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SUBMISSION TO THE REVIEW OF THE RENTAL TENANCIES ACT 1995 (SA)

SA UNIONS SUBMISSION

Submission to Review of the *Residential Tenancies Act 1995* (SA)

SA Unions

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PART A

FOREWORD

This submission is proudly endorsed and adopted by SA Unions, prepared by authors Paris Dean and William Fay.

Paris Dean is a distinguished Barrister at the Victoria Square Chambers and William Fay is a highly regarded Solicitor at Lieschke & Weatherill Lawyers. The authors of this paper are legally trained persons with relevant experiences in, and observations of, the residential tenancy field including in connection with residential tenancy disputes. It should be noted that the views expressed in this paper are those of the authors and do not necessarily reflect the views or positions of organisations with whom they are affiliated.

SA Unions is the peak trade union council for South Australia. Through its twenty-six (26) affiliated organisations, SA Unions represents approximately 160,000 union members in all industries and sectors.

South Australian workers have faced a decade of wage stagnation, compounded by high inflation and the increasing cost of living. Only two percent of rental accommodation is affordable for a single person on the minimum wage, contributing to the significant number of workers holding down multiple jobs to make ends meet.

Even when workers extend themselves to working intense schedules across multiple employers, the structural issues in the rental and tenancy system mean they face an uphill battle to achieve and remain in accommodation. This struggle is even more pronounced among people without employment, people in insecure casual employment, people injured at work and in receipt of weekly payments under the *Return to Work Act 2014* (SA) which, for most injured workers, decrease to 80% after 12 months and to zero (0) after two (2) years, and people reliant on social security payments from the federal government.

We appreciate the opportunity to make this submission; the intersectional issues of insecure work, gendered violence, the cost of living, and housing and homelessness are issues of concern to SA Unions. In our respectful submission, changes to the RTA must be cognisant of that intersectionality.

Dale Beasley

SA Unions Secretary

INTRODUCTION

We thank the office of the Minister for Consumer and Business Services ("**CBS**") for undertaking a review of the *Residential Tenancies Act 1995* (SA) ("**the RTA**") and for the discussion paper provided in connection with the same.

We note that the last significant review of the RTA occurred in 2014. Since that time, there have been considerable changes in both the residential tenancy and broader property markets. These include: significant tightening of the rental market, attendant increases in rental costs and the COVID-19 pandemic. There have also been significant reforms directed towards the provision of enhanced rights and protections for tenants in residential tenancy laws in other Australian jurisdictions not yet considered in South Australia. In this context, CBS' review of the RTA is timely.

We welcome the range of thoughtful measures offered for consideration in the discussion paper. We note that many would bring South Australia into line with comparable jurisdictions or are otherwise urgently needed to update outdated existing rights and protections afforded by the RTA. Others are novel and welcomed by the authors.

We are concerned however about the potential for unintended consequences arising from some measures proposed in the discussion paper and respectfully offer proposals to avoid the same.

We are also concerned to ensure that, whatever the rights conferred by the RTA, they are meaningful. To that end we strongly endorse any proposed amendment to the RTA to protect tenants against retaliatory action and/or the threat of retaliatory action.

To achieve that objective, we respectfully propose two additional reforms directed towards:

(i) ensuring tenants are apprised of the rights conferred by the RTA; and

(ii) ensuring tenants have access to advocacy services to enforce those rights.

In the absence of these reforms areas any rights conferred by the RTA risk being illusory.

We offer a third proposal derived from recent developments concerning group negotiations arising from an authorisation granted by the Australian Consumer and Competition Commission after consideration of detailed submissions on issues arising in the commercial tenancy space.

Fourth, we note the urgent need for reform of the RTA to protect the rights of persons with disabilities. We thank Ms Natalie Wade, Principal, Equality Lawyers for the insight and advice provided in relation to issues faced by people with disabilities under the RTA. We are particularly hopeful that the complex issues identified by Ms Wade and addressed in this submission concerning gaps arising as a result of interactions between the RTA, *Supported Residential*

Facilities Act 2009 (SA) (**"the SRF Act"**), Commonwealth social security law and the National Disability Insurance Scheme ("**the NDIS**") will be useful the CBS.

Finally, we propose an expansion of the levers available to regulate rent increases in light of changing social and economic conditions.

It is the view of the authors that, subject to the observations herein, the measures detailed in the discussion paper and in this submission offer an opportunity for meaningful reform to South Australian residential tenancy law. We hope that this submission assists the CBS in its review and would welcome the opportunity to provide clarification or additional input as may be required by the CBS.

PART B - PROPOSALS IN DISCUSSION PAPER

Longer Tenancies

Should the RTA include a requirement for landlords to provide a prescribed reason for the termination of a periodic lease or the non-renewal of a fixed term tenancy agreement, and if so, what should these prescribed reasons be?

The RTA should be amended to require the provision of a prescribed reason in connection with the termination or non-renewal of a residential tenancy.

In the absence of the provision of a prescribed reason, tenants may be subject to eviction for reasons which are, at best, capricious and at worst retaliatory or unlawful.

The *Equal Opportunity Act 1984*[1] ("**the EO Act**") proscribes the taking of certain actions against a tenant (including eviction) for certain identified reasons (e.g. on the basis of the race or sex of the tenant). In practice, this legislative protection may be easily evaded, and the objects of that Act frustrated, in the absence of the provision of a reason for termination. This is because the reasons for eviction are peculiarly within the knowledge of the landlord. A tenant who is not given a reason for their eviction is likely to face significant difficulties in establishing, or indeed identifying, potential or actual contraventions of the EO Act.

Further, tenants who exercise rights under the RTA Act, for example refusing to submit to unlawful demands or insisting upon residential tenancy rights such as repairs, may be subject to undetectable retaliatory eviction or other adverse action. If such practices are to be proscribed as is mooted in the discussion paper, the need for the provision of a prescribed reason becomes even more imperative.

The provision of a reason in connection with the termination of a lease will serve as a bulwark against capricious, arbitrary, unlawful and retaliatory eviction or non-renewal of tenancies. It will also complement existing frameworks for the protection of rights such as those found in the EO Act.

We consider that the prescribed reasons nominated in the discussion paper are sensible limitations on the right of non-renewal or eviction. Further, the introduction of a basic requirement to inform tenants of the reasons for their eviction constitutes a minimal imposition on landlords taking action to end leases for *bona fide* reasons.

