TENANTS' UNION OF NEW SOUTH WALES

Tenants' Union of NSW
Suite 201
55 Holt Street
Surry Hills NSW 2010
ABN 88 984 223 164

P: 02 **8117 3700**
F: 02 8117 3777
E: contact@tenantsunion.org.au
tenantsunion.org.au
tenants.org.au

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Attn: Resident Rights Consultation Process
Family and Community Services
Level 13, 4-6 Bligh Street
Sydney NSW 2000

To whom it may concern,

Re: TUNSW Submission on Protections for Residents of Long Term Supported Group Accommodation in NSW

The Tenants' Union of NSW (TUNSW) is the peak body representing the interests of renters in New South Wales. We are a specialist Community Legal Centre with expertise in residential tenancy law and practice, and the primary resourcing body for the state-wide network of Tenants' Advice and Advocacy Services in New South Wales (TAASs). We have a long standing interest in the rights and obligations of those who pay rent, or fees of a similar kind, to secure a principle place of residence. Our relationship with the TAASs, who provide information and advice to between 25,000 and 30,000 renters across New South Wales each year, means we are extremely well informed as to the interests and concerns of our renting population, and have a unique understanding of statutory schemes such as the *Residential Tenancies Act 2010* and the *Boarding Houses Act 2012* in operation.

We are pleased to respond to the NSW Government's Issues Paper on Protections for Residents of Long Term Supported Group Accommodation in NSW. By raising a number of questions and points for discussion, the Issues Paper proposes the establishment of a scheme to regulate agreements between occupants and providers of long term supported group accommodation. TUNSW supports this, subject to our detailed comments below. We will respond to each of the issues paper's points in turn.

1. Definition and scope

TUNSW supports the NSW Government's proposal to provide statutory rights and protections for residents of long term supported group accommodation in NSW. It is our long-held view that people who pay rent, or fees of a similar kind, for their principle place of residence should not have to rely on outdated and inadequate principles of the common law for legal rights and remedies. Ensuring those remaining groups of renters who are excluded from coverage of legislation such as the *Residential Tenancies Act 2010* and the *Boarding Houses Act 2012* should be a priority for Government, and the present attention to long term supported group accommodation is most welcome.

We have no objection to the proposed definition of *long term supported group accommodation* to which the reforms are intended to apply, particularly as it relates to the overall nature of a supported group home rather than the specific needs of any given occupant. The proposed definition appears broad enough to cover people with disability living in a range of shared accommodation circumstances, regardless of any additional service or funding package that may (or may not) apply for a particular resident. This is important as it will ensure those living in long term supported group accommodation through circumstances other than NDIS funding for Supported Disability Accommodation – e.g. people with disability who are older than 65 years but reside in supported group accommodation rather than an aged care facility – will also be given the benefit of the new scheme for as long as they reside in such accommodation, as defined.

We note the scheme is not intended to apply to short term, temporary, crisis or respite shared living arrangements or aged care accommodation funded under the Commonwealth *Aged Care Act*. It may be assumed that people residing in such accommodation will have access to legal rights and remedies through other legislation – such as the *Aged Care Act* as is noted, or perhaps the *Boarding Houses Act 2012* or the *Residential Tenancies Act 2010*. TUNSW cautions against such assumptions, as it is possible that some types of accommodation fitting the above descriptions would not meet the criteria for coverage under those Acts. As such, some residents of such facilities may only have outdated and inadequate rights and remedies as provided by the common law. Further reform will be required if this is to be rectified.

