

# Comment

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## Tenancy Bonds for Public Housing

*October 2016*

The Tenants' Union of NSW (TU) is the peak body representing the interests of tenants in New South Wales. We are the main resourcing body for the statewide network of Tenants Advice and Advocacy Services, who handle around 25,000 – 30,000 calls for tenancy information and advice each year. We are a Community Legal Centre specialising in tenancy law.

We have been invited to comment on FACS Housing's ***Tenancy Bonds for Public Housing Policy and Operational Framework (Draft for consultation)***. We appreciate this opportunity.

### **The TU objects to bonds for public housing tenancies**

We note comments have also been sought from a select group of others, including Homelessness NSW. We have reviewed the comments made by Homelessness NSW, and we agree with them. This is particularly true of their general comments under the headline ***Lack of evidence base***, which include the recommendation that FACS NSW conduct a genuine consultation on the benefits and impacts of introducing bonds for public housing tenancies.

In supporting this recommendation we note the introduction of bonds for public housing tenancies was raised in the ***Future Directions for Social Housing*** strategy document, released earlier this year. But no discussion on bonds for public housing tenancies was prompted in the 2014 ***Social Housing in NSW*** discussion paper upon which the Future Directions document was premised. This is significant, because similar ideas have been raised in the past, but only ever in passing. The last notable occasion was in 2012 when the Hon. Greg Pearce was the Minister responsible for the public housing portfolio. Contributors to the 2014 discussion paper might have expected further broad consultation on the merit of the policy initiative prior to any progress being made. Instead, a select number of industry peaks have been asked to comment on a draft Policy and Operational Framework, with no opportunity to comment on or contribute to the available evidence and analysis that guided new policy considerations in the first instance.

Had such an opportunity been provided, the TU would have raised **four serious objections** to the introduction of bonds for public housing tenancies. One of these has been adequately

addressed in Homelessness NSW's submission under the headlines ***A barrier to entering the public housing system***, and ***Increased evictions into homelessness***. Given the complexities that must be present for an application for housing assistance to even be considered in New South Wales, the imposition of additional costs at the beginning of a tenancy will only set already vulnerable households on the path to further hardship.

Our **second objection** is more general. Provisions in the *Residential Tenancies Act 2010* that allow a landlord, at their discretion, to collect a bond of up to four weeks rent at the beginning of a tenancy, reflect that the vast majority of NSW's landlords have an interest in only one or two rental properties and that many are subject to finance. A rental bond is an assurance that funds will be available to these landlords in the event that a tenant leaves them with some money owing at the end of a tenancy.

But the Land and Housing Corporation is not a small-time property investor. In fact, it holds the largest portfolio of residential property in the southern hemisphere, with more than 140,000 tenanted properties. Many of its tenancies are expected to remain on foot for extended periods of time, providing secure and affordable homes for some of the State's most vulnerable households. It cannot rely on arguments about limited cash flow and ad-hoc relationships with tenants to support its interest in a rental bonds scheme.

There are also problems with these provisions. While a rental bond remains the tenant's money until such times as the landlord becomes entitled to it, many landlords see it as fair game. Spurious claims are often made against tenants' bonds, and once a claim is made it can be very difficult for tenants to protect their money. The private rental market offers no suitable model upon which to build a policy about bonds.

This brings us to our **third objection**. We are aware that FACS Housing's processes around determining liabilities at the end of tenancies are questionable in many cases. We have provided a number of examples of this from across NSW to FACS Housing in response to its draft policy document. These can be summarised as FACS Housing frequently failing to identify which liabilities at the end of a tenancy can be reasonably passed on to a former tenant, and which are simply the cost of being a landlord in New South Wales.

NSW renting laws require tenants to keep their homes in same the condition they are in when they take possession, excluding fair wear and tear, and they must not negligently or intentionally damage their homes. But many former tenants are charged for repairs and maintenance that should have been attended to by the landlord during the course of the tenancy, and are only now being done to bring the property back to a let-able standard. Other examples include tenants being charged for damage that has occurred after they have returned possession of the property to the landlord, when it is no longer the tenant's

responsibility to secure the property against vandalism. Examples of these kind should give FACS Housing serious pause to consider its messaging around “taxpayer expenditure” when defending its policy of bonds for public housing tenancies.

This is the combination of a chronically poor approach to repairs and maintenance of public housing properties – the recent introduction of new contracts being unlikely to resolve this in and of itself – and an equally poor approach to raising and handling debts for former tenants. Until proper attention is given to each of these issues at both public policy and operational levels the introduction of bonds for public housing tenancies would simply compound them. The undertaking to investigate matters such as we have recently brought to FACS Housing’s attention is heartening, but we do not see how it could be either sensible or desirable to proceed with the introduction of bonds for public housing tenancies before each of these serious issues is resolved.