We further consider that security of tenancy could be achieved by amendment to section 93 of the RTA. Section 93 of the RTA allows the Tribunal, on application of a landlord, to make an order granting the landlord vacant possession. Section 93(4) provides the Tribunal a limited discretion to suspend the operation of an order under this section by 90 days where the immediate provision

[1] See Part 3, Division 5; Part 4 Division 5; Part 5A, Division 5; Part 5B, Division 5; s 87A.

of an order for possession would cause 'severe hardship to the tenant'. It is our submission that this is an unreasonably high threshold to suspend vacant possession and does not sufficiently consider the social harm of homelessness and tenant displacement both upon individual tenants and the wider community. As Hughes PJ notes in *Upton v Fynes*:

> In practice, suspension of orders for possession for 90 days or even 60 days are quite rare. This reflects the fact that although a tenant may be in severe hardship, a residential tenancy agreement is essentially an exchange of exclusive possession of premises for weekly or fortnightly rent.[2]

As such, it is our submission that the ambit of the Tribunal with respect to suspension of the operation of an order for vacant possession under s 93 be expanded to adapt ss 8(1)(k) and(l) of the *COVID-19 Emergency Response Act 2020* ("**Emergency Response Act**") to the general avoidance of homelessness and current crisis in housing. As such, references to the COVID-19 pandemic are not necessary. In the authors' experience, the ERA permitted the Tribunal to undertake a full consideration of a tenant's circumstances when making an evaluation pursuant to s 93 and thereby facilitated the disposition of applications in a manner that was just in all of the individual circumstances of a case. Sections 8(1)(k) and (l) provide:

> **"8—Provisions applying to residential tenancies**
>
> (1) Subject to this section, the operation of the Residential Tenancies Act 1995 is modified as follows:
>
> …
>
> (k) the Tribunal, on an application under section 93 of that Act (whether the application was made before or after the commencement of this section)—
>
> (i) must have regard to the circumstances of the COVID-19 pandemic (including the need to ameliorate the effects of the pandemic in the State and the need to avoid homelessness during such a public health emergency); and
>
> (ii) may, in a case where a tenant is suffering financial hardship as a result of the COVID-19 pandemic, despite section 93(4)(a), suspend the operation of an order under that section for such period, and on such conditions, as the Tribunal thinks fit; and
>
> (iii) may, in a case where a tenant is suffering financial hardship as a result of the COVID-19 pandemic, despite section 93(4a), modify

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[2] *Upton v Fynes* [2021] SACAT 84 at [29] (Hughes PJ).

> a residential tenancy agreement during such a period of suspended operation so as to reduce the tenant's immediate financial obligations under the agreement;
>
> (l) the Tribunal may, in relation to an order made under section 93(4)(a) of that Act before the commencement of this section, on an application by a tenant or landlord, further suspend the operation of the order for possession if the tenant is suffering financial hardship as a result of the COVID-19 pandemic"

This amendment allows the Tribunal to more flexibly consider the circumstances in which a tenancy may come to an end and ensure that this is guided not only by the commercial needs of landlords, but also gives due consideration to the social consequences of ending a tenancy. Such an approach allows Tribunal members to engage their expertise in the jurisdiction and understanding of the dynamics of the rental market at the time of dealing with an application to ensure the social imperative of minimising homelessness and tenant displacement are upheld.

Should the RTA be amended to accommodate longer fixed term tenancy agreements?

The RTA should be amended to accommodate longer fixed term tenancy agreements.

Subject to the one consideration outlined below, it is not evident why parties ought not be free to negotiate longer term tenancies. Further, such an amendment would facilitate greater security of tenancy in appropriate circumstances, with obvious attendant social benefits.

We note that a potential consequence of the permissibility of long term tenancies would be to create the possibility of significant and often crushing civil liabilities for tenants who vacate prior to the end of their fixed term.

In *Battersby & Battersby v Thapa & Thapa*[3] Parker PJ referred to a potential understanding amongst members of the predecessor Residential Tenancies Tribunal that a landlord would not have acted reasonably to mitigate their loss if they were unable to replace a tenant within three weeks of vacation by the tenant in breach of a residential lease, referring to that principle as the "three week principle". Parker PJ held that approach was wrong.[4] Accordingly, the assessment of a landlord's losses is, subject to mitigation, potentially the full measure of the balance of a fixed term tenancy.

To avoid the potential for tenants to become liable for considerable damages, or to become effectively trapped in existing tenancies by the prospect of the same, we propose a statutory cap on the damages that may be awarded to landlords in the event of a breach of lease by early vacation.

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[3] [2017] SACAT 7.

[4] Ibid [25]—[28].

We consider that a cap of four weeks is appropriate. We note that this is longer than the “three week principle” alluded to in *Battersby*.

A landlord’s right to recover this sum should remain subject to their acting diligently to mitigate loss. This (i) is consistent with the approach at common law; (ii) avoids an undue potential windfall to landlords who might otherwise be incentivised not to take reasonable and commercially prudent actions; (iii) avoids consequent undue liability for former tenants; and (iv) serves an important public purpose by ensuring vacant housing stock is promptly returned to the rental market.

It is proposed that this be achieved by amending section 86 of the RTA to provide for a minimum period of notice applicable to fixed term tenancies.

Should the minimum notice period required prior to the non-renewal of a fixed term tenancy agreement be extended to 60-days?

The RTA should be amended to require an extended notice period regarding the non-renewal of a fixed term tenancy.

This extension creates a greater degree of certainty for tenants and landlords, and allows tenants a greater opportunity to secure another tenancy if need be where non-renewal is impending.

However, an extended notice period may disadvantage tenants who, as was the case in *Battersby*, wish to transition to home ownership or those who, due to changing circumstances, may find their tenancy no longer affordable, however are not caught by the hardship protections provided by s 89.

As such, the statutory cap on the damages that may be awarded in the event of early vacation proposed above is imperative.

Residential Bonds

Should the relevant limit be increased to $800 to allow most tenants in SA to pay a bond of no more than the equivalent of 4 weeks’ rent?

We respectfully submit that the increase of the residential bond limit constitutes an obvious imperative.

The current limit renders the provision largely redundant, with the application of the limitation having been, and continuing to be, eroded over time by inflation. As the discussion paper notes, upon the institution of this provision a significant number of tenancies fell subject to its limitation; now that number is approximately 9% of tenancies. Without reform it will undoubtedly continue to approach 0%, and rapidly so in a high inflation environment.

As is noted in the discussion paper, the current bond limit is also seriously out of step with many other Australian jurisdictions with similar provisions. As with other anomalous features of the RTA, no peculiar features of the South Australian rental market support this discrepancy.

Put simply, there can be no justification for allowing an important protection deemed necessary by the parliament to become otiose merely by the effluxion of time.

To ensure its ongoing relevance, it is further appropriate that the increased limit be the subject of automatic annual or other periodic indexation reflecting changes in the Adelaide rental market. Given the Residential Bonds Authority is required to receive bonds calculated as a proportion of rent, it is uniquely placed to monitor average rental prices in the South Australian rental market for this purpose.[5] An indexation approach would also avoid the need for ongoing supervision by the legislature merely for "maintenance" purposes.

Should the RBO be made mandatory and require additional tenant contact details upon registration to minimise unclaimed bonds?

We respectfully submit that ending manual bond lodgements and encouraging use of the RBO also constitutes an obvious efficiency benefit, and that increasing the required tenant contact details upon registration would be a useful development to ensure tenants receive the return of their moneys.

We are alarmed to note in the discussion paper that the RTA does not contain provisions concerning the death of tenants, and specifically that there may be some perceived ambiguity as to whether rental arrears could accrue following the passing of a tenant.

