Tenants' Union of NSW Submission on Improving NSW Rental Laws

August 2023

About the Tenants' Union of NSW

The Tenants' Union of NSW is the peak body representing the interests of tenants in New South Wales. We are a Community Legal Centre specialising in residential tenancy law, policy and practice, with a particular interest in the *Residential Tenancies Act 2010* (RTA or the Act). The Tenants' Union NSW is also a member of the National Association of Renters' Organisations (NARO), an unfunded federation of State and Territory-based Tenants' Unions and Tenant Advice Services across Australia.

In producing this response we have closely consulted with and drawn on the work of the statewide network of Tenants' Advice and Advocacy Services (TAAS), whom we resource. The TAAS network has assisted more than 35,000 tenants, land lease community residents, and other renters in the last 12 months.

The TAASs' considerable experience informs and complements our own, and provides a significant body of knowledge to draw on when considering the reforms required to improve NSW renting laws. We understand a number of Tenants Advice and Advocacy Services will also be providing responses to the Department of Customer Services' Discussion Paper, based on their own experiences providing assistance to renters. We recommend these – they will demonstrate some of the urgent problems renters are currently experiencing, and the limits of our current renting laws in addressing these.

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About this submission

We encourage readers of this submission to understand renting as an essential service. People require not just basic shelter but a good home to live a safe, healthy and dignified life. Homes are our base from which we are connected to communities, broader society and can engage in social, cultural and economic activities. We recognise the renting sector requires a rebalancing to achieve this, with a new and elevated conversation that prioritises the common purpose across government, industry and community of ensuring all homes are good homes.

NSW is in the midst of a genuine renting crisis, especially for households on moderate and low incomes. The sector needs significant reforms to both the availability of homes at a diversity of price points and the regulatory framework to set expectations for both renters and landlords with a fair, clear set of rules for both parties. Importantly, the experience of these rules must be consistent with their intent.

There are a number of areas we know in which the renting sector is falling short. Mental health outcomes for renters and owner-occupiers equivalise at 5-6 years of stable occupancy - but the current median tenure in NSW is just 18 months.[1] Large numbers of renters report living with unattended repairs and maintenance, mould or with poor thermal comfort, in large part due to concerns of putting their current or future housing at risk.[2]

There are a number of areas of concern for renters that are not primarily addressed in this consultation process, including repairs, access and privacy within the home, and the broader mechanisms for dispute resolution such as the NSW Civil and Administrative Tribunal (NCAT or the Tribunal). We acknowledge their importance to many renters and encourage the NSW government to consider a broader review into the future.

Our hope is that over time, regulation, planning and other structural levers such as planning and taxation, can be used to help in rebalancing the rental sector and in particular the assumptions underpinning investment in the rental sector. Investment, both public and private, should be seen as a mechanism by which we deliver on the needs of the community, rather than the primary purpose of the sector. As with other essential services, like energy, health-care, food and more, there needs to be a recognition that avoiding harm, both physical and financial, is a necessary and achievable part of the regulatory framework, and that this provides greater certainty and stability for both investors and consumer renters. It also sets a social licence under which investment occurs with greater harmony across the community.

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[1] Ang Li, Emma Baker, and Rebecca Bentley (2022) Understanding the mental health effects of instability in the private rental sector: A longitudinal analysis of a national cohort, *Social Science and Medicine*; Ang Li et al, Stability and security: the keys to closing the mental health gap between renters and home owners, *The Conversation,* accessed 18th August 2023

[2] Lyrian Daniel, Emma Baker, Andrew Beer & Rebecca Bentley (2023) 'Australian rental housing standards: institutional shifts to reprioritize the housing–health nexus', *Regional Studies, Regional Science*, 10:1, 461-470