We understand it is not the current intention to ensure all renters in the marginal rental sector are afforded basic legislated rights and remedies that are fit for housing consumers in the twenty-first century. However we note the opportunity presented by this Issues Paper being circulated for comment at a time when a review of the *Boarding Houses Act 2012* is required by the statute, and the outcomes of a similar review of the *Residential Tenancies Act 2010* are yet to be resolved. By keeping in mind the long standing difficulties created by the exclusion of boarders, lodgers and some residents of shared rental accommodation from coverage of the *Residential Tenancies Act*, which have not been satisfactorily resolved with the introduction of the *Boarding Houses Act*, the NSW Government could make some structural improvements to the legal framework of renters rights in New South Wales that would enable future reform to be considered and implemented with relative ease. Specific protections for residents in other forms of marginal rental accommodation such as shared rental homes, student accommodation, and boarding and lodging arrangements not covered by the *Boarding Houses Act 2012* could all be brought under the coverage of the *Residential Tenancies Act 2010* with the inclusion of specific provisions catering to those cohorts. Boarding house occupancy agreements could be moved from the *Boarding Houses Act* and brought into *Residential Tenancies Act*, leaving the *Boarding Houses Act* to deal primarily with the registration of boarding houses.

We would also like to raise a general concern around the question of legal capacity for residents to enter into contracts which does not appear to be considered in the Technical Issues paper. We expect there needs to put in place supports to ensure residents are able to access disability advocacy services and gain timely legal advice to ensure they are able to understand and make informed decisions about the agreement and any subsequent disputes. The need for access to external support will also need to considered where residents have time limitations on applications to Tribunal and correspondence regarding the same – the default time limit to NCAT

is 28 days, and review periods within NCAT can be as little as seven days. Any legislation drafted will need to make clear and reasonable time limits, and may require complementary amendment of NCAT legislation.

Finally, we note the assumption in the Issues Paper that the *Residential Tenancies Act 2010* will not apply to residents in long term supported group accommodation unless they create an unwieldy co-tenancy arrangement. There is no exclusion in the *Residential Tenancies Act* that would act to automatically exclude residents of long term supported group accommodation. A residential tenancy agreement is defined by the statute as an exchange of a right to occupy a residence, for value. This may be effected as a written or oral agreement, and the agreement may be express or implied. The statute displaces the common law requirement that exclusive possession must be provided. Agreements that are mere licenses to board or lodge cannot be residential tenancy agreements, but the relevant legal test will not always result in a resident of long term supported accommodation being found to have a license to board or lodge. As such it is important to ensure any new rights and obligations provided to residents of long term supported accommodation do not displace, or otherwise undermine, rights that might already be available under the *Residential Tenancies Act 2010*.

2. Written Accommodation Agreement

TUNSW supports the requirement that accommodation agreements be provided in writing, however we caution against any requirement being placed upon a resident to sign and return a copy of a written agreement in order for it to be properly executed. As is the case with the *Residential Tenancies Act*, an accommodation agreement for long term supported group accommodation should be recognised even where it is oral or implied, or partly oral or partly implied. For this reason it will be important to develop and publish a standard form agreement, with a number of terms being made standard in every accommodation agreement along similar lines to a residential tenancy agreement.

At the same time, there will be elements of accommodation agreements that do not lend themselves to the kind of standardisation we might expect from the residential tenancy agreement model. Adopting aspects of the principles based occupancy agreement model from the *Boarding Houses Act* for makes sense for these.

Determining the rights and obligations that are to be codified as terms of every agreement at a global level, and those elements of an agreement that are to be determined at a local level subject to a series of clearly articulated principles, will require careful consideration.

Consistent with the above, TUNSW also supports the notion of minimum terms being deemed to apply where they are for some reason omitted from a written accommodation agreement; and we support a requirement that terms offering lesser protections than the legislated standards be over-ruled by statutory terms. Careful thought needs to be given to how this “no-disadvantage” requirement would work, as the significant imbalance in the bargaining positions of prospective resident and accommodation provider means minimum standards may become default maximums. Providers are likely to offer agreements subject to minimum terms on a “take it or

leave it basis", as this would be in their commercial interests. It would be difficult, if not impossible, for a vulnerable would-be resident to negotiate up to an agreement with more favourable terms. Minimum standard terms must be developed with this in mind.

