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# SUBMISSION

## Senate Standing Committee on Community Affairs

### Inquiry into the Social Services Legislation Amendment (Housing Affordability) Bill 2017

November 2017

#### Introduction

The Tenants' Union of NSW (TUNSW) is the peak body representing the interests of tenants and other renters in New South Wales, including tenants in social housing. We are a specialist Community Legal Centre with expertise in residential tenancy law and policy, and we are the main resourcing body for the state-wide network of Tenants' Advice and Advocacy Services (TAASs). Collectively the TAASs and TUNSW provide information, advice and advocacy to tens of thousands of renters across New South Wales each year.

TUNSW is a member of the National Association of Tenants' Organisation (NATO). NATO has produced a detailed submission outlining key areas of concern with the Automatic Rent Deduction Scheme (ARDS) as proposed by the Social Services Legislative Amendment (Affordable Housing) Bill 2017 (the bill), and we recommend this submission to the Committee. This short additional submission will draw to the Committee's attention how we anticipate the ARDS, were it to proceed, would operate alongside existing legislation within our own jurisdiction, and explore some of the difficulties it would bring to social housing tenants across New South Wales.

We note that in the 2015-16 financial year the NSW Land & Housing Corporation let approximately 110,000 dwellings to vulnerable tenants across the state. A further 26,000 dwellings were rented to social housing tenants by community housing landlords, and 4,500 dwellings were rented to Aboriginal households by Aboriginal Housing providers.<sup>1</sup> The New South Wales social housing portfolio is the largest in the country, and the proposed ARDS will affect considerably more tenants in New South Wales than in other jurisdictions.

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<sup>1</sup> Family and Community Services NSW Annual Report 2015-16

A great deal of our work, as well as that of our TAAS colleagues, involves assisting social housing tenants in matters concerning allegations of rental arrears, and other alleged liabilities such as end-of-tenancy repair costs. We anticipate the bill, if passed, will have a detrimental impact upon arrears and debt management processes employed by social housing landlords in New South Wales. It has strong potential to reduce fairness and transparency across social housing tenancy management systems, and this will be keenly felt by tenants in social housing – whether or not they are referred to a compulsory Automatic Rent Deduction Scheme.

**Our recommendation is that the ADRS should not proceed.**

In making this recommendation we will focus first on issues with the proposed scheme in principle, and then on anticipated issues with the scheme in practice.

## **Issues with the scheme in principle**

In introducing the bill to the Legislative Assembly last month, the Minister for Social Services Mr Christian Porter suggested the proposed ARDS would “help to reduce homelessness for social housing tenants who are in serious rental arrears that could, and in many cases does, lead to eviction or housing abandonment”.<sup>2</sup> However, available evidence suggests that rental arrears in social housing is not a strong driver of homelessness. Indeed, Minister Porter’s remarks suggest eviction is not a common outcome of rental arrears. It is more likely that social housing landlords wish to work with tenants to overcome financial difficulties to keep their tenancies on track. Legislating away the inalienable protection of social security payments for social housing tenants, as this bill would do, seems quite out of proportion to the issue as stated.

In his second reading speech, Mr Porter noted figures from state and territory governments indicating that almost 9,000 social housing households across Australia accrued rental arrears of more than three weeks in 2013-14, with more than 2,300 people being evicted from social housing due to such arrears.<sup>3</sup> To put this into perspective, the Australian Institute of Health and Welfare reports that 394,000 households lived in social housing at June 2016, with the growth of the sector recorded at 5.6% between 2008 and 2016.<sup>4</sup> This suggests a figure of around 380,000 social housing households in the year Minister Porter referred to. According the state and territory figures cited, approximately 2.4 per cent of these households accrued rental arrears of more than three weeks in 2013-14. If each of the 2,300 people evicted for rent arrears at that time represents a single social housing household the total percentage dwindles to slightly more than half of one per cent; but of course the figure is likely to be somewhat lower as many will have resided with

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<sup>2</sup> HANSARD: Mr Christian Porter, Thursday 14<sup>th</sup> September 2017 page 10419

<sup>3</sup> HANSARD: Mr Christian Porter, Thursday 14<sup>th</sup> September 2017 page 10419

<sup>4</sup> Australian Institute of Health and Welfare *Australia’s welfare 2017* Australia’s welfare series no. 13

one or more others, such as partners, children or other extended family, in a shared social housing household.