Summary of Recommendations

1. *At the end of a fixed term lease a landlord should only be able to end the tenancy for a valid and contestable reason.*
2. *A property 'being prepared for sale' should not be added as a new reason for eviction.*
3. *The following new reasons to end a tenancy be added:*
    a. *The landlord genuinely intends to demolish, and/or reconstruct the property and has obtained all necessary consents and permits to carry out the planned demolition and/or reconstruction of the premises .*
    b. *The landlord genuinely intends to use the property for another purpose where they can demonstrate the intended change of use and that the premises will not be used as a residence for at least 6 months.*
    c. *The landlord, or a member of their immediate family, genuinely intends to use the property as their principal place of residence for at least 12 months and intends to move in as soon as is reasonably possible once vacant possession is provided.*
4. *Notice periods be provided for new reasons as follows:*

a.	*Change of use*	*6 months*
b.	*Demolition*	*6 months*
c.	*Landlord or immediate family moving in*	*120 days*

5. *If 'Sale of home' (section 86 of the RTA) is not removed, the notice period provided be extended to 120 days*
6. *A landlord must be required to provide documentary evidence supporting the landlord's reason for the notice when they serve the notice to vacate. A notice to vacate served without the appropriate documentation should not be considered valid.*
7. *The current Victorian evidentiary requirements for termination on the basis of Change of Use; Demolition; Landlord or immediate family moving in; Sale and other 'no fault' reasons provide an appropriate model that NSW might draw – and improve – on.*
8. *The following reasons should have a temporary ban on residential re-letting applied as indicated:*

a.	*Change of use*	*12 months*
b.	*Demolition and/or reconstruction*	*6 months*
c.	*Landlord or immediate family moving in*	*12 months*

9. *Where the landlord intentionally misleads or willfully misuses a termination reason, they should incur a significant penalty (a fine) and be required to compensate the renter, e.g. for loss, including moving costs.*
10. *Alternatively, if the landlord's circumstances have simply changed since the tenancy ended, but they are found to not be using the property as they stated they had intended, the landlord should pay any associated moving costs for the evicted renting household.*

11. *Once a termination notice has been served by the landlord, remove the liability for a renter in a fixed term lease to pay any rent for any period after they have given vacant possession and before the termination date for any newly introduced termination reasons.*
12. *The Tribunal be provided with discretion to decline termination if it considers it would not be appropriate – reasonable and proportionate – to do so, having regard to all relevant factors and the circumstances of the case.*
13. *The factors the Tribunal can consider when determining retaliatory action should be broadened.*
14. *The legislation should remove the Tribunal's discretion where retaliatory action is found to have occurred, with the RTA providing that a notice of termination is considered invalid when served in retaliation.*
15. *The onus of proof in relation to retaliatory eviction should shift from the tenant, with the landlord being required to demonstrate that the notice for termination is not invalid due to retaliation*
16. *A preclusion period for another notice should be introduced*
17. *Consideration should be given to making a landlord liable to compensate a renter for any moving costs incurred where they terminate a tenancy for a reason other than the renters' breach.*
18. *Compensation of this nature could be provided to the renter in the form of a lump sum payment, or through an equivalent rent-free period.*
19. *Remove the ability of landlords to evict on the basis of sale of premises.*
20. *Require the landlord provide a valid termination notice to the renter when terminating a long term tenancy*
21. *Consider a variation at section 94 of the RTA of the requirement of continual possession of residential premises down from 20 years*
22. *Fourteen (14) days is a reasonable amount of time for a landlord to consider and respond to a renter's request to keep a pet.*
23. *Where a landlord is seeking an order to refuse a request for a pet they should be required to do this within a 14 day timeframe from the date on which the renter made a written request.*
24. *Landlords must be required to seek an order at Tribunal if they wish to refuse a request for a pet. The onus of proof must be placed on the landlord to demonstrate why it is reasonable to refuse the request.*
25. *The Tribunal should consider the welfare of the animal as the primary consideration when determining whether it is reasonable to refuse a request for a pet at the property. They should be guided to determine this with reference to relevant animal welfare guidelines and/or other companion animals regulation, and any other relevant legislation or applicable regulation.*
26. *The Tribunal should not be able to give the landlord the ongoing right to say no to animals at the property.*
27. *Amend the Residential Tenancies Act 2010 to prohibit landlords and agents from asking about pet ownership at the application stage.*

