

Housing Assistance (Public Rental Housing Assistance) Program 2023 (No 1)

Disallowable instrument DI2023–92

made under the

Housing Assistance Act 2007 s 19(1) Approved housing assistance program

EXPLANATORY STATEMENT

Overview

Section 19 (1) of the *Housing Assistance Act 2007* (the **HAA**) provides for the Minister to approve housing assistance programs.

The *Housing Assistance (Public Rental Housing Assistance) Program 2023 (No 1)* (the **Program**) reflects the policy framework for the provision of housing assistance in the Territory.

Such programs are required to include the kind of assistance that may be provided, the eligibility criteria, and how decisions of the Commissioner for Social Housing (**housing commissioner**) under the program may be reviewed.

This instrument outlines eligibility criteria for housing assistance to those people in the Territory who are most in need. This instrument also outlines how community rental housing assistance (including affordable housing assistance) is provided by the Territory and other community housing providers.

Regulatory impact statement (RIS)

A regulatory impact statement is not required. This instrument does not impose appreciable costs on the community or a part of the community (see section 34 (1) of the *Legislation Act 2001*).

Human Rights

Human right analysis within this explanatory statement deals only with amendments to the Program.

This instrument engages the following rights under the *Human Rights Act 2004* (**HRA**).

- Right to recognition and equality before the law (section 8)
- Right to the protection of family and children (section 11)
- Right to privacy and reputation (section 12).

Right to privacy – new grounds in which the housing commissioner may require a transfer.

Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 12 (a) of the HRA provides for the right of privacy and the right to not have one's home interfered with unlawfully or arbitrarily. When housing assistance is provided to an individual, this housing assistance can be provided in the form of a rental dwelling under a residential tenancy agreement. The Program introduces provisions that engage and may limit the rights to privacy and home of a tenant by allowing housing commissioner to require the tenant to move from one rental dwelling to another.

Clause 28 of the Program allows for the housing commissioner to require a tenant to transfer to an alternative dwelling:

- where the physical condition of the property is likely to cause harm to the household or the public; or
- in the interests of community harmony; or
- for the purpose of repair, renovation, disposal or redevelopment; or
- for the efficient use or management of the public housing stock (see. subclause 28(3)).

The ability to require a transfer for the efficient use of stock is new (i.e. the other grounds to require a transfer existed in the 2013 version of the Program). This amendment may limit a tenant's right to privacy and home, by creating additional grounds in which the housing commissioner may require a transfer.

Legitimate purpose (s 28(2)(b))

The Program amends the grounds in which the housing commissioner may require a tenant transfer to a property with fewer bedrooms, or other housing where the housing commissioner considers the transfer will enable the efficient management of stock.

This allows the housing commissioner to effectively target accommodation assistance to the most vulnerable members of the community by effectively aligning stock allocation to household composition. This is connected to the function of the housing commissioner in ensuring the effective operation of the Program and addresses inequality of access of housing for disadvantaged groups, by allowing the housing commissioner to manage limited resources to support the maximum number of people through an effective allocation of housing stock.

Rational connection between the limitation and the purpose (s 28(2)(d))

There is a rational connection between allowing the housing commissioner to require a tenant transfer to a property with fewer bedrooms, or other housing with the limitation on the right to privacy and home. Enabling the housing commissioner to require such transfers, ensures a tenant receives an appropriate dwelling to which they are entitled, and to which matches their needs.

The housing commissioner can request an existing tenant to transfer where the tenant's household composition or needs change. In this instance, the housing commissioner may request a transfer to a property with fewer bedrooms, in order to re-allocate underutilised stock to eligible applicants on the public housing wait list.

Proportionality (s 28(2)(e))

The new transfer provision for public housing tenants has been carefully crafted and targeted towards achieving the goals of the Program. It is closely linked to the housing commissioner's power under the Program – specifically the power to provide assistance to eligible people in the Territory who are in most need.

