overall, we question the need to remove no-cause termination from the Act and promote appropriate protection for landlords and tenants through other provisions of the Act.

Additional Grounds for Termination of Tenancy

The following are proposed to be added to the Act as grounds for tenancy termination:

- Use of rental premises for a non-residential purpose;
- Effective management of social housing stock for public housing property;
- Loss of eligibility for accommodation assistance; and
- Termination at the end of a fixed term tenancy.

We consider that these proposed grounds are valid reasons to terminate a tenancy and support their addition to the Act. Below are further comments on each ground:

Grounds for termination	Suggested notification period	Other comments
Use of premises for a non-residential purpose	8 weeks ¹	Landlords can be required to provide documentary evidence. ²
Management of social housing stock	Flexible	There can be a number of reasons that justify termination of a social housing tenancy and it may be difficult to prescribe specific grounds.

¹ The notification period for use of premises for a non-residential purpose is 60 days in Tasmania and Victoria: *Residential Tenancy Act 1997* (TAS) s 42(1)(d); *Residential Tenancies Act 1997* (VIC) s 91ZZ.

² Similar to the *Residential Tenancies Act 1997* (VIC) s 91ZZO.

		However, certain specific grounds can be included. ³
Loss of eligibility for accommodation assistance	4 weeks ⁴ or as agreed by landlords and tenants	Landlords should be given the power to request information in relation to eligibility for accommodation and to terminate a tenancy if tenants fail to provide the relevant documents or if the tenants no longer meet the eligibility test. Rules can establish when eligibility may be assessed, particularly for fixed term social housing. ⁵ Tenants should be required to give a 14-day notice period if they wish to end a tenancy at an earlier date due to eligibility reasons. ⁶
At the end of a fixed term tenancy	Variable depending on the length of the term	An approach similar to Victoria could be followed where termination at the end of a fixed term tenancy is limited to the initial term for a fixed term tenancy of more than 5 years. ⁷ For a fixed term tenancy agreement of less than 5 years, the notification period is between 8-12 weeks. ⁸ We consider that the minimum duration should be agreed upon by the landlords and tenants. Tenants may require short-term living arrangements for a number of reasons and could be prevented from doing so if a minimum duration is prescribed.

Additional Grounds for Termination

We consider that “threat, intimidation, or harassment” should be considered as an additional ground for termination. Currently, a landlord can terminate a tenancy if a tenant causes “*serious damage or injury*” to the landlord or the landlord’s family member or if the tenant causes “*serious or continuous interference with the enjoyment of nearby premises*”.⁹ We note that this ground can be interpreted narrowly in court,¹⁰ and is unlikely to cover behaviour such as threat,

³ Drug related conduct and prescribed indictable offences in public housing are specific grounds for tenancy termination in Victoria: *Residential Tenancies Act 1997* (VIC) ss 91ZR, 91ZS.

⁴ The notification for a similar ground in Queensland is around 4 weeks: *Residential Tenancies and Rooming Accommodation Act 2008* (QLD) s 329(2)(g)-(i).

⁵ See e.g., *Residential Tenancies Act 1987* (WA) s 71D.

⁶ See e.g., *Residential Tenancies Act 1999* (NT) s 96.

⁷ See *Residential Tenancies Act 1997* (VIC) ss 91ZZD; 91ZZDA.

⁸ See *Residential Tenancies Act 1997* (VIC) s 91ZZD.

⁹ *Residential Tenancies Act 1997* (ACT) s 51.

¹⁰ See e.g., *Faull v Commissioner for Social Housing for the Act and Residential Tenancies Tribunal* [2013] ACTSC 121.

intimidation, or harassment (including sexual harassment) that may justify termination of a tenancy agreement.¹¹

Additional Protections related to Ending No Cause Terminations

Statutory declaration and documentary evidence

Landlords can be required to provide documentary evidence when giving a NTV under certain termination grounds. For instance, in Victoria, landlords are required to provide documentary evidence if:¹²

- The property is the landlord's principal place of residence (only for fixed term residential rental agreements);
- The property is to be occupied by the landlord or the landlord's family members;
- The landlord intends to repair, renovate, reconstruct, demolish or sell the property;
- The landlord intends to use the property for a business; and
- The property is required for public purposes.

We note that a statutory declaration is not commonly required in other jurisdictions and such requirement may be burdensome for landlords.

Preventing landlords from reletting a property for a period of time

We consider that it would be difficult to prescribe an appropriate period of time that takes into account particular circumstances.

Other Matters

Rent Bidding

We recognise that the ACT does not currently have any specific laws regarding rent bidding. The Society is not opposed to the introduction of laws regulating this practice and notes the approach taken in Victoria, Tasmania, Queensland and New Zealand which allows voluntary rent bidding and the ability for landlords to accept higher offers if they are received.

Right to Grow Food

We note that growing food can involve significant alteration to the property.

In extending tenants' rights to grow food, the quality and value of the landlord's property should not be adversely affected. Small-scale gardening and compost which does not require major alterations to a property may be allowed and encouraged for environmental and wellbeing reasons. However, we consider it important that sufficient safeguards are in place in relation to large scale changes to landscaping and gardens. For example, in NSW and Victoria, landlords cannot unreasonably refuse consent to planting of vegetables and herbs, but in NSW this only applies if existing vegetation and plants do not have to be removed.

Under the proposed change, a landlord would have to seek an order from ACAT to refuse to give consent to grow food, even in respect of larger-scale gardening. We consider this too onerous for landlords.

In relation to an obligation to 'make good' at the end of the tenancy, we recognise that some allowances should be made for gardens which change with the seasons and suffer in ecological

¹¹ See also *Residential Tenancies Act 2010* (NSW) s 92; *Residential Tenancies Act 1997* (VIC) s 91ZK; "objectionable behaviour" in *Residential Tenancies and Rooming Accommodation Act 2008* (QLD) s 297; "unacceptable conduct" in *Residential Tenancies Act 1995* (SA) s 90; *Residential Tenancies Act 1999* (NT) s 100.

¹² *Residential Tenancies Act 1997* (VIC) s 91ZZO(e).

events, such as droughts. Under the 'make good' obligations it should be recognised that the quality of the garden may change due to natural conditions, but gardens that have been materially impacted by tenant's changes for growing food should be subject to a reasonable make good obligation if required by the Landlord.

Minimum Standards

We don't have any comment on minimum standards.

We welcome the opportunity to comment further if that would be of assistance.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Simone Carton". The signature is fluid and cursive, with the first name "Simone" being larger and more prominent than the last name "Carton".

Simone Carton

Chief Executive Officer