This is in keeping with earlier figures that were reported to us by our State Housing Authority. Over a period between 2009 and 2011 we corresponded with the NSW Department of Housing amid concerns that they were frequently proceeding to eviction proceedings before other reasonable steps to recover rent arrears had been pursued. In reply, the Department assured us that eviction for rent arrears was uncommon, and only pursued as a last resort – that “Housing NSW will make an application to the Tribunal where it has not been able to resolve a matter with a tenant or to formalise an agreement, such as a repayment arrangement to repay a debt owing to Housing NSW”.<sup>5</sup> They also informed us that “rent arrears in June 2010 were one half of one per cent of the rent payable”.<sup>6</sup> Since that time we have noted a reduction in Tribunal applications by the Department for eviction due to rental arrears, suggesting their efforts to resolve instances of rental arrears without eviction are being pursued with some success. Again, the introduction of a compulsory ARDS seems out of step with this. Working with tenants to overcome difficulties, to restore financial independence and resume regular payments is a far more appropriate and proportionate response to rent arrears in social housing.

## **Issues with the scheme in practice**

NATO has provided a substantial submission concerning a number of practical concerns with the proposed ARDS. Here we wish to make three further points to illustrate how such a scheme, as proposed in the bill, would interact with current law and practise. The first point relates to whether or not participation in the ARDS will require genuine agreement from a social housing tenant in New South Wales, while the second and third points relate to the manner and methods by which social housing landlords determine liabilities and obtain money orders from the New South Wales Civil and Administrative Tribunal (NCAT).

### **1. Will genuine agreement by the tenant be required in New South Wales?**

The bill contemplates tenants’ agreement for a social housing lessor to request income diversion or deductions from welfare payments under clauses 124QF(1)(a) and 124QF(1)(c) of the social security amendments, and clauses 67D(1)(a) and 67D(1)(c) of the family assistance amendments. Such agreement could be made when entering into a social housing tenancy agreement, or as a separate agreement made at a later time. Alternatively the landlord would access the proposed ARDS after obtaining a written agreement from the tenant that they will pay an amount owing as a result of their tenancy. This implies that tenants may retain some agency over whether or not to accede to the use of an ADRS, however this is unlikely to be the case in New South Wales.

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<sup>5</sup> Letter to TUNSW from Mike Allen, former Chief Executive HNSW, 7/12/2009

<sup>6</sup> Letter to TUNSW from Mike Allen, former Chief Executive HNSW, 22/2/2011

Section 140 of the *Residential Tenancies Act 2010*<sup>7</sup> (RTAct) provides:

**140 Payment of debts by social housing tenants**

A tenant under a social housing tenancy agreement who incurs or has incurred a debt to the landlord in connection with that agreement or a prior social housing tenancy agreement:

- (a) must enter into arrangements with the landlord, in accordance with any reasonable request of the landlord, for the payment of that debt, and
- (b) must comply with those arrangements (including any such arrangement entered into during the term of a prior social housing tenancy agreement) and with any variations to those arrangements that may be agreed to by the landlord and tenant.

Social housing tenants in New South Wales may be required, as a matter of law, to agree to their landlords' use of an ADRS. In practice this would make use of an ADRS a matter of landlord discretion, rather than tenant agreement, contrary to the apparent intention of the bill.

**2. Money ordered by a court or tribunal in New South Wales**

The bill would also allow social housing landlords to make use of the proposed ARDS in circumstances where a court, tribunal or other body with the requisite powers has ordered the tenant to pay the landlord an amount of money arising from their tenancy, at clause 124QF(1)(b) of the social security amendments and clause 67D(1)(b) of the family assistance amendments. As noted in the NATO submission, there is great risk of orders being made against tenants at *ex parte* NCAT hearings.<sup>8</sup> We anticipate there would also be problems with the way tenants' liabilities are determined – including liabilities for end-of-tenancy costs that may have a negative impact on a person's future prospects, should they apply for another social housing tenancy at some later point in time, as well as liabilities for rent arrears that arise on account of administrative decisions concerning entitlements and calculations of rent subsidies.