28. *Continue to prohibit landlords and real estate agents from requesting pet bonds.*
29. *A standard rental application form should be prescribed*
30. *An explicit restriction on a request for information that can be used to unlawfully discriminate against an applicant be introduced into the RTA.*
31. *Being a survivor of gender-based violence be included as a protected attribute in the Anti-Discrimination Act 1977*
32. *Limits should be placed on the types of additional information and the number of pieces of information that can be requested for specific categories of information (i.e. Information relating to: Proof of identity; Ability to pay agreed rent; Suitability)*
33. *Renters, not the landlord or their agent, must be able to choose which of the types of information they will provide for each category for which information can be requested.*
34. *Appropriate limits should also be placed on the information that can be collected in relation to suitability, for example only written character references should be allowed addressing a list of prescribed questions relating to suitability.*
35. *Consideration be given to how to regulate not only the information that can be asked for, but information that can be considered in the assessment of a rental application.*
36. *Landlords, agents and PropTech must only use information collected about an applicant to determine their suitability for a rental property*
37. Renter*s should have confidence that any information collected about them is held only for the period it is beneficial to the renter to do so. This means*
    a. *For landlords and agents -*
        i. *For a successful applicant*
        Contact information such as phone and email address needed for the ongoing relationship should be stored securely.
        The tenant should be provided with copies of any information held about them and then all non-contact information destroyed within 2 months of entering into the agreement.
        ii. *For unsuccessful applicants*
        Information and documentation should be destroyed once an agreement has been entered into, unless the unsuccessful applicant gives explicit and withdrawable consent for the retention of information in response to a plain language explanation of its use for a specific time frame of no more than 6 months or as directed by the person. At the end of that time frame, information must be destroyed or consent renewed.
    b. *For third parties - Information should be destroyed upon completion of the application unless the person gives explicit and withdrawable consent for the retention of information in response to a plain language explanation of its use for a specific time frame of no more than 6 months or as directed by the person. At the end of that time frame, the information must be destroyed or consent renewed.*
    c. *For all - Renters should be given access to personal information (including specifying this be free, reasonably* accessible, and clear timeframes for response)

38. *NSW consider introducing a registration scheme for landlords in the private rental market*
39. *Work to create a pathway for automated decision-making that can test technology before widespread adoption and ensure legal compliance.*
40. *Disallow further use of automated decision-making including elements such as 'scores' that may influence decision-making until appropriate regulatory protections, monitoring and enforcement powers are in place.*
41. *Renters should be provided a minimum of 14 days to top up the bond if there is a difference between the bond required at a new property and the bond refunded from their old property.*
42. *A renter should not be barred from the portable bond scheme in future, though there may appropriately be a temporary limit placed on use if you have not kept up with payments on a previous portable bond for the difference in bond (i.e. renter is currently defaulting on the guarantee)*
43. *Landlords should not be able to end the lease, as their interests (the bond) is secured by Government, who should be provided with alternative appropriate pathways to seek repayment from the renter as a debt where the difference in rents is not 'topped up'.*
44. *Appropriate hardship support should be made available for those renters struggling to pay the difference because they are experiencing financial hardship.*
45. *The Portable Bond Scheme should be universally accessible but optional for renters to use.*
46. *To ensure the data is reliable and timely, landlords or their agents should be required to report a rent increase to the NSW Government using an online system (such as Rental Bonds Online).*
47. *Rent should not be able to be increased more than once in 12 months regardless of changes to contract type. Unless changes to rent increase rules are also implemented, these limits should also be considered to apply to the property.*
48. *Landlords should be required to justify a rent increase if it is over a reasonable threshold (set by a measure appropriately determined by the Rental Commissioner or another relevant independent agency). The responsibility to prove a rent increase is not excessive should sit with the landlord.*
49. *The Tribunal should consider at Section 44(5)(a) the fair market value of rents for comparable premises to allow consideration of whether the general market level is reflective of market failure.*
50. *The Tribunal should be able to consider the question of affordability, and other questions relating to the landlord's motives for increasing the rent if warranted, when considering whether a rent increase is excessive.*
51. *Landlords or their agents should be required to disclose where any services are provided via embedded networks when listing (advertising) the property for rent, at inspections for the property, as well as in the tenancy agreement.*
52. *The law should require a landlord or real estate agent to also offer an electronic way to pay rent that is free to use, such as a direct bank transfer option.*
53. *Owners should be directly responsible for repairs and maintenance issues and then*