3. Bond and holding fees

TUNSW does not support the use of bonds or holding fees in the long term supported group accommodation context.

Any risk associated with offering long-term accommodation to a person with disability should be priced into the accommodation provider's ongoing costs. TUNSW suggests such risk would be negligible, as residents are unlikely to cause damage beyond fair wear and tear. Where damage is considered likely because of the nature of a resident's disability, alternative sources of funds for repairs and restoration should be pursued.

Holding fees are an unfortunate function of the competitive private market that should not be imported into the long term supported group accommodation context. Application and allocation processes need to be very consciously resident and prospective resident focused, and it would not be appropriate to introduce an up-front payment for a prospective resident to "reserve" themselves a place in a supported group home.

4. Rent

TUNSW generally supports the rent provisions with the following comments.

Where rent is set by a particular percentage of income and any increases to income are clearly foreseeable, such as a CPI adjustment to Disability Support Pension, then a shorter time for corresponding rent increases is acceptable. However legislation should provide that where a rent increase occurs by any other circumstance the rent increase needs to allow the resident time to seek necessary advice and assistance and review the increase. We suggest 60 days should be the minimum required for this purpose.

We note that the *Residential Tenancies Act 2010* also provides that a tenant must have a way to pay the rent which doesn't incur charges for the resident, but the regime in that Act has some flaw. The Tenants' Union is regularly approached by tenants who are given a technically valid method, such as paying by cheque, which indeed incurs extra charges because it requires the tenant to open and use a form of account which they would not otherwise have. We recommend that within reason the resident rather than the provider should choose the manner of payment.

We note that clarity for residents paying a percentage of income towards both rent and support services is needed so that the specific amounts due for each expense and the nature of service provided under each line item is easy to determine. This is particularly important for organisations that operate as an accommodation provider and a support service under the same banner but with

separate agreements but ensuring such clarity is provided should be a term of every accommodation agreement.

5. Utilities charges

TUNSW supports the proposal that accommodation providers take responsibility for utility and other service connections, including meeting all charges for connection and supply. This should be a term of every accommodation agreement. We have no objection to the proposal requiring accommodation providers to regularly review contracts with utility and other service providers to ensure costs are kept commercially competitive.

TUNSW does not have a preference for the method of passing on of utility usage charges to residents of long term supported accommodation, however it should be made clear that an accommodation provider may not profit from the on-selling of utilities to a household of residents under accommodation agreements. Regardless of the method used to calculate payments copies of utility bills should be provided or at least made reasonably available to residents even where they are not requested. These should be terms of every accommodation agreement.

6. Right to quiet enjoyment

The right to quiet enjoyment refers to an occupant's ability to enjoy uninterrupted tenure. It goes without saying that residents of long term supported group accommodation should be entitled to quiet enjoyment of their entire residence, and that they should not interfere with the quiet enjoyment of other residents with whom they share a home.

The right to peace, comfort and privacy refers to an occupant's ability to enjoy the use of their residence without unreasonable interference or interruption from the accommodation provider or their agent. This should also apply for residents of long term supported group accommodation, across the entirety of their residence. Residents and support service providers should also be required to respect the reasonable peace, comfort and privacy of other residents with whom they share a home.

This will be relative, and accommodation agreements may need to allow for site-specific qualification of these rights, or at least explanation of specific circumstances in which they are to be interpreted according to the needs and expectations of the residents sharing the home. Careful thought needs to be given to remedies that may be provided in the legislation for a breach of these requirements by a resident. Remedies should be focused on outcomes for residents rather than for accommodation providers, and termination of accommodation agreements should not be considered an appropriate remedy for a breach of a resident's right to peace, comfort and privacy by another resident of a shared home. An appropriate alternative solution should be sought in all instances.

7. Companion animal

TUNSW does not support the proposal to require residents of long term supported group accommodation to seek the accommodation provider's permission to keep a pet under an accommodation agreement. The decision to keep a pet should be made subject to discussion and agreement amongst all residents of a shared home, along with any support service staff working with the residents, rather than the accommodation provider.