It is submitted that, in circumstances in which a tenant passes and no other tenant or co-occupant desires to continue the tenancy, there could be no warrant for the estate continuing to accrue liabilities. We submit that the passing of a tenant in those circumstances would be a frustrating event at common law, resulting in the termination of the contract. The RTA should be amended to make this explicit to avoid the potentiality for particularly undesirable disputation.

As to the refund of bonds, the RTA should be amended to permit a person with a grant of probate or letters of administration to attain refund. This is consistent with the ordinary practices concerning the distribution of the assets of a deceased estate.

[5] This information appears to be already collated; see https://data.sa.gov.au/data/dataset/private-rent-report, accessed at 4 December 2022.

Rent Bidding

Should landlords and land agents be prohibited from advertising a property within a rent range, putting a property up for rent auction and soliciting offers to pay an amount of rent above the advertised price?

The RTA should be amended to prohibit "rent bidding", following the example of most other jurisdictions.

Rental bidding is an undesirable phenomena, and may tend to contribute to other undesirable behaviours, for example deliberate under quoting.

Moreover, the authors recommend further regulation of the process of entering into a residential tenancy in line with other reforms advanced in the Victorian jurisdiction. The *Residential Tenancies Act 1997* (Vic) ("**Victorian Act**") expressly outlaws false, misleading and deceptive representations made by landlords ("rental providers" in the Victorian nomenclature) and the asking of inappropriate, proscribed questions of tenants in a rental application, as well as providing a statutory scheme for pre-contractual disclosure of relevant information by landlords to tenants.

The provision of false information by tenants is already directly proscribed by s 51 of the RTA, however no analogous section appears with respect to representations made by landlords when entering into a tenancy agreement. The Victorian Act is a guide in this respect, providing that:

> "A residential rental provider or that person's agent who promotes or advertises rented premises must not make a false or misleading representation in relation to the rent for the premises".[6]

The Victorian Act also directly prohibits the engagement of landlords in misleading and deceptive conduct inducing a person to enter a residential tenancy agreement.[7]

With respect to pre-contractual disclosure, the Victorian Act provides a mandatory disclosure regime,[8] limitations on landlords requesting prescribed information,[9] and restrictions on the use of personal information provided by prospective tenants.[10]

It is our submission that the provisions referenced in the Victorian Act also provide instruction regarding the institution of a pecuniary penalties regime to address contravention of same. Such a regime finds analogy in the civil penalty provisions of the *Work Health and Safety Act 2012* (SA).[11]

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[6] *Residential Tenancies Act 1997* (Vic) s 30G(2).
[7] Ibid s 30E(2).
[8] Ibid, s 30D.
[9] Ibid, s 30C.
[10] Ibid, s 30B.
[11] *Work Health and Safety Act 2012* (SA), Division 7.

Civil penalty provisions work to ensure compliance by emphasising the financial cost of contraventions above the short-term benefit that contraventions may provide. The High Court observed in *Australian Building and Construction Commissioner v Pattinson* that 'it has long been recognised that, unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of deterrence.'[12] Such regimes promote the 'public interest in compliance [with regulatory schemes].'[13]

It is submitted that the same protective purposes which form the object of a deterrence focused regime apply in the context of residential tenancies and that a civil penalty framework is thereby apposite.

Further, the conferral of standing to seek the imposition of penalties upon persons affected by contraventions increases the opportunities for compliance activity and would serve to reduce the burden on state regulators.

A civil penalties regime also provides the possibility of a further funding stream for an enshrined tenant advocacy service discussed below.

Rooming Houses and Shared Accommodation

Should the definition of a rooming house be amended to include rooming houses that accommodate 2 or more residents?

The definition of a "rooming house" should not be so amended.

As is noted in the discussion paper, tenants in rooming houses enjoy significantly diminished rights as compared to other tenants, including:

(a) a diminished right to quiet enjoyment; and

(b) a diminished right to possession.

The RTA also permits a rooming house proprietor to engage in other actions prejudicial to the interests of tenants, including permitting landlords to:

(c) impose rules on a tenant,[14] which rules may be unilaterally altered by the landlord;[15] and

[12] *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13, [15].
[13] *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 at 52.
[14] The RTA, s 105(a).
[15] Ibid, s 105(b).

(d) an unlimited right on the part of the proprietor to non-consensually enter a tenant's own room without notice.[16]

Broadening the definition of rooming house would extend the opportunities for the above thereby diminishing the rights of tenants. Such a proposal cuts against the grain of the other proposals advanced in the RTA review, and in the respectful view of the authors ought not be entertained.

Should the RTA establish a registration scheme for rooming houses that have 5 or more residents and require 'fit and proper' person checks for proprietors?

The RTA should be amended to provide for a registration scheme involving fit and proper person checks.

It is the position of the authors that *all* persons who are providing residential tenancies should be subject to "fit and proper" persons checks. The imposition of such checks is common for persons entering into a position of authority, and is a ubiquitous aspect of occupational licensing and regulation. Offering residential tenancies is a commercial activity rather than a fundamental right; it is submitted that conditioning participation in that activity by the imposition of a "fit and proper" person test is minimally intrusive.

Such a requirement would also provide strong specific deterrence against contraventions of the RTA in circumstances where other mechanisms to address systemic contravention are lacking.[17] The current regime, relying on tenants individually litigating grievances, is unsatisfactory and ineffective.

If, contrary to the position advanced in this paper, a registration scheme is not instituted for all landlords, we respectfully submit it ought be instituted for all rooming house operators and all persons operating multiple concurrent residential tenancies.

Renting with Pets

Should the RTA include the presumption that a tenant who applies to keep a pet in a rental property cannot have their request unreasonably refused, provided the tenant agrees to comply with any reasonable conditions imposed by the landlord?

The RTA should be so amended.

The authors' proposed model for tenant pet ownership is dealt with below, compendiously with submissions regarding a "pet bond scheme".

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[16] Ibid, s 105(N)(1)(c).

[17] Elsewhere in this paper we propose a pecuniary penalty system, which would also serve this objective.

Should a pet bond scheme be introduced in SA?

The RTA should be amended to provide for a prima facie right on the part of tenants to live with pets. A pet bond model is undesirable.

While reforms to allow tenants to keep pets in their rental properties are necessary and welcomed, we are wary of the ways in which a pet bond model may:

(a) place those rights beyond the reach of the many who already struggle to raise funds to meet existing bond requirements; and

(b) impose undesirable additional burdens on existing pet-owners including those with a demonstrated history of responsible pet ownership.

For these reasons, it is the primary position of the authors that the right to keep a pet should be enacted but should not be contingent upon the payment of a pet bond. We note that rental reforms to permit the keeping of pets were recently enacted in Victoria. The Victorian legislature did not implement a pet bond model.

The implementation of a pet bond model risks introducing a “two tiered” rental scheme, in which those who have access to greater financial resources are permitted to maintain pets, while those who do not are excluded from these rights.

If a pet bond model is introduced, the appropriateness of any pet bond scheme should be the subject of ongoing monitoring. Further, if a pet bond scheme is to be introduced, it is appropriate that the additional bond be waived for tenants for whom the keeping of a pet is a necessity rather than a choice, including:

(a) tenants who require service animals; and

(b) tenants who require emotional support animals.