empowered to pass on costs to strata.

54. *By laws should be provided with the tenancy agreement with penalties for failure to provide. They should also be published and available through the Strata Hub.*
55. *A breach of by-laws should not constitute a breach of the tenancy agreement.*
56. *Landlords are responsible for any strata fees or bonds and the Act should make clear these can not be passed through to the renter*
57. *All major works planned by strata must be disclosed to a renter prior to the renter signing a tenancy agreement*

Response to Consultation Paper Discussion and Questions

Removing 'no grounds' terminations

Guiding principle
A renter should be able to stay in a rental home unless the property is no longer available for rent.

Q1. What is your preferred model for ending fixed term leases and why?

A valid reason for eviction

All renters should be provided with a valid reason for ending a tenancy.

Landlords must be required to provide a reason to end a rolling (periodic) lease *and* a fixed term lease. The end of a fixed term is not a valid reason in and of itself for a termination. Terminations on the basis of 'End of residential tenancy agreement at end of fixed term tenancy' (section 84, *Residential Tenancies Act 2010*) are evictions without a valid and contestable reason, and removing 'no grounds' evictions must include removal of section 84.

Fair Trading's End of Tenancy survey provides a valuable insight into the nature of tenancy agreements (fixed term leases vs periodic leases) in NSW and why tenancies end. A majority (58%) of renters who filled out the End of Tenancy survey in NSW between August 2021 and September 2022 indicated they were on a fixed-term lease.[3] The survey also indicates renters on fixed term leases are more likely to receive a 'no-grounds' eviction notice. The majority of renters (71%) who indicated in the survey they had received a 'no grounds' eviction received these at the end of a fixed term tenancy (vs 29% on a periodic lease).

NSW tenant advocates report that in the current context of low vacancy rates and increasing rents they are already seeing a disturbing trend where landlords or their agents are issuing a notice of termination for the end of a fixed term agreement *and* a notice for a substantial rent increase at the same time. If the renter agrees to the increase they are told they can stay, if not they must leave in line with the termination notice issued. They also note an increasing number of landlords or their agents are shifting renters onto back-to-back short term tenancies to facilitate this practice and because it allows them to use a section 84 termination notice requiring only 30 days notice in comparison to the 90 days notice required for a section 85 notice.

Other Australian jurisdictions' reforms to end 'no cause' evictions

The ACT recently implemented reforms to remove equivalent no cause evictions from their tenancy law. These have been in effect since 1 April 2023, and apply to tenancies on a fixed term lease or a periodic lease. South Australia has also announced they will be introducing reforms to similarly ensure that landlords can only end a tenancy – whether periodic or at the end of a fixed term – for a prescribed reason.

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[3] Based on End of Tenancy survey results from August 2021 to September 2022. Information was collected for approximately 1 in 6 of all tenancies that ended during this period.

