



Commentary on the Residential Tenancies Amendment (Social Housing) Bill 2005

13 October 2005

This commentary is produced by the Tenants' Union of NSW ('TU') and Shelter NSW for the information of Members of Parliament in their consideration of the Residential Tenancies Amendment (Social Housing) Bill 2005 ('the Bill').

As those reading this commentary may be aware, the TU and Shelter hold grave concerns about the 'reshaping public housing' reforms ('RPH reforms') announced by the Government in April this year. Notwithstanding our concerns, this commentary accepts the intention of the RPH reforms as given, and instead is concerned with:

- whether the provisions of the Bill are specifically required by the RPH reforms;
- whether the provisions are appropriate to the intention of the RPH reforms; and
- how the provisions will operate in practice.

Where we consider that the provisions of the Bill are either not required, or are not appropriate, or do not operate fairly, we have made suggestions as to amendments to the Bill.

Also, a number of the amendments presented in the Bill are merely incidental to other amendments. In the following commentary, they are noted as incidental without further comment.

Schedule 1 Amendment of the Residential Tenancies Act 1987

[1] Section 3 Definitions

This provision is appropriate to the Government's intentions in the RPH reforms.

[2] Section 9A Extension of terms in standard form to existing social housing agreements

This provision is not required by the RPH reforms. There was no consultation on this provision prior to its drafting.

The provision is dangerous for two reasons. First, it allows the terms of contracts already in existence to be changed independent of the wishes of the one of the parties. In some instances legislation to this effect is justified (for example, the recent amendments that create a new

term in existing tenancy agreements relating to the installation of smoke alarms), because it is in the interest of both parties and the community generally. The present provision is not limited to instances in which this justification applies.

Secondly, the provision allows the Executive to unilaterally change the terms of existing contracts that the Government itself has entered into with individual tenants. Persons who have complied with their contracts and relied on their terms (for example, to make alterations to the premises, or to keep a pet) would be vulnerable to the terms on which they had relied being unilaterally changed and hence placing the tenant in breach – in the words used in the second reading speech, an ‘invidious position’ for tenants.

The rationale given for this provision is flawed. First, the Department does not need such a provision to retain ‘operational flexibility’ as it moves to a system of fixed term agreements with tenants, as is proposed under the RPH reforms. The second reading speech includes the statement ‘the introduction of fixed term leases could have the effect of preventing... revision of tenancy agreements.’ This is, with respect, incorrect. On the contrary, the proposed system of fixed term agreements offers more scope for revising the terms of agreements than the current system of continuing agreements. Currently, most of the Department’s tenancy agreements continue without revision (except market rent increases) until they are terminated. Under the proposed system, the Department’s fixed term agreements will be periodically reviewed and renewed, and so are subject to more opportunities for revision, quite apart from the present amendment.

Second, the Department does not need to change tenants’ agreements in order to give effect to changes in its operational policies. For example, in recent years the Department has made a number of changes to its policies relating to the rate and assessment of rent subsidies, including for existing tenants, without changing their agreements. There is no question that these changes are effective. The example of anti-social behaviour, given in the second reading speech in support of the amendment is, on the contrary, an example of why the amendment is unnecessary. All tenancy agreements contain a term prohibiting tenants from causing nuisance and annoyance, and the Department has policies guiding how its officers take action in relation to breaches of that term. The Department may make refinements and other changes to those policies, and do not need to change the terms of tenants’ agreements to do so.

The Bill should be amended to delete this provision.

Suggested amendment: delete proposed new section 9A.

[3] Section 14A Special provisions relating to social housing tenancies

This provision is appropriate to the Government’s intentions in the RPH reforms.

[4] Section 19 Landlord to pay council and water rates, land tax etc

Incidental to [5].

[5] Section 19A Social housing tenants to pay water charges

The provision requires a social housing tenant to pay a water charge that is based on ‘guidelines approved by the Minister’ rather a tenant’s actual use of water. As it relates to tenants in unmetered premises, the provision is contrary to ordinary ‘user pays’ principles

and does not encourage the responsible use of water. According to the approach indicated in the second reading speech, the charge paid by tenants of unmetered premises will depend on their net rent, not on their water use; therefore, they will not be able to reduce the amount they pay by reducing the amount of water they use. The statement in the second reading speech that ‘this approach... is well aligned with actual usage’ is, with respect, tenuous at best. Assuming they pay the same amount in rent, a single tenant living in a high-rise flat will pay the same charge as a couple with a child living in a house and garden.

The provision does not require that the Minister’s guidelines reflect the Department’s (or other social housing landlord’s) own actual water use or costs. The provision does not require that the guidelines reflect any reduction over time in the Department’s (or other social housing landlord’s) water use or costs. The provision does not provide for any scrutiny or review as to how the charges in the guidelines are calculated.