Further, it is undesirable to impose a pet bond upon those who keep a pet that has been demonstrated not to cause property damage over a reasonable period. We therefore propose that:

(a) tenants who are able to provide evidence of their ownership of their pet for a prescribed period prior to moving into a tenancy be exempted from additional bond requirements; and

(b) in the absence of a deduction from a pet bond, or recovery of damages from a tenant in connection with damage caused by a pet over a prescribed period, the amount of the pet bond should be refunded to a tenant during the life of a tenancy.

It is important to note that if a pet bond is implemented in the absence of the proposals in the preceding paragraphs, existing pet owners may become the subject of additional bond

requirements that they could not be lawfully subjected to under the current regime because of the bond cap. Such a reform would increase potential bond obligations for the very many responsible pet owner tenants who cannot by law currently be required to pay such a bond. We do not consider that this is desirable and doubt it would be intended.

Further, it is submitted that tenants should be entitled to keep certain species of pets without a right of refusal on the part of the landlord. The amendments recently introduced in Victoria provide for the following definition of a pet:

> *"pet means any animal other than an assistance dog…".*[18]

The effect of this is that a Victorian tenant requires landlord permission, or failing that must seek an order of the Tribunal, to keep a goldfish.[19] It is respectfully submitted that this is highly undesirable and would tend to impose undue inconvenience on the tenant and unnecessary burden on the Tribunal.

A right to keep animals of species not reasonably likely to cause damage would avoid this result. For such animals, if it is considered desirable, the right could be made presumptive and subject to an application for review to the Tribunal by a landlord on the basis of exceptional circumstances. A definition of permissible or presumptively permissible species could be inserted into the RTA to provide certainty.

If contrary to the submission in this paper, pet bonds are introduced as a condition of owning a pet, they ought only apply where the pet is of a species reasonably likely to cause property damage. This would avoid the absurdities that would arise associated with the imposition of a pet bond on the basis of the above definition.

Under any model, a right to keep a pet and protection against discrimination on the basis of pet ownership should be enshrined in the RTA.

Housing Standards and Retaliatory Evictions

Should the RTA include further complimentary provisions to those proposed under Section 1 of this paper to ensure tenants can exercise their rights without the risk of a retaliatory eviction or rent increase?

The RTA should be amended to provide for protection against retaliatory eviction.

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[18] *Residential Tenancies Act 1997* (Vic), s 3.

[19] With reference to the above see s71A of the *Residential Tenancies Act 1997* (Vic).

As we identify at the beginning of this submission, the absence of protections for those exercising tenancy rights risks rendering all other rights conferred upon tenants by the RTA illusory.

We suggest that the RTA be amended to provide for a broad protection against eviction or other action adverse towards a tenant by a landlord on the basis of a tenant:

(a) making a complaint or enquiry by a tenant about their tenancy;

(b) making a complaint or enquiry by a tenant about matters arising under the RTA;

(c) making a complaint, enquiry or referral in connection with a property under the *Housing Improvement Act 2016;* or

(d) participating in tenancy proceedings.

It is suggested that the regime embodied in section 340 of the *Fair Work Act 2009* (Cth) provides a clear model for achieving this aim. The provision essentially prohibits the taking of identified actions where the reasons for that action are or include the exercise of an employment right. We submit that the objectives which underpin such a protection are equally apposite in the context of residential tenancy.

Provision for the protection of the exercise of rights and the making of complaints in like circumstances already finds ample precedent in South Australian law, including in regimes comparable to the RTA which seek to recognise and ameliorate power imbalances in enduring relationships including:

(e) in the field of anti-discrimination;[20]

(f) in connection with "whistleblowing";[21]

(g) in the field of industrial and employment regulation;[22] and

(h) in the field of occupational health and safety law.[23]

Protection against adverse action on the basis of retaliation would serve a core purpose of the RTA and the amendments proposed by the review in that it would make more meaningful all other rights conferred to tenants.

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[20] *The EO Act,* Part 6.
[21] *Public Interest Disclosure Act 2018*; s 9.
[22] *Fair Work Act 1994,* s 223.
[23] *Work Health and Safety Act 2012* (SA), Part 6.

For the same reasons, we consider that the RTA should be amended to prohibit the making of a *threat* of retaliatory action consequent upon protected activity. Such actions are similarly likely to have a chilling effect on the exercise of the tenancy rights provided by the RTA. We note that, again, the model of protection provided at section 340 of the *Fair Work Act 2009* addresses this concern.

Should the RTA impose minimum energy efficiency standards in rental properties?

The RTA should be amended so as to impose minimum energy efficiency standards in rental properties. The RTA should also be amended so as to similarly provide minimum heating and cooling standards.

Insufficient and inefficient heating and cooling is a significant issue for South Australian tenants[24] and the lack of a sufficient regulatory framework to address this issue exposes tenants to significant social, economic and health risks – possibly violating international health guidelines.[25] The RTA should impose minimum energy standards upon rental properties that protect renters and ensure their cost of living is reduced. This should include the requirement that all new rental properties meet a minimum of an 8 Star National Construction Code energy efficiency rating and, where possible, have provisions for electric vehicle charging and distributed energy.

In this respect, the *Residential Tenancies Regulation 2021* (Vic) ("**Victorian Regulations**") is instructive. Schedule 4 of the Victorian Regulations provides minimum standards for rental properties, including heating.[26] Under the Victorian Regulations, a landlord is required to install an energy efficient heater that meets the aforementioned minimum standards unless it would be unreasonable to do so, including if:

> (a) the cost of installation would be significantly higher than the average price of installation …; or
> (b) owners corporation rules prohibit installation of the appliance; or
> (c) compliance with any other Act or local law makes the cost of installation prohibitive.[27]

Such inability to install a compliant energy efficient heater should be evidenced and communicated to prospective tenants prior to entering into a residential tenancy agreement. An infringement of the minimum rental standards set out in the Victorian Regulations is subject to a civil penalty.[28] It is our submission that the imposition of a similar penalty is appropriate to ensure compliance and should be in accordance with the principles of a penalties regime outlined herein.

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[24] Max Chalmers, 'Australian homes are so cold that some are falling below the WHO's recommended 'safe' temperature' *ABC News* (online, 15 July 2022) <https://www.abc.net.au/news/2022-07-15/why-are-australian-homes-so-cold/101227308>.
[25] World Health Organization, *WHO Housing and Health Guidelines* (Guidelines, 23 November 2018) xvii.
[26] *Residential Tenancies Regulations 2012* (Vic) sch 4 s 14.
[27] Ibid, sch 4 s 14(5).
[28] Ibid sch 5, item 23.

Further, it is our submission that such minimum tenancy standards should be extended to include energy-efficient reverse cycle air conditioning. To abate the cost of the imposition of such minimum standards to safeguard the health and wellbeing of tenants and ensure the liveability of residential tenancies, a government rebate system, akin to that underway in the Victorian jurisdiction, to assist in financing upgrades of heating and cooling facilities is also recommended.[29]

Finally, it is our submission that, through similar subsidies and public funding, support should be provided for the installation of solar photovoltaic and battery systems.