Where reforms to end 'no cause' evictions have not gone far enough renters have continued to face insecurity, and eviction for retaliatory or discriminatory reasons. Queensland, for example, only ended 'no grounds' evictions for renters on periodic agreements, introducing 'end of a fixed term agreement' as a prescribed reason for ending a tenancy. Advocates in Queensland report landlords and their agents have taken advantage of this loophole to shift renters onto shorter term fixed-term tenancies – for instance, 6-month agreements – so they can continue to evict without grounds. Tasmania has similarly limited 'no grounds' evictions to the end of fixed terms since 1997. Around 84% of renters in Tasmania are now on fixed term agreements, preserving the ability of landlords to end agreements every 6 to 12 months without being required to provide a reason beyond 'end of fixed term'.

In Victoria, reforms to get rid of no grounds came into effect in March 2021. They have disallowed the use of 'no reason' terminations, except at the end of the first fixed term. This model creates an incentive for landlords to increase the churn of tenancies in order to ensure they always maintain control over the premises. We are aware many landlords consider the first term a probationary period, placing extra pressure on renters early on in their tenancies not to 'rock the boat' or assert their rights. In NSW introduction of reforms along the lines of the Victorian model would mean over 300,000 – or up to 1 in 3 renters – would still be at risk of eviction for no reason (an eviction without grounds at the end of the first fixed term lease) each year.[4]

If NSW continues to allow landlords to evict without having to provide a valid reason at the end of a fixed term tenancy we will see a significant number of landlords and their agents shift renters onto short fixed term leases, as is the current practice in Tasmania and Queensland. This will mean reforms to end 'no grounds' eviction are undermined, and fail to deliver the greater protection and stability promised.

Our recommendation

1. *At the end of a fixed term lease a landlord should only be able to end the tenancy for a valid and contestable reason.*

New reasons for ending a tenancy

Q2. Are there any other specific situations where a landlord should be able to end a lease?

The Consultation Paper suggests the following grounds be added as reasonable grounds for eviction, to replace 'no grounds':

- The property will soon be sold
- The property will be renovated or repaired
- The landlord wants to use the property differently
- The property will be demolished
- The landlord or a member of their immediate family is going to move into the property

[4] In 2022 there were 330,382 new rental bonds lodged, a vast majority of which would be new fixed term tenancies. Currently there are a total of 958,184 bonds held by the NSW rental bond board.

We discuss each of the proposed new reasons below.

Property will soon be sold

We are extremely concerned about the proposed addition of 'is being prepared for sale' as a ground for termination. Currently, section 86 of the *Residential Tenancies Act 2010* allows a periodic tenancy to be terminated if the owner has entered into a contract for sale with vacant possession.

When a property is to be sold, it can be sold to either an investor or an owner occupier. If an investor purchases the property the property will continue to be available to rent and the sitting tenant should be able to remain. If a prospective owner-occupier moves into the property then they can rely on the new grounds to be introduced, i.e. Notice to terminate on the basis 'Landlord or a member of their immediate family is moving into the property'.

Landlords and agents may suggest they would like the option to sell the property empty to ensure they are able to maximise their sale price. We are not aware of any research or data that provides clear evidence for this claim, or a good indication of the estimated increase in price that they anticipate for vacancy. However we note that landlords who felt that vacancy was essential for sale, would still be able to open a conversation with the tenant, and negotiate on fair terms such as assistance with finding alternative accommodation, compensation for moving costs and/or reduced rent to reach an agreement to end their tenancy early by mutual consent. This is an option open currently to landlords who wish to sell their property while a tenant is in a fixed term tenancy. The lack of widespread usage of negotiation speaks to the current power imbalance between landlords and tenants.

Further, the inclusion of 'intention to sell' as a new reason for eviction introduces the possibility that a landlord may say they are preparing to sell, evict a sitting tenant, and then simply 'change their mind' and bring in new tenants.