To ensure a tenant has security when required to transfer under the Program, a tenant continues to be considered eligible for housing assistance and a rental rebate. A request for transfer by the housing commissioner under this program does not require a complete reassessment of the tenant's eligibility, nor needs categories. The housing commissioner will also consider the current needs of the tenant, such as their bedroom entitlement, location preferences, support needs and location of services.

When a tenant is required to transfer, they are presented with properties that match their current needs. As a safeguard, where the housing commissioner requires a tenant to transfer under clause 28 of the Program, they must consider the tenant's, identified needs and preferences. If a tenant is considered a special applicant, their entitlement to a special needs dwelling must be considered. Finally, the housing commissioner must also consider cultural and kinship rights of the tenant.

Where a tenant is required to transfer, they may seek a review of the decision. Under the Program when a decision is made by the housing commissioner, the tenant may within 28 days from being notified of a decision, seek an administrative review of that decision.

A tenant is further entitled to seek a decision to transfer by the housing commissioner, be reviewed by the Administrative and Civil Tribunal (**ACAT**).

These review rights and the requirement that the housing commissioner consider the individual needs of the tenant when making a new property offer support the proportionality of the measure.

For clarity a 'transfer' under clause 28 of the Program means ending a tenancy agreement for the current dwelling and offering the tenant a new tenancy agreement for an alternative premises.

Right to privacy – new grounds in which the housing commissioner may review ongoing eligibility for housing assistance

Nature of the right and the limitation (ss 28(2)(a) and (c))

This instrument engages and may limit the:

- Right to recognition and equality before the law (section 8)
- Right to the protection of family and children (section 11)
- Right to privacy and reputation (section 12)

Sections 8 and 11 provide for the right for equality and non-discrimination, and protection of the family unit. Section 12 provides for the right of privacy and the right to not have one's home interfered with unlawfully or arbitrarily.

Clause 31 of the Program enables for the housing commissioner review a tenants' ongoing eligibility for housing assistance. The clause has been amended to include the ability for the housing commissioner to find, upon review, that the tenant is no longer eligible for housing assistance where they have been absent from the dwelling for a period of 6 months or more.

This amendment may limit the right to privacy and home by withdrawing a person's entitlement to housing assistance. It may limit protection of the family unit if the ability of the family to remain living together in their family home is impacted by the withdrawal of housing assistance. Finally, it may limit and the right to equality before the law as this provision may have a disproportionate impact on certain vulnerable cohorts such as incarcerated people.

Legitimate purpose (s 28(2)(b))

The Program expands the grounds in which the housing commissioner may find a tenant to be ineligible for ongoing housing assistance. Upon a review of eligibility, the housing commissioner may withdraw or cancel the assistance provided to a tenant who has been absent from their dwelling for a period of 6 months or more (long-term absence).

The effectiveness of the housing assistance program is reliant on the ability for the housing commissioner to manage a limited housing portfolio and ensure that properties allocated under the program are used for their intended purpose - to provide assistance to eligible people in need. This provision supports the operation of the Program to address inequity of access to housing for disadvantaged groups by allowing the housing commissioner to recover possession of a dwelling if the tenant is found to not be eligible for ongoing housing assistance.

Further, vacant dwellings impose significant costs on Housing ACT as well as the community. This is because vacant dwellings are highly susceptible to costly damages and unlawful activity such as squatting. Absence may also impose costs to the tenant who may accumulate debt due to damages to the property the longer it is vacant. Withdrawing assistance in the circumstance of long-term absence will also assist in avoiding costs of this nature.

Rational connection between the limitation and the purpose (s 28(2)(d))

There is rational connection between this limitation imposed on the right to privacy and withdrawing or cancelling housing assistance and the purpose of this measure, which is to ensure the availability of dwellings to eligible applicants on the public housing wait list. It ensures that properties that are not currently being utilised (due to tenant absence) can be recovered and then made available to another person in need. It also contributes to the equity and operation of the Program, by ensuring that resources are allocated efficiently, and the maximum number of dwellings are available to people who are eligible for housing assistance. This means that the limited financial resources can be directed towards providing assistance to the greatest number of people.