Since 1995, it has been an additional term in the standard form of tenancy agreement that the tenant is obliged to pay for water according to the metered amount used by the tenant. Under the current law, therefore, it is open to social housing landlords to charge water costs to new tenants and, depending on the agreements they have used, existing tenants who entered into agreement since 1995, where the premises are separately metered.

We suggest a number of alternative amendments to the provision. The first is to delete this provision from the Bill, and allow the current law to stand.

Suggested amendment: delete proposed new section 19A.

The second alternative amendment would allow social housing landlords to charge for water use as under the current law, but also in relation to tenants whose agreements were entered into prior to 1995.

Suggested amendment: provide that it is a term of every social housing tenancy agreement, including social housing tenancy agreements in existence at the commencement of the section, that where the premises are separately metered, the tenant agrees to pay for water use according to its metered use.

The third alternative amendment would allow social housing landlords to charge for water use as proposed by the provision, and would allow for external scrutiny of the guidelines by which the charge is calculated.

Suggested amendment: insert a new subsection to provide that on the anniversary of the commencement of the provision, the guidelines are to be reviewed by the Energy and Water Ombudsman NSW.

Section 19B Payment of debts by social housing tenants

This provision is not required by the RPH reforms. There was no consultation on this provision prior to its drafting.

The second reading speech states that where the fixed term of a tenancy ends and the parties enter into a new fixed term, ‘[t]he debt under the old tenancy agreement would then become

a mere civil debt, which would be extremely difficult to recoup.’ This statement is, with respect, incorrect. The situation described is already adequately addressed by the current law, which permits a landlord to pursue debts arising under previous fixed term by taking action under the current fixed term tenancy agreement, where those agreements have been entered into as a continuous series of ‘renewed’ agreements. Under the current law, a tenancy agreement terminates only in the circumstances given at section 53 of the Residential Tenancies Act. None of these circumstances are met where parties to a tenancy agreement agree to enter into a new fixed term for the same premises with the tenant in continuing occupation. Any arrears, therefore, do not pass into ‘a mere civil debt.’

The provision goes further than what is required by the RPH reforms. It refers not just to previous fixed terms in a continuous series of fixed terms, but to both the present agreement and to ‘a prior social housing tenancy agreement.’ This means it would allow a social housing landlord to take action under the present agreement in relation to a debt arising under any other prior agreement, including where there was no continuing occupation, where the prior agreement was for different premises, and where the debt was incurred by jointly and severally with another person. We are concerned that the provision might also allow a social housing landlord to recover alleged debts that have not been determined by a court or Tribunal, and debts the recovery of which would otherwise be barred by the Limitation Act 1969.

Suggested amendment: delete proposed new section 19B.

[6] Section 44 Application of Division

Incidental to [7].

[7] Section 47A Social housing tenant may apply for an order that rent is excessive

The TU supports this provision. It addresses a flaw in the current law.

This provision is not required by the RPH reforms, but the problem it addresses is a longstanding one, and has been the subject of consultation with the TU and other sector representatives.

[8] Section 49 Orders as to excessive increases or rents

Incidental to [7].

[9] Section 49 (2)

Incidental to [7].

[10] Section 49 (3)

Incidental to [7].

[11] Section 49 (3A)

The TU supports this provision, as discussed at [7], above. The provision conforms to the other provisions of the current law relating to excessive rents and excessive rent increases.

[12] Part 5, Division 2A Special provisions relating to social housing tenancy agreements

Section 63A Operation of Division

Incidental to proposed new Division 2A.

Section 63B Notice of termination may be given on ground that tenant not eligible for social housing

This provision is appropriate to the Government's intentions in the RPH reforms as they relate to tenure.

Section 63C Eligibility assessments of social housing tenants

This provision is appropriate to the Government's intentions in the RPH reforms as they relate to tenure.

Section 63D Review of decision to give notice on ground that tenant not eligible for social housing

With one qualification, this provision is appropriate to the Government's intentions in the RPH reforms as they relate to tenure.

The qualification relates to section 63D (6). Where there is a question as to whether a social housing landlord has afforded procedural fairness, the question should be decided on the facts of the matter, rather than the landlord being 'taken' or deemed to have afforded procedural fairness.

Suggested amendment: delete proposed new section 63D (6).

Section 63E Time periods to be observed in giving notice of termination on ground that tenant not eligible for social housing

With one qualification, this provision is appropriate to the Government's intentions in the RPH reforms as they relate to tenure.

The qualification relates to the period of the notice of termination. We submit that the 60 days is insufficient, considering that many tenants who are given these notices may have difficulty finding alternative accommodation (we note that under the draft eligibility criteria currently being considered by the Department, a tenant whose income is 80 per cent of the median income for the general population may be ineligible). We understand that the Western Australian public housing authority, which also reviews tenancies according to continuing eligibility, allows tenants 6 months to find alternative accommodation.