In Victoria, Queensland and the ACT landlords are able to end a tenancy during a periodic lease or at the end of a fixed term lease if the property is sold or is to be sold. In Victoria and the ACT landlords are required to provide evidence they genuinely intend to sell the property. In Victoria they are required to provide at a minimum a contract of engagement/authority to sell with a licensed estate agent, and in addition they are restricted from re-letting the property as a residence for six (6) months. In the ACT there is no prescribed evidence, only examples of evidence that might be sufficient including a statutory declaration. In Queensland there is no requirement to provide documentary evidence when serving the notice, though penalties apply if the landlord is found to have provided false or misleading information when serving the notice.[5] Queensland also places a temporary ban against re-letting for six months when this reason is used to terminate a lease.

While temporary bans provide a disincentive to misuse or casually use the 'intention to sell' reason, this is limited by existing challenges in enforcing such a restriction (see further discussion on this below). Similarly, the failure of regulators to enforce penalties against landlords or their agents in all jurisdictions has limited the effectiveness of these as a disincentive against misuse of the provisions. The Victorian requirement that a

[5] Penalties – a maximum of 50 penalty units – applies for providing false or misleading information.

landlord must provide evidence of a contract of engagement/authority to sell when serving the notice may currently be more effective as a disincentive against its use given the fees involved for the landlord in breaking the contract.

In jurisdictions where 'intention to sell' has been introduced as a reason for eviction, advocates suggest stronger enforcement measures are required. This should include allowing renters to seek compensation or alternatively request their reinstatement as tenant where wrongful eviction has occurred.[6]

We do not support introducing a new reason for 'intention to sell' as any new reforms introduced must protect, rather than erode, fairness and security for renters.

The property will be renovated or repaired or demolished

Demolition and reconstruction of a property may be a valid reason for the landlord to end a tenancy agreement.[7] However, we do not believe renovation or general repair should be considered as a reason.

The landlord, if using demolition and reconstruction as a reason to evict, should be required to demonstrate they have obtained all necessary permits and consents to carry out the planned demolition of the premises and reconstruction.

There is a significant risk that including repair within the reasons for eviction may allow landlords to leave a property to fall into disrepair, then evict on the basis repairs are required having avoided their contractual obligations regarding maintenance and repairs during the tenancy.

If the language of repair and renovation is included, it must be clarified that this is allowable only where the landlord genuinely intends to carry out *significant* repair and renovation of the residential premises and where the repairs are not required as a result of the landlord's breach of the agreement. The works will render premises uninhabitable for a minimum period of time (for example, a minimum of 6 weeks or longer) and that the work can only be undertaken if the property is vacant. The renter must also have been given the option to continue the tenancy agreement with an abated rent during the repair and renovation period and declined.

In addition it could be a requirement that plans to renovate, repair or demolish must be disclosed to the tenant before a tenancy agreement is entered into for the premises, if the landlord plans to end the tenancy for 'significant repair and renovation'. This ensures the renter is aware of the more limited duration or tenure on offer and can make an informed decision before moving into the property.

Appropriate disincentive measures should be implemented to limit inappropriate or casual use of this reason and minimise the circumstances where termination occurs and the landlord then has a 'change of mind'. This should include a temporary ban on re-letting of the property for a set period of time (e.g. 6 months).

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[6] The ACT provides for this within their *Residential Tenancy Act 1997* at section 58(2)&(3).
[7] Sackville in his 1975 report on the Inquiry into Poverty included demolition and reconstruction as one of the few no fault grounds that should be included as a prescribed grounds on which eviction could occur.

Landlord wants to use the property differently (Change of use)

Where the landlord intends to change the use of the property, withdrawing the premises from the private rental market to use for a business or similar purpose they should be allowed to issue a termination notice. They should be required to demonstrate the intended changed use, and that the premises will not be used as a residence for at least 6 months. For example, where a landlord intends to use the premises for a business purpose they should be required to provide evidence of the details of the business, appropriate Council permission for the premises to be used for this purpose and any other evidence requirements outlined in the Act.