Safety Modifications and Minor Changes

Should the RTA be amended to prevent the unreasonable refusal of safety modifications and minor changes including the installation of wall anchors, child safety gates, childproof latches, wireless outdoor cameras, showerheads, and internal window coverings?

The RTA should be amended to preclude the unreasonable refusal of safety modifications and minor changes.

The provisions of the Victorian act provide a useful model, in particular:

(a) a right on the part of tenants to make certain, prescribed modifications without the need to seek or obtain permission;[30] and

(b) prohibiting landlords from unreasonably refusing minor modifications;[31]

Although significant submissions on the topic are beyond the scope of the authors' experience and expertise, it is submitted that protections against the unreasonable refusal of safety modifications be extended to modifications to improve accessibility for tenants, their family and dependents, and modifications funded under the National Disability Insurance Scheme.

We note in particular that the Victorian scheme explicitly permits "reasonable modifications" within the meaning of the corresponding Equal Opportunity Act.[32] The RTA ought be amended to similar effect.

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[29] 'Upgrades for Rental Properties', *Solar Victoria* (Web Page, 5 December 2022) <https://www.heatingupgrades.vic.gov.au/upgrades-rental-properties>.
[30] *Residential Tenancies Act 1997* (Vic), s 64(1).
[31] ibid, s 64(1B) generally.
[32] ibid, s 64(1B)(c)(i).

Start of Tenancy Requirements

Should the RTA require prospective tenants to use a standardised application form in any application for a rental property that has questions that restrict the amount of personal information a landlord or land agent can gather about a prospective tenant?

The RTA should be amended to provide for a standardised tenancy application.

The absence of a standardised form risks exposing tenants to capricious and arbitrary decision making, invasions of privacy and unlawful discrimination. Confining the information that may be collected to that which is reasonably and objectively required to evaluate the suitability of a tenant is inherently logical. There is no principled reason to permit the collection of additional information.

Such an amendment would operate to prohibit the collection of information which could be used for an unlawfully discriminatory purpose (for example, information about race, religion or national extraction) and would thereby limit the opportunities for such discrimination to occur, deliberately or subconsciously.

The standardisation of the manner of the collection of that information also creates obvious efficiencies for tenants who may be applying for multiple prospective tenancies. This is particularly useful in a tight tenancy market where this is likely to be the norm.

Should the RTA be amended to prohibit landlords, land agents and database operators from charging a fee to a person who requests a copy of the personal information about themselves that is listed on a residential tenancy database?

The RTA should be amended to prohibit landlords, land agents and database operators from charging a fee to persons who request a copy of tenancy database information where that information pertains to the applicant.

The operation of such databases is undertaken for the benefit of landlords and land agents. Accordingly, it is appropriate that the costs of administering those systems including the provision of information, itself likely to be minimal, are met by those parties.

Such databases are conceptually similar to credit reporting databases. Errors, omissions or false information on such databases can have a similarly deleterious effect on persons in respect of whom such information is retained. It is notable that Subdivision F of Part IIIA of the *Privacy Act 1998* requires the free provision of such information to persons who are the subject of credit reporting.

The elimination of fees would also serve to reduce barriers to access to such information, both in terms of cost and inconvenience. The unimpeded exchange of information with tenants promotes the accuracy of information retained on tenancy databases.

This should not be conceived of solely as a protection or benefit to tenants; on the contrary, the maintenance and provision of complete and accurate tenancy information to landlords and tenancy agencies ensures that landlords do not forego rental revenue by declining to enter tenancies based on inaccurate adverse information about prospective tenants.

Domestic Violence

Are further amendments required to strengthen financial protections for victims of DV who are renting?

Further amendments to the RTA are required to strengthen protections for victims of domestic violence.

The 2015 changes are welcomed, but the RTA continues to permit tenants to be financially liable for damages arising in consequence of domestic violence. The *Residential Tenancies Act 2010* (NSW) provides at s 54A:

> “(1) A tenant (the "exempted tenant") is not responsible to the landlord for any act or omission by a co-tenant that is a breach of the residential tenancy agreement if--
>
> (a) the act or omission--
> (i) constitutes or resulted in damage to the residential premises, and
> (ii) occurred during the commission of a domestic violence offence, and
>
> (b) the exempted tenant is--
> (i) the victim of the domestic violence offence, or
> (ii) an exempted co-tenant.
>
> (2) In this section--
> "exempted co-tenant" means a person who--
>
> (a) is a tenant under the same residential tenancy agreement as the tenant who is the victim of the domestic violence offence, and
>
> (b) is not a relevant domestic violence offender (within the meaning of Division 3A of Part 5) nominated in a document referred to in section 105C(2) and annexed to a domestic violence termination notice (within the meaning of section 105A) for the residential tenancy agreement.
>
> (3) This section is a term of every residential tenancy agreement.”

It is respectfully submitted that this provision should be adopted *mutatis mutandis*. The imposition of liabilities upon a person in consequence of another person's domestic violence offending is:

(a) unconscionable as a matter of principle; and

(b) may serve to discourage tenants from exiting households in which domestic violence occurs.

Water Billing

Should the RTA require landlords to provide tenants with a copy of any water bill the tenant is required to pay within 30 days of receiving the water bill?

It is appropriate that the RTA be amended to require landlords to promptly apprise tenants of the extent of their liabilities when seeking to recover the cost of the provision of utilities.

The timely provision of such bills promotes two important purposes:

(a) it allows tenants to better manage their finances by ensuring they are advised at an early and appropriate time about forthcoming liabilities;

(b) it provides tenants with an opportunity to adjust their water consumption in response to usage charges if appropriate.

There are few countervailing considerations. The requirement constitutes a minimal imposition on landlords, particularly in circumstances in which landlords recovering water charges are already required to provide bills to tenants, albeit presently on a quarterly basis.[33]

Should responsibility for the payment of the water supply fee be paid by the landlord, as is the standard practice in other jurisdictions?

The RTA should be amended to provide that landlords are liable for water supply charges. This is so for at least four reasons.

Firstly, as the discussion paper notes, the supply charge is a statutory fee charged against the landowner. In this way, the supply charge is analogous to council rates[34] and the Emergency Services Levy.[35] Neither of these charges is payable by a tenant. The current arrangements are thereby anomalous in that they are routinely passed on to non-landowners.

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[33] The RTA, s 73(3)(a).
[34] *Local Government Act 1999* (SA), s 177(1).
[35] *Emergency Services Funding Act 1998,* s 15(1).

Secondly, landowners are liable to pay an abuttal charge on properties that are able to be connected to the network irrespective of whether they are actually connected or utilised. SA Water advises that this is because:

> "[the] abuttal charge reflects the availability of the service should you or future owners choose to connect it to the property. The sewerage network has been designed to make this connection available, which adds value to your property [emphasis added]".[36]

Such charges are not in any way referable to the occupancy of the property: property owners face these costs even if they allow their properties to stand unoccupied. Further, the addition of value to a property by the sewerage network is of benefit to the property owner and is not dependent on tenancy. It is appropriate that land owners pay for services and amenities that serve to add value to their property. It is not appropriate that tenants assume liability for land owner's financial obligations that have no nexus to, and would be payable irrespective of, their tenancy.

