ANGLICARE
TASMANIA

Response to Consumer Affairs & Fair Trading consultation on 'Residential Tenancy Commissioner – draft guidelines for residential tenancy disputes'

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Introduction

Anglicare welcomes the opportunity to respond to the Office of Consumer Affairs & Fair Trading's consultation on the draft guidelines for residential tenancy disputes. Anglicare's reading of the document is that it is intended to provide information to both landlords and tenants about how the Residential Tenancy Commissioner goes about determining bond disputes and in particular, about what kinds of claims are considered legitimate and what kind of evidence is considered necessary to substantiate legitimate claims.

The draft content of the guidelines covers many important areas of dispute between landlords and tenants and much of the information will be illuminating and useful. For example, Anglicare workers advise that claims against the bond for the replacement of damaged property are commonly based on landlords' mistaken belief that they can claim the full replacement cost of the item, rather than the value of the item at the time the damage occurred. Similarly, claims for the cost of reletting the property in the event of early vacation or abandonment and the limit on damages arising from early vacation are issues that are not usually well understood. The draft guidelines generally provide welcome clarification for landlords and tenants on these and other issues.

However, Anglicare is concerned that the document as drafted is not particularly user-friendly. Someone browsing casually through the Consumer Affairs & Fair Trading

(CAFT) website could be forgiven for thinking that it is a set of legal guidelines applying to the Commissioner, rather than an information brochure for landlords or tenants. Even someone looking specifically for information on bond disputes would not necessarily know, from glancing at this document, that it was what they needed.

Anglicare recommends that the document be retitled and reformatted to make its actual purpose more obvious. For example, we suggest changing the title to a more informative and user-friendly one, such as 'What you need to know about bonds: tips for landlords and tenants'. Formatting and design changes to make the document more attractive and easier to navigate and read are also recommended. In addition, Anglicare points out that some of the language used would not be easily understood by many people, particularly those with limited literacy skills, and recommends that the document be revised prior to its final publication to make sure that all of the content is in plain English.

The finished document will of course be of little use unless it is widely available. Anglicare recommends that CAFT ensure that it is well-publicised and extensively distributed. The publicity and communications campaign that was used to support the introduction of the residential deposit authority (RDA) provides a useful template for what is required. We stress that simply having this information available on the website is inadequate – many private landlords and tenants will simply not be proactive in seeking it out and, even if they try, may have difficulty in accessing it through CAFT's website, which is not consumer-friendly in layout or design. Anglicare notes that now that the RDA is established, CAFT have a much greater capacity to communicate directly with landlords, particularly private landlords, and tenants than before.

Comments on the content

The document needs to serve a dual purpose: explaining the existing process for dispute resolution and educating landlords and tenants about what this means for their own claims. There are a number of elements that Anglicare feels need to be expressed in much stronger terms or explained in much more detail to ensure that the document is as useful as possible in addressing the issues our workers see in the private rental market every day.

Condition report: In the words of one of Anglicare's workers, 'condition reports cannot be emphasised too much!'. According to the draft guidelines,

> [a]n owner is required under section 26 of the Act to give a condition report to a prospective tenant if they require a bond. The condition report is the most important document of evidence that can be provided to support a claim. The absence of a condition report signed in accordance with the Act *will significantly disadvantage an owner's claim. … However, while the condition report is important, it is not the only evidence that the Commissioner will accept.* Other evidence such as photographs can be useful in supporting a claim (CAFT 2010, p. 7, emphasis added).

The draft guidelines as written clearly suggest to owners that they do not have to substantiate a claim for damages with a condition report in order to be successful and that not having a condition report will merely disadvantage the claim, not invalidate it.