Where the landlord seeks to withdraw the premises from the private rental market for another non residential purpose they should be able to demonstrate to the NSW Civil and Administrative Tribunal (NCAT or the Tribunal) they have considered whether the intended new use can be achieved via reasonably available and suitable alternative premises or any other means. That is, the Tribunal should be provided clear discretion to consider whether termination is reasonable and proportionate in these circumstances, balancing the relative hardship the parties may face.

A temporary ban on re-letting of the property should apply when this reason is used.

Landlord or a member of their immediate family is moving into the property

We understand there will be circumstances in which a landlord or their immediate family may need to move into a property that is currently being rented. In these circumstances, where there is a periodic tenancy in place or a fixed term lease is coming to its end a landlord should be able to terminate a tenancy where:

- they can demonstrate a genuine intention to use the property as their principal place of residence,
- they intend to occupy the property for at least 12 months;
- and they genuinely intend to move into the property as soon as is reasonably possible once vacant possession is provided.

A clear definition of family must be provided within the Act. Without clarity on this, there is significant scope for disagreement between parties, and unnecessary applications to the Tribunal to resolve the issue. Tasmanian and Victorian tenancy law provide a useful definition of family NSW could draw on:

> **Section 42(5) of the Tasmanian *Residential Tenancies Act 1997***
> A member of the family of an owner means –
> (a) the owner's domestic partner, son, daughter or parent; or
> (b) a parent of the owner's domestic partner; or
> (c) another person who normally lives with the owner and is wholly or substantially dependent on the owner.
>
> **Section 91ZZA(1)b of the *Victorian Residential Tenancies Act 1997***
> In the case of a residential rental provider who is an individual—
> (i) by the residential rental provider's partner, child, parent or partner's parent; or
> (ii) by another person who normally lives with the residential rental provider and is wholly or substantially dependent on the residential rental provider.

Our recommendations

2. *A property 'being prepared for sale' should not be added as a new reason for eviction.*
3. *The following new reasons to end a tenancy be added:*

    a. *The landlord genuinely intends to demolish, and/or reconstruct the property and has obtained all necessary consents and permits to carry out the planned demolition and/or reconstruction of the premises .*

    b. *The landlord genuinely intends to use the property for another purpose where they can demonstrate the intended change of use and that the premises will not be used as a residence for at least 6 months.*

    c. *The landlord, or a member of their immediate family, genuinely intends to use the property as their principal place of residence for at least 12 months and intends to move in as soon as is reasonably possible once vacant possession is provided.*

Appropriate notice periods

Guiding principle

Renters have enough time to find alternative accommodation when they are forced to move homes through no fault of their own.

> *Q3. What would be an appropriate notice period for the five proposed reasons (and for any other reasons you have suggested)? Why is it reasonable?*

Finding a new home for yourself, your family or household can take some time and planning. This is whether you are on a fixed term lease or a periodic (rolling) lease. This is especially the case when vacancy rates in the private rental market are very low, as they are right now.

Since before Covid, the number of renters who are calling local Tenants' Advice Services seeking advice after receiving a 'no grounds' eviction has more than doubled. Prior to Covid, around 5% (1500 calls/year) of calls were about a no grounds eviction, this has risen sharply to 11% (3,800 calls/year). Most renters know a 'no grounds' eviction is difficult to challenge. Most are calling for advice on whether/how they can extend the period before they must give vacant possession. They report they have been unable to secure alternative accommodation and do not believe they will be able to do so within the current 90 days notice provided.

It is important for renters and landlords alike that renters who are evicted have enough time to secure a new home. Renters who are unable to do so may be forced to overstay their notice period (or face homelessness), leading to potential Tribunal proceedings and additional stress for everyone.