Suggested amendment: at proposed new section 63E (2)(a) and (b), delete ‘60 days’ and insert instead ‘6 months.’

Section 63F Notice of termination may be given on ground that tenant offered alternative social housing premises

This provision, and those related to it (that is, sections 63G and 63H), is not required by the RPH reforms. We acknowledge, however, that the situations in which the provision may be used would likely occur more frequently where the Department is in the practice of entering into long fixed term agreements, as is proposed by the RPH reforms. There was no consultation on this provision prior to its drafting.

In the second reading speech, the rationale for this provision refers to situations where the Department or other social housing landlord seeks possession of the premises for the purposes of redevelopment. The provision, however, is not limited to these circumstances. The circumstances in which this provision may be used, and the purposes to which it may be used, are not limited at all. Considering the range of landlords who are covered by the definition of ‘social housing’, it is not appropriate that this provision should be available for all to use without limitation as to purposes.

Suggested amendment: insert a new subsection to provide that this section applies where the social housing landlord has determined that, for the purposes of redevelopment or renovation of the premises, it requires vacant possession of premises under a social housing tenancy agreement.

Section 63G Review of decision to give notice on ground that tenant offered alternative social housing premises

With one qualification, this provision is appropriate to the Government’s intentions as indicated by the proposed new section 63F.

The qualification relates to section 63G (8). Where there is a question as to whether a social housing landlord has afforded procedural fairness, the question should be decided on the facts of the matter, rather than the landlord being ‘taken’ or deemed to have afforded procedural fairness.

Suggested amendment: delete proposed new section 63G (8).

Section 63H Time periods to be observed in giving notice of termination on ground that tenant offered alternative social housing premises

This provision is appropriate to the Government’s intentions as indicated by the proposed new section 63F.

[13] Section 63I Notice of termination of public housing tenancy agreement – acceptable behaviour agreements

Incidental to [12].

[14] Section 64 Application to Tribunal by landlord for termination and order for possession

This provision rewrites the current section 64. Except for the references to new provisions inserted by the Bill, it appears to retain the effect of the current section.

[15] Section 64 (2A), (2B) and (2C)

This provision sets out matters that the Tribunal is to consider in applications for termination on grounds referred to in proposed new sections 63B and 63F. By setting these matters out separately from section 64 (2), this provision is cut off from the provision in the current law that the Tribunal is to make a termination if it is satisfied ‘that, having considered the circumstances of the case, it is appropriate to do so’ (see the rewritten section 64 (2)(c)(ii) at [14]). Under the current law, that provision is the basis of the Tribunal’s discretion in termination proceedings. It is appropriate that the Tribunal should have this discretion in all proceedings, including those relating to the grounds in proposed new sections 63B and 63F, as a safeguard against misconceived or mischievous proceedings. We note that the proposed new sections 64 (2B) and (2C) would limit such discretion and prevent review of the social housing landlord’s decisions.

Suggested amendment: after proposed new section 64(2A)(b), insert new subparagraph (c) to provide ‘and, in either case, that it is appropriate to do so in the circumstances of the case.’

[16] Section 64 (2D)

Incidental renumbering of an existing section.

[17] Section 64 (2D)

Incidental to [16].

[18] Section 64 (3A)

This provision requires the Tribunal to consider certain matters in relation to termination orders. It is an appropriate provision.

[19] Section 64 (4)

Incidental to [14].

[20] Section 64 (4)

This provision is not required by the RPH reforms. It makes a minor change to the wording of the current section.

[21] Section 64 (4)(b)

This provision is not required by the RPH reforms. It makes a minor change to the wording of the current section.

[22] Section 64 (6)

This provision is not required by the RPH reforms. It makes a minor change to the wording of the current section.

[23] Section Tribunal may waive defect in notice

Incidental to proposed new sections 63D and 63G.

[24] Section 132 Exemptions

The TU supports this provision. It brings the obligations of the Department in this regard into line with those of other landlords.

[25] Section 132 (4)

This provision allows social housing landlords to increase rents during the fixed term of an agreement. We acknowledge that the Department and other social housing landlords wish to keep their rents to the market level during the relatively long fixed terms proposed by the RPH reforms. We note, however, that it diminishes a protection to tenants, and that private landlords may seek a similar provision.

[26] Schedule 4 Savings, transitional and other provisions

The insertion is incidental to the proposed new Part at the end of Schedule 4. See [27].

[27] Schedule 4 Part [x] Provisions consequent on the enactment of Residential Tenancies Amendment (Social Housing) Act 2005

These provisions are consistent with the Government's intentions for the RPH reforms. In particular, the clause referring to notices of termination under the proposed new section 63B is consistent with and gives effect to the Government's express commitment that current tenants would not be subject to reviews as to continuing eligibility.

Schedule 2 Amendment of other Acts

These provisions are appropriate to the Government's intentions in the RPH reforms.