Yet section 26 of the *Residential Tenancy Act 1997* (the Act) clearly states that '[i]f an owner requires an amount as a security deposit … the owner is to give the tenant 2 copies of a report stating the condition of the premises on or before the day on which the tenant occupies the premises' and that this condition report 'is evidence of the state of repair and condition of the residential premises to which it relates'. A landlord who has charged a bond but has not provided a condition report is in breach of the Act, and should not be able to make a successful claim for damage to the property, regardless of what other evidence they produce. The guidelines should be reworded to state that a condition report is mandatory if a landlord wishes to make a claim for damages.

Wear and tear: Anglicare workers report that many landlords simply do not understand the provisions in s. 53 of the Act in relation to 'reasonable wear and tear'. This leads to claims for replacement of items or repairs that are not legitimate.

For example, a tenant who has regularly vacuumed the carpet in their property and who has not done anything to cause it to become torn or stained has met their obligations under s. 53. Their landlord does not then have the right to make a claim, for example, for replacement of the carpet on the basis that it has become worn due to people walking over it or faded due to sunlight, particularly if the carpet is old and therefore more prone to wearing and fading. Nor, in Anglicare's view, does the landlord have the right to expect the tenant to have the carpet professionally steam-cleaned – although, as noted in the draft guidelines (CAFT 2010, p. 11), landlords are increasingly including a specific provision in their residential tenancy agreements requiring this.

Simply put, it is not the responsibility of the tenant if aged, worn fittings become more aged and worn during a tenancy. This is wear and tear, not damage, and a landlord cannot legitimately claim all or part of the bond in order to replace these fittings. Nor is it legitimate to compulsorily require professional servicing of the item by the tenant upon vacating the property. It is Anglicare's view that the guidelines need to contain a clear and comprehensive explanation of the meaning of 'reasonable wear and tear' and the implications for claims for repairs and replacement. This will assist enormously in helping landlords to understand these provisions and hopefully prevent some disputes over this issue arising.

Loss of value: There is a section in the draft guidelines on 'loss of value' (CAFT 2010, p. 7). Anglicare is concerned about this section on the basis that, as the guidelines note, '[l]oss of value is difficult to assess' (CAFT 2010, p. 7). This raises a number of questions. How is loss of value calculated? Is the methodology robust enough to be consistent and fair across a potentially infinite number of types of damage? Is a claim for loss of value

actually legitimate by definition – how can the tenant be made responsible for the value of the landlord's investment? These are serious issues that require clarification from CAFT.

Evidence: As the draft guidelines note, under s. 61(1) of the Act, landlords are obliged to keep a record of all rent paid by the tenant. This record can be used as evidence in a claim against the bond for unpaid rent. The guidelines note that the form of the record is non-specific, but that 'a written record completed on the receipt of each payment will be the best form of evidence' (CAFT 2010, p. 9). Anglicare workers report that many landlords, especially those at the lower end of the market, do not keep adequate rent records. Anglicare recommends that, for the purposes of educating landlords, the guidelines provide greater clarity about the standard of record keeping required to substantiate a claim for outstanding rent. A 'written record completed on the receipt of each payment' could after all mean an exercise book with notations in pencil.[1]

Another form of evidence that the Commissioner will accept in support of a claim is photographs (CAFT 2010, p. 7), and Anglicare presumes, although it is not stated, that the Commissioner requires such photographs to be dated. Photographs can be valuable evidence in support of the claims of both landlord and tenant, but it is important to be conscious that the issue of dating photographs is problematic. For example, automatic camera dates can easily be reset. Anglicare urges the Commissioner to set a high standard of proof in this regard.

Mitigating losses: Anglicare would like to see greater clarity in the section of the guidelines on mitigation of loss (CAFT 2010, p. 9), and particularly, greater emphasis on the landlord's obligations in this area. The guidelines note the landlord's obligation, under s. 64A of the Act, to take all reasonable steps to mitigate any loss arising from the tenant's failure to comply with the terms of their agreement and state that '[t]his means that as soon as an owner becomes aware of an event such as the abandonment of the property, the owner must takes [*sic*] steps to avoid any further damage' (CAFT 2010, p. 9). However, Anglicare's reading of s. 64A is that the Act imposes a higher standard on the landlord in this area than the guidelines imply. S. 64A (c) states that a landlord 'is not entitled to be paid for any loss or damage that occurs because of the failure to take those measures'. Anglicare's reading of s. 64A is therefore that not only is a landlord required to take all reasonable steps to mitigate any loss, but that they forfeit their right to claim bond money for that loss if they do not take those steps. This, and the implications for the evidence required to support claims, should be made clear in the guidelines.