Thirdly, as is noted in the discussion paper, the arrangements are also anomalous when compared to other jurisdictions. There are no special features peculiar to South Australia that justify a divergent approach.

Fourthly, unlike the water usage charges which depend upon activities undertaken by the tenant, water supply charges are unavoidable by the parties. Other than an allocation of liabilities as between the parties, no purpose is served by tenants to meet those costs, and in particular the passing on of those costs does not serve to drive socially desirable behaviours such as water conservation.

It is conceivable that the effect of the reallocation of this liability may result in increases to rents as landlords seek to recover the additional expenditure. The extent to which this is possible will be driven by market factors. In any event, even if this were to occur, and even if it occurred on a 1:1 basis, the reform is still desirable as the increase would be modest and result in smaller, more manageable payments for tenants vis-a-vis the current model.

Should landlords have a full or partial obligation to pay the excess water charges resulting from a reported water leak that remains unrepaired, noting this would require the RTA to define how excess water charges are identified?

The RTA should be amended to hold landlords liable for excess water charges arising as a result of an unrepaired water leak.

[36] https://www.sawater.com.au/my-account/water-and-sewerage-prices/sewerage-prices, accessed at: 4 December 2022.

Notably, it is already the obligation of a landlord to repair tenanted premises.[37] In the absence of reform, a landlord may cause considerable loss to a tenant arising from their breach of a statutory duty.

The proposed amendment, essentially providing for a form of liquidated damages, will avoid the need (in most cases) for time consuming tribunal proceedings to determine the amount of compensation in circumstances in which a reasonable evaluation of the tenant's loss is readily available by reference to a water bill. The attendant costs to the state of such proceedings would be avoided.

It is proposed that, in the event of a dispute as to whether the liquidated rate is appropriate, parties be granted a right to invoke the Tribunal's review and, if appropriate, its assessment of the appropriate reduction.

The *prima facie* reduction should be robust. It is submitted that there is little room for legitimate complaint by a landlord about a reduction in their rights of recovery in circumstances in which they are in contravention of statutory obligations of repair. This is doubly so where a right of review by the Tribunal is afforded. On the other hand, a tenant who faces additional water charges occasioned by a contravention ought be entitled to remedy.

The imposition of these charges would also incentivise the timely repair and maintenance of relevant facilities by landlords. This serves a broader social purpose in that it promotes the conservation of water resources.

There is no principled justification for the financial consequences of any breach of statutory duty by a landlord being visited upon a tenant. We note that the RTA contains significant protections for landlords, in that a landlord only becomes liable to repair property after they have been expressly notified of the issue by the tenant. This means that, for example, tenants may retain liability for excess water charges caused by latent defects about which they do not know and therefore cannot have informed a landlord. This in itself may be seen as a generous concession to landlords.

Illegal Drug Activity

Should landlords who know or suspect that illicit drugs have been manufactured or regularly smoked in their property be required to undertake necessary remediation before leasing the property and provide evidence of this to prospective tenants?

The RTA should be amended to establish a specific duty upon landlords to undertake necessary remediation where the landlord knows, suspects, or ought reasonably know or suspect that the manufacture or usage of illicit drugs, or other substances that pose health risks to subsequent

[37] The RTA, s 68.

tenants, has taken place in a rental property. Landlords should be required to provide evidence of such remediation to prospective tenants. This can be achieved under the mandatory pre-contractual disclosure regime discussed above in the section entitled “Rent Bidding”.

It is not anticipated that the reform will substantially increase costs or obligations on landlords, noting that obligations to offer properties in a decent state of repair and cleanliness are already imposed.[38] A property tainted with, for example, methamphetamine or methamphetamine residue could scarcely be said to have been tenanted in a “reasonable state of cleanliness” and would therefore be precluded from offer under the existing statutory duty.

Further, with respect to illegal conduct taking place in residential tenancies, the authors respectfully submit that s 90(1)(a) of the RTA be amended to require a firm nexus be established between the illegal conduct for which the premises was used or permitted to be used by a tenant and an adverse impact upon the interests of the landlord or other tenants in order for the Tribunal to terminate a tenancy (eg property destruction).

Landlords should not be deputised into sanctioning contraventions of the criminal law properly the province of police. It is submitted that it is instructive to remember that the RTA is concerned with protecting the interests of the parties to a residential tenancy agreement and should not imbue the Tribunal with a power to impose an additional punishment on tenants above that which the criminal law provides, especially an additional punishment concerning the deprivation of shelter.

Third Party Payments

Should the RTA prohibit landlords or land agents charging tenants an additional fee to make rental payments, whether this is directly or indirectly by passing on costs from third parties engaged by the landlord or land agent to facilitate payment?

The RTA should be amended to prohibit landlords charging any additional fees in connection with payment of rent.

The RTA provides that the only permissible consideration for a residential tenancy is “rent” and “bond”.[39] The term “rent” is defined in the RTA[40] and confined to the rent payable under a tenancy agreement.

Accordingly, it appears already facially impermissible to charge additional amounts over and above those agreed as a term of a tenancy agreement. Further s56A already obliges a landlord to permit tenants to pay in a non-cash manner not attracting additional fee.

[38] RTA, s 67 and s 68.
[39] The RTA, s 53(1).
[40] Ibid, s 3.

It is submitted that, in the circumstances, the proposed reform is sensible and ought have no meaningful adverse impact on landlords compliant with extant statutory obligations.

Modernisation of Language

Should terms within the RTA be updated? If so, which terms should be revised and what should they be replaced with?

The section of the discussion paper addressing the modernisation language is noted.

The modernisation of language with respect to the aforementioned reforms concerning people with disabilities and persons within other protected categories is encouraged, and it is generally advisable that the legislature ensure the use of the contemporary and appropriate language.

PART C - ADDITIONAL REFORMS

As is noted at the commencement of this submission, the rights conferred by the RTA depend for their practical efficacy on tenants having knowledge of their rights, security in their exercise and access to supports to do so.

To that end, we welcome the proposed prohibition of retaliatory eviction and non-renewal of leases offered for consideration in the discussion paper.

In this part of the submission, we propose two further reforms directed towards ensuring tenants can effectively avail themselves of the statutory protections of the RTA. We consider that both are fundamental to achieving practical access to the rights contained in the RTA and those proposed in the discussion paper.

We propose a reform to permit groups of tenants to nominate bargaining representatives in cases where a landlord has outsized market power. This proposed reform arises as a result of recent developments in the commercial tenancy sector.

Finally, we propose a reform to expand the levers available to regulate rent increases in light of changing social and economic conditions, as evidenced by the experiences of South Australian renters during the COVID-19 pandemic and present experience of significant housing unaffordability.

Should the RTA be Amended to Require the Provision of a Tenancy Information Statement?