A tenant who leaves their dwelling vacant by being absent for a period of 6 months or more, unlikely to be using the allocated dwelling for its intended purpose.

Proportionality (s 28(2)(e))

The Program is designed to provide targeted assistance and accommodation to eligible members of the community. Housing assistance programs under the HAA have been designed to protect and promote the human rights of individuals experiencing complex and layered vulnerability, including people facing socio-economic disadvantage, living with chronic physical or mental illness or disability, people who have experienced trauma, people from diverse backgrounds, and those transitioning out of homelessness.

This clause is intended to be used in limited circumstances, and only where a dwelling is found to be vacant for a period of 6 months or more due to a tenant's absence. While this may appear indirectly discriminatory, particularly for tenants incarcerated in the judicial system, these tenants are already physically unable or legally restricted from being at the dwelling.

Previously, if the housing commissioner was seeking to take re-possession of a vacant dwelling where a person was absent due to incarceration, the housing commissioner would have used the broad 'without cause' RTA provision.

Instead, this amendment introduces rigorous procedural safeguards by making clear the processes and requirements which the housing commissioner will follow in reaching a decision to cancel or withdraw housing assistance.

Before seeking to issue a Notice to Vacate (NTV), the housing commissioner must first review a tenant's entitlement to housing assistance. If a tenant is found not eligible, they are entitled to seek administrative review internally through Housing Assistance and externally through the ACAT.

The housing commissioner cannot issue a notice to vacate under the Residential Tenancies Act until after any administrative review process available in connection with the decision to withdraw assistance has been finalised.

When reviewing a tenant's eligibility, and subsequently seeking to withdraw or cancel housing assistance if the tenant is found ineligible, the housing commissioner may still consider several factors of the individual tenant, consistent with housing commissioner's functions to fulfill the objectives under the HAA. These specific considerations are outlined within the *Housing Assistance (Review of Entitlement to Housing Assistance) Determination 2023 (No 1)*. This means that the housing commissioner will take into account the tenant's individual circumstances before deciding to withdraw housing assistance.

At all times, housing commissioner will take the interests of children into consideration when seeking to withdraw or cancel housing assistance, primarily where the absent tenant is caregiver or kin. Where the withdrawal or cancellation of a tenant's entitlement to housing assistance may affect the family unit or rights of children, the Program allows for the housing commissioner to provide immediate temporary housing assistance due to a tenancy breakdown for any remaining residents at the dwelling.

The effectiveness of the housing assistance program is reliant on the ability for the housing commissioner to manage a limited housing portfolio and ensure that properties allocated under the program and achieving their intended purpose. To enable the effective utilisation of stock and to continue allocating dwellings to people in need on the public housing waitlist, the housing commissioner must have the authority to withdraw or cancel assistance where a tenant is absent. However, the safeguards described above ensure that the tenant's individual circumstances can be considered as well, contributing to the proportionality of this measure.

Clauses

Clauses 1, 2, 3 and 4 are formal requirements. These clauses establish the name of the Program, its commencement date, the object of the Program, and define particular terms used in the instrument.

Clause 5 specifies the kinds of assistance available under the program.

Clause 6 provides for the housing commissioner to make determinations and housing operational guidelines in accordance with the Act. These are disallowable instrument where they deal with a ‘relevant matter’, otherwise they are notifiable instruments.

Clause 7 Specifies the arrangements for making an application for assistance under the program.

Clause 8 specifies in detail how facilitation of community rental housing assistance will operate under the Program.

Clause 9 specifies the eligibility criteria for the forms of assistance available under the program.

Clause 10 allows the housing commissioner to disregard any eligibility criteria in their absolute discretion, with the exception of an applicant’s age and their intent to enter a tenancy in the Territory and to reside in the tenant residence for the duration of their tenancy. The clause applies criteria against which the housing commissioner must be satisfied before making a decision to exempt any eligibility criteria.

Clauses 11 and 12 set the meaning of income and the methodology applied when calculating an applicant’s income for the purpose of determining eligibility. When working out income, the housing commissioner should use the method that best reflects the current and foreseeable circumstances of the applicant.