**a) End-of-tenancy costs**

With regard to end-of-tenancy costs, we often see debts alleged that should not be raised according to the social housing landlord's own policies. This includes debts raised against victims of domestic violence where damage has been caused by the perpetrator during an incident in which the tenant is the victim, as well as debts raised for damage caused by vandalism once a tenant has returned possession of the property and the landlord has not yet secured it. Even without such complications, it can often be difficult to establish which costs, if any, the tenant is liable for at the end of a tenancy because they have negligently or intentionally damaged the property,<sup>9</sup> and which are simply the landlord's ongoing costs of maintaining a portfolio of rental housing. Where advocates assist with NCAT hearings, claims for end-of-tenancy costs are often

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<sup>7</sup> *Residential Tenancies Act 2010* (NSW)

<sup>8</sup> NATO submission (at 2.3)

<sup>9</sup> *Residential Tenancies Act 2010* (NSW) s 51

reduced quite significantly. However, access to a tenants' advocate is never assured, and many vulnerable social housing tenants may struggle to achieve similar outcomes without the assistance of an advocate. This is especially so in cases where the landlord is represented by a team member with considerable experience in NCAT procedures. It is also compounded by a recent amendment to the RTAct that allows social housing landlords to produce "evidentiary certificates" in relevant NCAT proceedings, to be taken as "conclusive proof of the reasonable costs of work" undertaken by the landlord.<sup>10</sup>

#### **b) Rental rebate variation or cancellation**

Finally, there is the issue of rental rebate cancellations and variations. The *Housing Act 2001* (HAct)<sup>11</sup> allows social housing landlords who operate in New South Wales to apply a rental rebate, based on a household's income, so that social housing tenants are not required to pay more than a specified proportion of their income towards rent. This rebate may be varied or cancelled by an administrative decision of the landlord, subject to section 57 of the HAct, and such decisions may be applied retrospectively so that an amount of rent arrears is created in an instant by the administrative decision of the landlord. In cases where such decisions are made in error, vulnerable tenants are placed at a considerable disadvantage because these arrears can lead to termination proceedings.<sup>12</sup> Replacing the prospect of termination and potential homelessness with a period of forced Automatic Rent Deduction from a welfare payment may seem less cruel, but it is hardly appropriate where rental arrears have been established in error.

Administrative decisions about rental rebates may be reviewed internally by the landlord, and externally by a Ministerial advisory body known as the Housing Appeals Committee (HAC). HAC can make non-binding recommendations but cannot order a social housing landlord to revisit or reverse its decision, and social housing landlords do not always apply HAC's recommendations. NCAT is not empowered to review these decisions so when an application is brought before it regarding arrears arising from a rental rebate cancellation or variation, it may only consider the arrears as put in the landlord's evidence. NCAT may not consider the manner in which the arrears have accrued or hear evidence from the tenant as to errors in the landlord's administrative decision making.

In circumstances where administrative decisions about rental rebates are made in error, social housing tenants must seek review in the Supreme Court.<sup>13</sup> This can take a considerable length of time. It is unlikely that the requirements for appeal processes to run their course before a landlord may make use of the proposed ARDS (at clause 154QF(b)(i)&(ii) of the social security amendments and 67D(b)(i)&(ii) of the family assistance amendments) will apply in these instances. This gives rise to potential situations where tenants are ordered to pay money by NCAT on the basis of an administrative decision made in error, triggering participation in the proposed ARDS that forces them into financial hardship, with review of the administrative decision available only through expensive and protracted proceedings in the Supreme Court. Then, in the event of a favourable outcome of those proceedings, tenants will need to seek recovery of the overpaid

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<sup>10</sup> *Residential Tenancies Act 2010* (NSW) s 156B

<sup>11</sup> *Housing Act 2001* (NSW) ss 56, 57 & 58

<sup>12</sup> *Residential Tenancies Act 2010* (NSW) s 154A

<sup>13</sup> *Twaddell v NSW Land and Housing Corporation* [2014] NSWSC 7

amounts arising from the referral in error to the ARDS, creating additional administrative burden for the tenant, landlord and income support agency alike.

## **Conclusion**

The introduction of the proposed ADRS is not an appropriate or proportionate response to the problem as stated. It will remove agency from social housing tenants and prevent them from being able to manage their own finances. It will add layers of complexity to social housing tenancy agreements where allegations of end-of-tenancy costs or rent arrears are made, and in many cases will place vulnerable households under extreme financial stress in a way that is simply not warranted.

Our recommendation is that the ADRS should not proceed.