In Anglicare's view the steps that a landlord should be expected to take include not only monitoring whether or not their property has been abandoned, but also ensuring that any maintenance required, including as the result of damage, accidental or otherwise, is

[1] CAFT may want to consider providing landlords with a 'model' or template rent record book in the same way that the Department of Infrastructure, Energy and Resources provides learner drivers with a log book to record their compulsory hours of driving experience. This would ensure that landlords could be confident that they were recording rental income correctly in the event of needing to make a claim. Other templates that could be provided include standardised condition reports and standardised application forms.

carried out promptly to avoid the problem getting worse and causing further damage, and ensuring that rent arrears are minimised. Anglicare understands and appreciates that some landlords do allow their tenants some flexibility around rental payments, particularly if the tenant is in financial difficulty. Anglicare is not suggesting that landlords cease doing this as allowing tenants a few extra weeks to pay their rent now and then may assist that household to juggle other expenses or, in some cases, even prevent homelessness. However there is a difference between this kind of negotiated flexibility and permitting, through carelessness or negligence, the accumulation of extremely large debts which the tenant has no prospect of being able to pay and which are then claimed against the bond. Ensuring that this does not arise should be considered a step the landlord is expected to take under s. 64A, and whether or not they have done so should be investigated by the Commissioner prior to making determinations on claims against the bond for unpaid rent. To substantiate a claim, a landlord could provide copies of written correspondence or a log of dated entries with notes of conversations with the tenant about the rental arrears situation.

'Break lease fees': Anglicare is concerned about CAFT's apparent acceptance of the practice of charging standard 'break lease fees' (CAFT 2010, p. 10). Under s. 17 (3) of the Act, the landlord must not require from the tenant during the term of the agreement 'any money or other consideration' apart from rent, the cost of water used (providing a meter is fitted) and 'reasonable compensation for damage … or … loss'. Charging a 'standard' fee on the breaking of a lease, even if no loss is incurred, by Anglicare's reading contravenes the legislation. We are disappointed to see CAFT implicitly condoning this practice by acknowledging it without condemnation in these guidelines. A far better approach would be to ensure that, and then state that, the Commissioner does not allow a claim based on a break lease fee and to require that, if the agent has incurred a loss as the result of the tenant breaking the lease, this must be claimed on its merits. CAFT should also take enforcement action against any agents charging such a fee in contravention of the Act.

Water usage: The guidelines note that the tenant's obligation for gardening is 'spelt out in section 53 of the Act' (CAFT 2010, p. 12). This is not the case. S. 53 requires the tenant to keep the property 'in a reasonable state of cleanliness having regard to the condition of the premises at the beginning of the tenancy' and to ensure that at the end of the tenancy, the property is left 'as nearly as possible in the same condition, apart from reasonable fair wear and tear as set out in the condition report'. S. 53 does not mention gardening at all, and certainly does not 'spell out' any obligations the tenant has in relation to gardening.

According to the draft guidelines, when determining disputes, the Residential Tenancy Commissioner currently assumes that the tenant is responsible for basic garden maintenance, including weeding and lawn-mowing, but not for specialist garden work such as pruning. Presumably, weeding and lawn-mowing are held by the Commissioner to be compatible with the requirement to keep the property 'in a reasonable state of cleanliness'.