The accommodation provider should be notified once a decision to keep a pet has been made by a resident, in agreement with all other residents (and support service staff where relevant). If the accommodation provider objects to the resident keeping a pet, they should be entitled to apply to an appropriate dispute resolution body for an order preventing the resident from keeping a pet. The onus should be on the accommodation provider to demonstrate that in the circumstances it would not be (or is not) appropriate for the resident to keep a pet, and the legislation should provide a clear presumption in favour of the resident.

No additional fees or charges should be payable by residents who keep pets.

8. Notice of sale of premises

TUNSW has no objection to the proposed requirements around notice of sale of premises, however a minimum period of notice should also apply to any proposed inspection by prospective buyers, and limits placed as to frequency and number of inspections. While the provider may be entitled to keep a property on market for as long as it takes to sell, there should be a cap on the total number of inspections residents should be subjected to where a property is not selling. Some residents of long term supported group accommodation will be more amenable than others to the kind of interruption presented by inspections and other general issues around a campaign for sale. Careful thought will need to be given to how this policy will be implemented.

Accommodation agreements should make clear that where a resident has reasonable grounds for requiring more than the minimum periods of notice of both an intention to sell and for any inspection by prospective buyers, agreements can negotiated. This could be on the basis of a resident's capacity to allow for and adapt to interruptions to routine. An appropriate dispute resolution process should apply, with the power to make binding orders in the event of disagreement between a resident and an accommodation provider as to what is required. A clear presumption in favour of longer notice periods should apply in circumstances where the relevant grounds are made out.

9. Accommodation provider or agent's right to enter the group home

TUNSW supports the suggested limitations and restrictions on accommodation providers and their agents accessing dwellings that are being used for long term supported group accommodation. Notice periods should be greater than the suggested 24 hours for general repairs and maintenance or property upgrades and structural work, as residents are likely to need to make

arrangements to minimise the impact of such access; and they should also be greater than the suggested 48 hours to show the room to prospective residents or for general inspections, for the same reasons. In each instance, a notice period of at least 7 days should apply.

As we have suggested above, some flexibility as to terms of an accommodation agreement may be required here. Sensible minimum standards should apply, with residents being able to negotiate up their rights where there are reasonable grounds for requiring longer periods of notice. An appropriate dispute resolution process should apply, with the power to make binding orders in the event of disagreement between a resident and an accommodation provider as to what is required. A clear presumption in favour of longer notice periods should apply in circumstances where the relevant grounds are made out.

10. Maintenance

TUNSW broadly agrees with the proposed policy in relation to maintenance, however the time limitation for a resident (or support service staff) to effect a self-help remedy must be shorter than 12 hours. A maximum time of 6 hours would be more appropriate, and this should be further reduced to 3 hours in circumstances where the urgent need for repair has caused the accommodation to become clearly unsafe or pose a serious health risk to any occupants.

11. Resident's requirements for modifications to be made to the property

TUNSW does not support the proposal to require residents of long term supported group accommodation to seek written consent from an accommodation provider before making modifications to the property. Decision about modifications to a residents own room should be made by the resident, while decisions about modifications to common areas should be made subject to discussion and agreement amongst all residents of a shared home, along with any support service staff working with the residents.

The accommodation provider should be notified once a decision to modify a room or common area has been made. If the accommodation provider objects to the proposed modification, they should be entitled to apply to an appropriate dispute resolution body for an order preventing the modification. The onus should be on the accommodation provider to demonstrate that in the circumstances it would not be appropriate for the resident to make the modification and the legislation should provide a clear presumption in favour of the resident.

Where an order is made in favour of the accommodation provider, they should be required to provide material assistance to the resident to find suitable alternative accommodation.

12. Locks and security devices

TUNSW broadly agrees with the proposed policy around locks and security devices. However, it cannot be assumed that residents of long term supported group accommodation will not want, or

need, internal locks on their bedroom doors. The option should remain open to all residents to install an internal lock subject to the proposals set out above in relation to modifications to the property.