We propose that landlords be obliged to provide tenants with a tenancy information statement at the commencement of their tenancy, and upon renewal of a tenancy (but not more frequently than every two years).

We propose that the RTA be amended to require that the CBS develop a brief, standard form information statement advising tenants of relevant information including:

(a) tenants’ rights under the RTA during the currency of their tenancy (e.g. the right to have property maintained by the landlord);

(b) tenants’ obligations under the RTA;

(c) tenants’ rights upon the expiration of a fixed term residential lease;

(d) when and in what circumstances a residential lease may be terminated by either party;

(e) where additional information about tenancy rights and obligations may be accessed; and

(f) where tenancy advocacy services may be accessed.

This approach is consistent with, for example, the obligations on employers to provide a statement concerning employment rights at the commencement of their engagement of a worker.[41] We envisage that directions towards additional information and advocacy services could be provided in multiple commonly spoken languages.[42]

Given our submission that the statement ought be in standard form and prepared and provided by CBS, it is submitted that this obligation would constitute a trivial imposition on landlords. Conversely, it is likely to be of significant benefit to tenants, particularly tenants from culturally and linguistically diverse backgrounds or who otherwise face barriers to obtaining tenancy information.

In the absence of an amendment to the RTA, we call upon the Commissioner to exercise powers under s 48(1)(f) of the RTA to require the same.

Should the RTA be Amended to Enshrine Tenancy Advocacy Services?

We propose that the RTA be amended to enshrine a tenancy advocacy service.

In this regard, we draw CBS's attention to the New South Wales "Tenants Advice and Advocacy Program" (TAAP). The NSW TAAP program is managed through NSW Fair Trading, the equivalent of the CBS in the state of New South Wales.

The program comprises grants to not-for-profit tenancy advocacy services funded by the interest accrued on monies held by the New South Wales Rental Bond Board.

This structure ensures the sustainability and independence of residential tenancy advocacy services, including its independence from government. It represents a principled investment of tenants' own monies which in South Australia, as in New South Wales, are held on trust by the bonds authority.

Enhancing tenancy advocacy services further requires amendment to section 113(3) of the RTA which limits the circumstances in which a person may be represented before the Tribunal. We note that in practice, landlords are often at a significant advantage since they are able to be represented, without leave of the Tribunal, by paid agents because of the operation of section 113(b) of the Act. Such agents are inherently likely to have significantly greater familiarity with tenancy law and the practices and procedures of the Tribunal vis-a-vis tenants.

We propose that a tenant be permitted to be represented by an unpaid agent, including a lawyer where the lawyer is acting on a *pro bono* basis. We consider this achieves a reasonable balance

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[41] See *https://www.fairwork.gov.au/sites/default/files/migration/724/Fair-Work-Information-Statement.pdf*

[42] This is conceptually similar to the obligation to provide a "multilingual notice" which is provided for under the *Uniform Civil Rules 2020* (See rr 63.3, 65.5, 82.3, and 214.2).

between, on the one hand seeking to avoid the incurrence of cost in proceedings and on the other, ensuring parties are able to effectively put their case before the Tribunal.

Should the RTA be Amended to Provide for Group Negotiation of Tenancy Terms?

We also propose that consideration be given to permitting tenancy advocacy organisations to be empowered to resource and appoint, upon nomination by the relevant tenants, a representative to negotiate the terms of residential tenancy agreements with landlords and rooming house proprietors or large residential tenancy portfolios over a specified threshold.

Group negotiation of tenancy terms has recent precedent in Australia; it is correspondent to the authorisation granted by the Australian Competition and Consumer Commission to industry representatives to bargain on behalf of groups of retail tenants.[43] The authorisation noted the following benefits which it held justified the grant of authorisation:

(a) the reduction in transaction costs associated with the negotiation of tenancies; and

(b) improved input into negotiations, holding:

> "The ACCC considers that small businesses can be at a disadvantage when negotiating with larger businesses. Small businesses may have fewer resources or less experience available when negotiating in complex commercial environments. Collective bargaining is one way in which a small business can seek to redress such disadvantage."

It is submitted that both of these considerations apply with even greater force to residential tenancies, particularly in respect of tenants bargaining with landlords with outsized market power and rooming house proprietors, which is the limited scope of the authorisation proposed in this submission.

It is the experience and observation of the authors that in most circumstances very little "bargaining" over the terms of residential tenancy contracts actually occurs in South Australia, with most tenants simply presented with contracts of adhesion offered on a "take it or leave it" basis. This reflects not only the imbalance of power between landlords and tenants, but also an imbalance of sophistication between tenancy agents and tenants.

In addition to the concerns regarding frictional costs identified by the ACCC authorisation, these are precisely the twin justifications for the authorisation identified at (b) above.

[43] Australian Competition and Consumer Commission, *Determination: Application for Authorisation lodged by ARA in respect of Collective Bargaining of ARA Members with landlords*, (AA100050, 6 August 2020).

Further, it is for this precise reason that the terms of the RTA which operate to constrain such contracts are critically important. This reform would serve to remedy this situation in the limited circumstances in which it is proposed to apply.

Further, the facilitation of such arrangements in respect of rooming houses is particularly desirable in view of the common interests of rooming house tenants and the sophistication and size of many rooming house proprietors' operations.

Should the RTA be Amended to Strengthen Protections for People with Disabilities?

The current RTA fails to provide adequate protection to people with disabilities, and in particular:

(a) people with intellectual disability or cognitive impairment;

(b) young people with disability; and

(c) people with disability at risk of homelessness

The authors respectfully submit that the RTA should be amended to include protections for persons with disabilities, especially those living in group accommodation settings of 3 or more residents.

The authors are advised that the current regime disproportionately impacts people with disabilities, in particular those with intellectual disabilities and cognitive impairments who are participants of the NDIS, because they are often funded by the NDIS to live in ratios of 3:1 or more. Due to this, people with disabilities are left without the promotion or protection of their tenancy rights. There should be specific provision within the RTA which anticipates this circumstance and provides adequate protection for people with disabilities living in group or shared accommodation.

The RTA also expressly excludes persons living in "supported residential facilities".[44] Further, such persons, as well as persons with disabilities living in rented accommodation but not party to a residential tenancy agreement are excluded. While it is perhaps anticipated by the Parliament that these residents would then be offered protection under the SRF Act, there is an exemption in place curtailing the operation of Part 4 (Licensing Scheme) and Part 5 (Rights of Residents) for facilities that provide accommodation services as defined under the *Disability Services Act 1993*, are registered as a Specialist Disability Accommodation provider or have three or more residents who are NDIS participants who are eligible for or in receipt of Supported Independent Living Support Payments.[45] The combined effect of this is that a significant proportion, and we are advised: a majority, of those living with disability being without protection from the RTA or SRF Act. The authors respectfully submit that the protections should be provided under the RTA, as

[44] The RTA, s 5(1)(a)(iv).

[45] *Government Gazette* dated 24 January 2019 at page 264.

people with disabilities have the right, like other South Australians, to recognition and protection as tenants.