However, Anglicare is concerned that many landlords have unrealistic expectations of tenants in relation to gardening. For example, it is normal in Tasmania for a lawn to turn brown or die off over summer, when there is little rain and the sun is hot. However, Anglicare is aware that some landlords blame tenants for this and see it as a lack of care on their part. A tenant should not be held responsible for changes in a garden or in the health of plants that arise because of weather conditions or drought.

Anglicare draws attention to this issue in particular because all tenants will soon become directly responsible for paying for their water usage. One of the justifications for the switch to user-pays billing of water services, supported by a statewide roll-out of water meters, is that it will send 'price signals' to customers, encouraging them to reduce their water usage. According to the Premier, water metering will 'allow people to monitor how much water they are using and give them the opportunity to adjust their habits in real time to reduce the size of their bills' (Bartlett 2009). Of course, not everyone in Tasmania has control over factors that affecting ongoing consumption, such as the efficiency of fittings and appliances, and tenants are particularly vulnerable in this regard. (In any event, even with the most efficient appliances available, not all consumption of an essential service is discretionary and therefore variable). In this context, and particularly as prices rise, tenants cannot be expected to use up water keeping lawns green in summer or protecting water-hungry plants from drought. The guidelines need to make these limitations on a tenant's obligation very clear and stress that claims against the bond for such 'damage' will not be considered by the Commissioner.

Anglicare also notes that the use of the term 'excess water' in the section headed 'Metered water consumption' (CAFT 2010, p. 12) is misleading. Some households in Tasmania are charged for 'excess water' but this is not precisely the same thing as charging for 'water consumption'. In fact, some 'excess water' charges in Tasmania are not based on metering (OTTER 2010, p. 96), which is required for landlords to pass on charges under the Act. The section should be reworded to make it clear that what is meant under s. 17 (3)-(4) is that landlords can only pass on charges for water actually consumed by the tenant and that they can only do this if a meter is installed, the cost of the water is based on the metered consumption and the owner is charged for the consumption by one of the water and sewerage corporations.

Insurance: The guidelines include information about claims arising from property damage and other forms of financial loss, but they do not discuss what happens when the landlord is actually insured for the damage or losses. While the numbers are still low, landlords – including Tasmanian landlords according to Anglicare workers – are increasingly taking out insurance to protect themselves against the costs incurred from unpaid rent, malicious damage by tenants or damage caused by pets or tenants' guests (Petty 2010). While an insurance policy held by the landlord should not exempt tenants from taking responsibility for any loss they have caused the landlord to incur, it does not seem fair that a landlord should be able to have the cost of a loss covered twice, once by insurance and once by the bond. What can be legitimately claimed from the bond in the event of the loss

also being insured? More work may need to be done on this issue by CAFT, in consultation with all stakeholders, to reach a solution.

Dispute resolution under the Residential Tenancy Act

Notwithstanding our comments on these guidelines, which cover the existing method of determining bond disputes, Anglicare would like to reiterate the comments on residential tenancy dispute resolution more generally which were made in our submission to the current review of the Residential Tenancy Act. In that submission Anglicare called for the establishment of a residential tenancies tribunal and presented a number of arguments in support of this recommendation. These arguments are reproduced in full below:

> Anglicare has previously advocated for an expansion in the role of the Residential Tenancy Commissioner as a mechanism for improving dispute resolution pathways (see Anglicare Tasmania 2006, p. 3). However, further consideration of the issues has led Anglicare to conclude that the establishment of a Residential Tenancy Tribunal would be a better and fairer means of ensuring effective dispute resolution. Colleagues in the sector have raised a number of concerns with a process centred on the Commissioner, including the lack of procedural fairness, as the tenant may not always have the opportunity to present their case, and the lack of transparency regarding how the Commissioner has reached a decision, including what evidence was given weight and what factors were taken into account and why. And as the discussion paper notes, the Commissioner would in any event still be unable to examine general questions of law or disputes about contracts (CAFT 2009, p. 12), which would mean that many disputes would still need to come before a Court.
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> There is also the issue of impartiality. Anglicare notes with concern the reference in the discussion paper to the existing process, which occurs within the Department. It states that if in the course of conducting an investigation of a complaint by either a tenant or a landlord 'one of the parties has difficulty in presenting their case', the investigator will assist them to do so (CAFT 2009, p. 12). How is an investigator to remain impartial if they are actually acting as advocate for one of the parties in a dispute? Or alternatively, how is their advocacy to be genuinely effective if they are seeking to remain impartial?
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> A discussion paper on the structure of tribunals in the ACT identifies a number of reasons for establishing a tribunal in preference to relying on the Courts, many of which are applicable to the situation with residential tenancy issues in Tasmania. The paper states that Tribunals tend to be established 'where the needs of a particular jurisdiction are such that they not fully met by the courts'. For example, tribunals can be established 'for informality, such as tribunals dealing with people suffering hardship or disputes where the parties will have an ongoing relationship after the dispute is resolved' (Department of Justice and Community Safety c. 2007, p. 7).
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> The discussion paper for the present review objects to the establishment of a Tasmanian residential tenancies tribunal on the grounds of cost: 'Tasmania's small population size and the economies of scale for providing regional services mean that a specialist tribunal is unlikely to be cost effective' (CAFT 2009, p. 12). Anglicare points out that a residential tenancies tribunal operates in the ACT, which similarly has a

small population, and that tribunals also operate in states with populations dispersed over a far greater geographical area than in Tasmania.

The ACT discussion paper on tribunals argues that access to justice requires both ease of physical access and the capacity for remote access by phone or email (Department of Justice and Community Safety c. 2007, p. 11). Anglicare believes that in Tasmania, a number of options exist to realise these requirements: there is the option, for example, of using space in existing government buildings familiar to ordinary people, such as Service Tasmania. Continuous improvements and innovations in communication technology are also allowing for increased flexibility in service delivery. Such efficiencies would make the operation of a 'roving' Tribunal fairly simple.

Tasmania's tribunal could operate with a 'brand' distinct from the Magistrates Court, with one or two Magistrates specialising in residential tenancy matters presiding – although these Magistrates would not be required to preside exclusively over these matters. The tribunal could have a small but adequate number of dedicated staff responsible for administration, managing applications, investigating complaints and assisting parties appearing before the tribunal. In some cases, it may be appropriate for a delegated member of staff with appropriate expertise to handle complaints without recourse to the tribunal, such as determining whether a rent increase fell within the Consumer Price Index limit suggested above [see Anglicare 2010, pp. 11-12]. A tribunal could retain the authority and dignity of a court-based approach while having a consumer-friendly focus and providing a less intimidating and more accessible environment in which tenants can present their case (Anglicare Tasmania 2010, pp. 14-15).

Anglicare confirms that it is still our position that a residential tenancies tribunal be established to cover all disputes under the Residential Tenancy Act and we look forward to the next stage in the review process.

Conclusion

Once again, Anglicare appreciates the opportunity to comment on the draft guidelines and looks forward to participating in further consultations by CAFT, particularly as the review of the Residential Tenancy Act continues.

Anglicare makes this submission in the interests of tenants, who comprise a significant proportion of our client group. For tenants to be able to fully benefit from the establishment of the RDA, they need to be aware of their rights and feel able to assert them. It is important that the RDA is proactive in seeking to engage with tenants to ensure that they are involved in the process when they are required to be – for example, when a claim form is received from the landlord but is not signed by the tenant. Anglicare does acknowledge that there can be difficulties in contacting tenants, especially given that the only contact information the RDA may have is the address of the tenancy that has just been terminated. Many of the people Anglicare works with live with a high level of housing insecurity and frequently change address and other contact details. They may not have the financial resources available to cover the cost of mail redirection. Therefore a greater level of effort may need to be made than would be customary to contact a person,

but it is important that this effort is made: those who are the most transient are also likely to be the most vulnerable.

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