Similarly, TUNSW does not support a requirement for support providers to seek permission from an accommodation provider before installing an internal lock as an "additional check and balance against restrictive practice". It would be inappropriate for an accommodation provider to assume such a role.

13. Change of accommodation provider or owner

TUNSW does not support allowing or requiring a new accommodation agreement to be drafted after a change of accommodation provider or owner. An accommodation agreement should continue on its original terms.

If such a policy were to be implemented, the legislation should make clear that a new accommodation agreement cannot be offered on terms that are less favourable to the resident than the existing agreement.

14. Termination

TUNSW does not support the proposed policy concerning termination of accommodation agreements. It borrows too heavily from the *Residential Tenancies Act 2010* without properly accounting for the increased vulnerabilities that are likely to be present in long term supported group accommodation.

Even without these increased vulnerabilities, the notion that a property owner should be able to end a person's right to occupy their residence without a specified reason should not be regarded as sound policy for housing or consumer protection. An accommodation provider must always be required to provide a good reason to the resident when seeking to end an accommodation agreement. Of those reasons that are proposed in the policy, some are too vague as to offer any great deal of protection to residents against unwarranted or unfair evictions. For instance, allowing an accommodation provider to terminate an accommodation agreement on the grounds that the resident "cannot be supported at the property without causing serious risk to staff or other occupants" or "has breached other requirements of the accommodation agreement" lends itself to a process that could result in eviction being the go-to solution for apparent problems caused by complex behaviour and reduced capacity that may in fact be a symptom of a resident's disability. To avoid the kind of injustice such a scheme could invite, the circumstances in which an accommodation provider might terminate an occupancy agreement require careful and considered thought.

Termination of a resident's accommodation agreement, by an accommodation provider, should only ever be considered as a last resort. The legislation must require accommodation providers to seek alternative solutions and consider remedies other than eviction where a resident's disruptive

behaviour or failure to fulfil a fundamental obligation presents an issue. This should be more than a mere box-ticking exercise, making it clear that outcomes for residents are of the utmost importance and that termination of an accommodation agreement by an accommodation provider should be avoided wherever possible.

Similarly, the legislation should require accommodation providers to ensure that residents are not evicted into inappropriate conditions, such as unsuitable housing or homelessness. Where no alternative remedy is possible and termination is to be pursued, accommodation providers should be prohibited from recovering possession of a resident's room until they have secured an appropriate alternative. Accommodation providers should be required to provide material assistance to a resident who is seeking alternative accommodation because their accommodation agreement is to be terminated by the accommodation provider.

On the other hand, it is difficult to imagine a resident seeking to end an accommodation without a genuinely good reason. Further, in order to fulfil the NDIA goal of respecting choice, merely choosing to end the agreement should be reason enough. Residents should not be required to provide 60 days notice to end an accommodation agreement where none of the proposed reasons apply – 14 days notice should be adequate. However, it is appropriate that residents may terminate their agreement without liability for compensation to the accommodation provider on all of the grounds proposed. Additional grounds to consider are where the resident's relationship with other residents in the group accommodation has substantially broken down to the extent that co-habitation is no longer tenable, and where the resident's needs have changed and the accommodation is no longer suitable.

15. Goods left on premises after vacating

TUNSW does not support the proposal to allow an accommodation provider to dispose of good left on premises after only 30 days and an application to a tribunal. Careful thought needs to be given to the grounds upon which a tribunal would to allow goods left behind to be disposed of, and any discretion they may have to decline. An accommodation provider must be required to take some positive steps to reunite goods left behind with a former resident, and should be required to demonstrate how those steps have been taken prior to being given permission by a tribunal to dispose of the goods.

For more information regarding this submission, please contact Leo Patterson Ross, Acting Senior Policy Officer on (02) 8117 3700 or contact@tenantsunion.org.au.