Clause 13 provides a power to determine needs categories and criteria in line with the focus of the program to assist persons most in need. A needs category must be allocated to each application for rental housing assistance.

Clause 14 specifies the arrangements for re-assessing an application for rental housing assistance, including the allocated needs category. A reassessment by the housing commissioner of the continuing eligibility of the applicant may occur at any time prior to the provision of rental housing assistance.

Clause 15 specifies when an applicant must tell the housing commissioner about relevant changes in their circumstances.

Clause 16 requires the housing commissioner to keep a register of all eligible applicants for rental housing assistance. Eligible applicants are allocated a needs category on the register.

Clause 17 specifies the circumstances in which an applicant’s name may be removed from the register and, where applicable, returned to the register.

Clause 18 specifies the normal arrangements under which rental housing assistance is to be provided to eligible applicants.

Clause 19 provides for the housing commissioner to consider the provision of temporary housing assistance to one or more remaining occupants in a dwelling following a tenancy breakdown.

Clause 20 provides for special arrangements for allocating dwellings earlier than otherwise provided for in the program in extreme circumstances. This clause provides for the housing commissioner to identify special needs applicants, including special needs dwellings which may be provided to special needs applicants, so as to ensure special needs applicants receive dwellings best suited to their housing needs.

Finally, this clause provides the housing commissioner with the capacity to identify dwellings that may have particular attributes, for example, their location, condition or size, which, in the housing commissioner's opinion, make them difficult to let. Such dwellings may be dealt with by the housing commissioner in the interests of efficient management of the public housing stock outside the normal allocation provisions set out in the program.

Clause 21 specifies the arrangements for transfers to alternative public housing dwellings.

Clause 22 provides the housing commissioner with discretion to decide the size, type and location of a dwelling to be provided as rental housing assistance. The housing commissioner must take into account the reasonable needs of the applicant and their expressed preferences, as well as the availability of different types of dwellings in various locations.

Clause 23 requires an incoming tenant to enter into a tenancy agreement before moving into a dwelling allocated as rental housing assistance, unless otherwise agreed with the housing commissioner.

Clause 24 specifies the housing commissioner's obligations when changing the rent payable on an occupied dwelling. In particular the housing commissioner must give the tenant written notice in accordance with the requirements of the *Residential Tenancies Act 1997*.

Clause 25 specifies the arrangements under which public tenants may qualify for a rent rebate.

Clause 26 specifies the arrangements under which a rent rebate may be re-assessed.

Clause 27 makes provision for rent commencement assistance available to new tenants at the commencement of a new tenancy.

Clause 28 specifies the arrangements under which the housing commissioner may require a tenant to transfer to alternative public housing. This has been amended to allow the housing commissioner to require a tenant transfer to a dwelling with fewer bedroom, or other housing where the housing commissioner considers the transfer will enable more efficient use or management of the public housing stock.

Clause 29 specifies the circumstances in which the housing commissioner may ask an applicant to provide further information in connection with an application for assistance, including a rent rebate.

Clause 30 reflects section 25 of the *Housing Assistance Act 2007* in relation to the housing commissioner's power to require an existing tenant to provide specified information that is needed to undertake a review of housing assistance being provided.

Clause 31 clarifies section 25 of the Act and that as a consequence of the review of ongoing housing assistance, the housing commissioner may withdraw or cancel housing assistance. This clause has been amended to clarify that the housing commissioner may find a tenant ineligible for ongoing housing assistance where they have been absent from their dwelling for a period of 6 months or more.

Clause 32 outlines what decisions under the Program are reviewable decisions. This has been amended in line with changes to the Program. A decision by the housing commissioner to require a tenant transfer under subclause 28(3) or to withdraw or cancel assistance under clause 31 are reviewable decisions.

Clause 33 specifies the process for the review of reviewable decisions.

Clause 34 specifies the arrangements for seeking ACAT review of decisions.

Clause 35 lays down the arrangements for approved forms.

Clause 36 repeals the previous Program.