Our **fourth and final objection** concerns the manner in which alleged debts are currently brought to former tenants’ attention, and the impact the introduction of a bonds scheme will have. Our observations are that former tenants are mostly unaware of a debt raised against them until they make a subsequent application for housing assistance at a later time. They must then enter into a payment plan in order to receive an offer of housing assistance, or to have any restrictions against them lifted under FACS Housing’s “categorisation of former tenant” policies. This is usually the time at which a Tenants’ Advocate becomes involved, and assists the former/prospective tenant through the process of having an alleged debt proven against them. Thus, it is often the time at which tenants become aware they are being charged for repairs they are not responsible for.

There are two points to take from this: first, up until this point the tenant is not out of pocket because they have not made payments towards a debt that they may not actually be liable for; second, given the tenant is responding to an allegation of liability, it remains the landlord’s obligation to commence Tribunal proceedings and prove the debt. Both of these factors will change if bonds for public housing tenancies are introduced. In responding to a FACS Housing claim for their bond, it will be up to public housing tenants to commence proceedings in the Tribunal. Where they fail to initiate this process, there is a high likelihood that their bonds will be paid out to the Land and Housing Corporation without scrutiny. Tenants would still have the option of applying to the Tribunal to dispute the claim, but with a time limit of six months from the time the bond is paid out. For households who have lost a public housing tenancy amidst allegations of damage and an inflated debt, six months will be all too fleeting – that is, assuming vulnerable householders will be prepared to commence legal proceedings against the NSW Government’s housing authority in the first place.

It follows that we support and endorse Homelessness NSW's recommendation that the NSW Government should not introduce bonds for public housing tenancies.

### **Specific comments on FACS Housing's proposal**

We offer the following comments in response to the draft Policy and Operation Framework document.

#### **The policy will not fulfil its aims**

We note the stated aims of the initiative at 2.2 – to encourage tenants to pay their rent on time and to look after properties, to prepare tenants for renting in the private market, and to help FACS recover costs.

The non-payment of rent is a breach of tenancy, and we frequently see sustainable tenancies being brought to an end by FACS Housing on account of rent arrears. In many cases, these arrears could be easily managed, and paid over time, if a more supportive approach that included retaining the tenancy were pursued.

Where claims about liabilities for cleaning and/or damage are concerned, we often see debts raised that clearly should not be. Reasons for this range from victims of domestic violence being charged to repair damage caused by the perpetrators of violence, to tenants being asked to foot the bill for vandalism and damage that has been wrought after they've vacated the property.

All the more concerning, FACS Housing seems to take a fairly "light touch" approach to an ingoing inspection and condition report – noting everything as clean, undamaged, and in good working order – but a more heavy-handed approach at the outgoing inspection. This makes it difficult to establish what costs, if any, the tenant is actually liable for. Where claims for cleaning and repair costs are disputed in the NSW Civil and Administrative Tribunal, debts are often significantly reduced.

When public housing tenancies end, most former tenants do not leave with an expectation that they are "prepared for the private rental market". This is particularly so for those who exit with a debt, or following an eviction. Even if they do spend some time in the private rental market (or in marginal rental, or homeless) many former public housing tenants find themselves back on the waiting list for social housing assistance.

The *Residential Tenancies Act 2010* requires any social housing tenant with debt to a social housing landlord to enter into an agreement to pay that debt. This means there is already an available and enforceable mechanism for the public housing landlord to recover debts from many former tenants. It also means that many former tenants with a debt over-and-

above what a rental bond will cover will be saddled with two costs – paying off the old debt, while paying off a new bond at around \$30/fortnight – at the start of their new tenancy. Far from being prepared for the private market, tenants on limited incomes will struggle.

### **The law does not need to change**

We note, at 2.4, a vague intention to “consider the need for amendments to the *Residential Tenancies Act 2010* as necessary to achieve the policy intent”. This is stated to include inserting clarifying provisions to make clear that non-payment of a bond is a breach of the tenancy agreement, and an enabling provision to permit FACS to use the interest accrued by the investment of tenants’ bond money to “ensure the ongoing financial stability of social housing”.

With respect to the first issue, it is already clear that the non-payment of a rental bond is a breach of a residential tenancy agreement. Where a bond is required, its payment becomes a term of the residential tenancy agreement to which it applies. This is already included in the statute – no amendment is required to the law.

With respect to the second issue, this represents a dramatic shift away from the established principle that the interest on tenants’ bonds remains tenants’ money. Currently this money is collected by the NSW Government and used to fund a range of initiatives that are of benefit to tenants and landlords, as is required by the legislation. This includes funding for independent tenants’ advice and advocacy services, no-interest loans schemes, financial counsellors and the like, as well as parts of Fair Trading’s Information and Complaints Service and the NSW Civil and Administrative Tribunal.

To suggest tenants’ money should be used to “ensure the ongoing financial stability of social housing” is an alarming proposition that, where it is to be presented as a serious option should attract broad and open consultation before any legislative amendment is even considered. In any event, such an amendment is not required for the introduction of bonds for public housing tenancies. FACS should look to other sources of revenue if it is concerned about the cost of administering such a scheme.