A further effect of the failure of the RTA to apply to people with disabilities in such circumstances that such persons are unable to access "rent assistance"[46] from Services Australia, and are refused funding for modifications that might otherwise be available from the National Disability Insurance Agency.

The RTA ought be amended to ensure persons living in such circumstances are afforded the basic tenancy rights conferred on other residential tenants in South Australia.

An additional issue of concern facing renters with disabilities is the absence of minimum accessibility requirements or any positive obligation on the landlords to disclose the accessibility features available in the property.[47] Without this knowledge, prospective tenants are required to:

(a) inspect or enquire separately in respect of any listed property; and

(b) disclose their disability to landlords (which they may not otherwise do), exposing them to increased opportunity for indirect or direct disability discrimination, including unconscious bias, in making a rental application.

The failure to have minimum accessibility standards also impacts young people with disabilities, disproportionately as they may wish to enter shared housing with peers but are not able to do so because a large majority of housing offered on the private rental market is inaccessible. Opportunities to rent with non-disabled peers are significantly reduced in social and public housing which, in the absence of minimum accessibility standards, become the predominant form of accommodation option for people with disabilities.

We therefore urge that the RTA be amended to:

(c) regulate minimum accessibility standards; and

(d) impose a positive obligation on landlords to disclose the accessibility features of a property when advertising the property as available to rent.

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[46] *Social Security Act 1991,* s 1070C(c) and s 13; see also *Social Security Guide* at 2.2.13.20 RA.
[47] This can be contrasted with, for example, Airbnb which proactively discloses accessibility features; https://www.airbnb.com.au/accessibility; accessed at 4 December 2022.

Should the RTA be Amended to Address Housing Unaffordability and Low Wage Growth?

Precarity of both employment and housing has become a defining feature of the lives of South Australian workers.[48] South Australia workers are currently experiencing a period of significant low wage growth and concomitant cost of living pressures. This is evident in the significant extent of rental unaffordability and rental stress throughout South Australia.[49]

It is our submission that the current RTA is not fit for the purpose of addressing these intersecting crises and, therefore, ought be amended. Amending the RTA to create appropriate levers to maintain housing affordability amid changing economic circumstances – as seen, for example, during the COVID-19 pandemic, and in the period of low-wage growth presently experienced by South Australian workers – is integral in achieving this.

It is our submission that this can be appropriately achieved through the expansion of existing tools provided by the RTA regarding rent increases. The RTA currently provides that rent increases must only occur once within a 12-month period, unless otherwise mutually agreed by the landlord and tenant/s.[50] Section 56 of the RTA also currently provides for a declaration by the Tribunal, on application of a tenant, that rent is "excessive" in light of:

(a) the general level of rents for comparable premises in the same or similar localities; and

(b) the estimated capital value of the premises at the date of the application; and

(c) the outgoings for which the landlord is liable under the agreement; and

(d) the estimated cost of services provided by the landlord and the tenant under the agreement; and

(e) the nature and value of furniture, equipment and other personal property provided by the landlord for the tenant's use; and

(f) the state of repair and general condition of the premises; and

(fa) the estimated cost of goods and services provided under any domestic services agreement collateral to the residential tenancy agreement; and

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[48] Australian Council of Trade Unions, Submission No 98 to Senate Select Committee on Job Security, *Inquiry into the Impact of Insecure or Precarious Employment* (30 April 2021) 3–4; Australian Institute of Health and Welfare, *Australia's Welfare 2021: Data Insights* (Biennial Welfare Report No 15, 16 September 2021) 135–8.

[49] South Australian Council of Social Service, *December Quarter 2021 – Rental Affordability* (Cost of Living Update No 49, 22 February 2022).

[50] RTA s 55(2)(c) and (2a).

(fb) if the rent was purportedly increased under section 55(2a)—whether the tenant was put under undue pressure to agree to the increase; and

(g) other relevant matters.[51]

Upon finding that rent charged by a landlord is excessive, the Tribunal may

(a) fix the rent payable for the premises and vary the agreement by reducing the rent payable under the agreement accordingly; and

(b) fix a date (which cannot be before the date of the application) from which the variation takes effect; and

(c) fix a period (which cannot exceed one year) for which the order is to remain in force.[52]

It is our submission that the RTA should be amended to create another possible lever to be utilised in combating present and future instances of widespread rental unaffordability and cost of living pressures. This is to be achieved by amending the RTA to provide for further limitation on rent increases by regulation. Such amendment will provide the government with the ability to adapt properly to crises such as the COVID-19 pandemic, or periods of wage stagnation and cost of living pressures, by properly limiting the extent to which rents may be increased, for example, in line with changes in the Consumer Price Index. To ensure flexibility in such an arrangement, it is submitted that landlords may increase rents above such a regulated limit by order of the Tribunal upon application, considering factors akin to those outlined in s 56(2).

Such intervention in rental increases is not unprecedented in South Australia, with s 8(1)(b) of the Emergency Response Act outlawing rent increases where tenants were experiencing hardship as a result of the COVID-19 pandemic. The abovementioned reform would allow governments to better adapt to changing circumstances and ensure that proper regard is given to rent stress and cost of living pressures experienced by South Australian tenants.

[51] Ibid s 56(2).
[52] Ibid s 56(3).

PART D - CONCLUSION & RECOMMENDATIONS

The discussion paper to which this paper is responsive identifies and proposes meaningful resolutions to pressing issues in the South Australian tenancy market.

The proposed reforms will bring South Australia into line with other jurisdictions and ensure that the RTA continues to provide meaningful protection to tenants. With the exception of pet-bonds and the extension of opportunities to offer "rooming house" tenancies, the authors endorse each proposal.

We respectfully provide suggestions to ensure that the implementation of these proposals does not have unintended or unfortunate consequences.

Whatever rights are conferred on tenants by an amended RTA, in the view of the authors, they depend for their efficacy on tenants:

(a) having knowledge of them;

(b) being able to exercise them without fear of retribution; and

(c) being supported in their exercise before the Tribunal.

To this extent preclusions on retaliatory eviction and the provision of a proscribed reason for the cessation of tenancies are particularly welcomed.

The additional proposals contained in this paper regarding the provision of tenancy information statements and tenancy advocacy services would address the other two imperatives identified above.

In particular, with respect to tenants with disabilities, we recommend immediate reform to ensure:

(d) tenancy arrangements of more than 3 people, including where the tenants are in receipt of NDIS payments are provided for by the RTA, ensuring valid tenancy agreements are able to be made under the RTA for people with disabilities in shared and group housing; and

(e) the implementation of minimum accessibility standards, including a requirement for landlords to disclose the accessibility features available at the property when advertising the property for rent.

Finally, we recommend an amendment to the RTA to allow for the regulation of rent increases as a means to combat widespread housing unaffordability in South Australia.

We are hopeful that the suggestions in this submission are of value to the CBS. If any further opportunities to address the review arise, either in writing or orally, we would be grateful for being apprised of the same.

P. Dean

W. Fay

Authorised by Dale Beasley, Secretary, SA Unions

15 December 2022