### **Clarification required around what makes a tenancy “new”**

We note the application and exemptions at 3.1 and 3.2 that suggest bonds will only apply to new public housing tenancies. It should be made clear that a requirement for an existing tenant to enter into a new fixed-term agreement does not constitute a new tenancy. Tenants who relocate in order to avoid paying a vacant bedroom charge should also be exempt from payment of a bond.

### **The proposed amounts are too high**

We note the intention to charge bonds based on the market rent at 3.4.1, rather than the rent payable after any available subsidy is applied. This will be a significant impost on a person who has been considered eligible for public housing assistance, even where it is capped at \$1400.00. Bonds should be set at a significantly lower amount, calculated according to a tenant's rebated rent.

### **Further discounts and exemptions should apply**

We note the intention, at 3.4.2, to provide a 20% discount to tenants who can pay their bond up-front. While we do not imagine a great many tenants will be able to avail themselves of this option, we do not see any reason not to offer it. In fact, it is worth exploring other circumstances in which discounts (or exemptions) may be offered, such as where a new tenant has been homeless prior to entering into a public housing tenancy, or where a new tenant has other pre-existing financial commitments such as medical expenses or a debt to a former social housing landlord.

### **Payment by instalments will cause prolonged housing stress**

We note at 3.4.4 and 3.4.5 the option for tenants to pay a bond by instalments over two years (up to \$26.90 per fortnight), and requirement for tenants' housing costs (including bond instalments) to remain below 30% of household income. Where housing costs will exceed 30% of a household's income, the option to extend the instalments for a further 12 months is introduced. Water charges and other social housing debts do not appear to have been factored into these calculations, which suggests the majority of new tenants will either be paying more than 30% of their income towards their new public housing costs, or taking the 36 month instalment option. In any case, payment of an additional \$26.90 for two or three years will be a significant impost for tenants on low incomes, and consideration should be given to setting bonds at a lower amount, and allowing a longer time to pay by significantly smaller instalments. In considering this comment, keep in mind that a rental bond is the tenant's money. It does not belong to FACS Housing or the Rental Bond Board.

### **Deferral options too narrow**

We note, at 3.6.5 the option for deferral under "extenuating circumstances". Deferral will be available for up to three months, on three separate occasions, within a limited range of circumstances. There is no good reason to limit deferral in such a way – where a tenant is genuinely unable to meet the demands of their instalment schedule, deferral should be allowed as a matter of course. This is especially so if FACS Housing intends to commence termination proceedings in circumstances where tenants fall into arrears on payment of bond instalments, which appears to be the case.

We also note the prescription of “extenuating circumstances” includes mostly unforeseen expenses or situations, and excludes increased costs arising from such things as car loans, credit card bills and “discretionary expenditure” on household goods. This will give far too much discretion to FACS Housing staff who assess deferral applications, and will potentially rule out deferral for households who incur genuine expenses that are foreseeable but cannot be put off. This might include costs associated with beginning a new job, getting the car repaired and registered, or replacing whitegoods and other household furniture. Households manage their money according to their own day-to-day needs. Low-income households should not be placed in the position of being unable to meet necessary expenses because they are required to maintain a strict schedule of payments towards their bond, which remains their own money even though they may not access it during their tenancy.

### Transfers should be encouraged

We note, at 3.8, that bonds will not be transferred to a new tenancy if the tenant moves. There is no good reason to apply a fixed rule to this issue, and it may be counter-productive – tenants who are inclined to move out of public housing and into the private rental market may find this acts as a disincentive.

### FACS must consider what tenants will do, not what FACS wants them to

We note, at 3.9, that FACS Housing has given no consideration to how it will approach unilateral claims for a bond refund made by former tenants. Especially given the issues we have identified and raised concerning FACS Housing’s poor record of determining what their former tenants actually owe, tenants would be well advised to make unilateral claims. We expect Tenants’ Advice and Advocacy Services will offer this as standard advice. FACS Housing will need to consider the implications of this on their practices and procedures.

### Debts over and above the bond should be waived

We note, at 3.9.4, that FACS Housing will pursue debts over and above what a bond will cover “via existing debt recovery processes”. We have already raised a number of concerns about existing debt recovery processes, including the statutory requirement for tenants to enter into payment plans if they have a debt from a previous social housing tenancy. The TU has grave concerns that countless new public housing tenancies will commence with plans for the payment of both a new bond and an old debt. This will exacerbate the financial stress that new public housing tenant households will already be under, dramatically increasing the chances that new tenancies will fail. To counter this, FACS needs to consider a broad range of circumstances under which it will waive a previous debt.

### Further discussion

Please do not hesitate to contact **Ned Cutcher, Senior Policy Officer with the Tenants Union of NSW**, on (02) 8117 3712, should you wish to discuss any of these matters in more detail.