Struggling to secure a rental home in regional NSW

Jane, an older renter, was issued a no grounds eviction (s85 termination notice). Jane lives with her family, including her dependent adult child (who had significant physical disabilities), along with several foster care children (one with special needs). Despite best efforts, the family were unable to secure appropriate alternative housing during the 90 day notice period and her landlord then applied to the Tribunal for vacant possession.

The tenancy was terminated at the Tribunal, but with assistance from her local Tenants' Advice and Advocacy Service, Jane secured a 2 month suspension of the order for possession. However, even with this extension she struggled to locate a new suitable housing. In the end a warrant for possession was issued, and this ultimately forced Jane and her family to leave causing significant anxiety and stress for the household.

Applied for more than 20 properties without success

Tom had been in his home for over a decade and was struggling with multiple medical issues while acting as a carer for an elderly family member also residing with him. Tom was issued with a no grounds eviction (s85 termination notice). He started looking and applying for other rentals straight away. Tom had applied for in excess of 20 properties in the regional area he lives in without any success. As a result, Tom had no choice but to remain in the premises longer than the 90 days and allow the matter to go to NCAT.

Appropriate notice periods may vary depending on the ground provided. For any 'no fault' eviction (ie where a renter is not in breach of the agreement) we recommend no less than 120 days notice should be given. Some grounds may require a longer notice period (more than 120 days).

Reason	Recommendation for NSW	ACT	Queensland	Victoria
Significant repair or renovation requiring the premises be vacant	n/a Note: We suggest this should not be introduced as a reason, but if considered for introduction then 6 months	12 weeks	2 months	60 days
Change of use	6 months	26 weeks	2 months	60 days
Demolition	6 months	n/a	2 months	60 days
Landlord or immediate family moving in	120 days	8 weeks	2 months	60 days in a periodic tenancy 14 days at the end of a fixed term
Sale of home	120 days Note: Currently section 86 of the RTA provides 30 days notice, we suggest increasing this to 120 days	8 weeks	2 months	60 days

Table 1: Notice periods in Australian jurisdictions

Our recommendations

4. *Notice periods be provided for new reasons as follows:*
    a. *Change of use* *6 months*
    b. *Demolition* *6 months*
    c. *Landlord or immediate family moving in* *120 days*
5. *If 'Sale of home' (section 86 of the RTA) is not removed, the notice period provided be extended to 120 days*

Evidence requirements

Guiding principle

If a renter is being evicted, the landlord must be able to provide sufficient evidence to demonstrate the validity of the reason for termination, and where possible the evidence should be independently verifiable (i.e. not created by the landlord but issued independently). The landlord must be responsible for demonstrating validity, rather than the renter being required to disprove it.

> *Q4. What reasons should require evidence from the landlord? What should the evidence be?*

Documentary (written) evidence should be provided to the renter with a termination notice for all proposed new reasons. Evidence must be sufficient to demonstrate the validity of the reason for termination.

In Victoria the Director of Consumer Affairs determines – approves and publishes – the appropriate documentary evidence that is required to support the reason for giving a notice to vacate for each 'no fault' reason available. In the ACT the RTA requires that a notice to vacate is accompanied by written evidence supporting the landlord's reason for the notice. They provide examples of appropriate written evidence that might be provided, including statutory declarations, development applications, and quotes from a tradesperson for renovations.

The current evidentiary requirements in Victoria for the new reasons proposed and being considered in this review provide a useful indication of the level and type of evidence that should be required in NSW.

Reason	Victoria
Change of use	A witnessed Statutory Declaration of intention to use the premises for business purposes, including details of the particular business and stating that the premises will not be re-let as a residence before the end of 6 months after the date the notice was given. And one or more of the following: ● the ABN of the business; or ● Business registration or licence; or ● Council planning permit.
Demolition	Both of the following: ● Building permit for demolition; and ● Contract with a suitably qualified Builder-demolisher, stating the date that demolition will occur.
Landlord or immediate family moving in	A witnessed Statutory Declaration signed by the rental provider, stating either: ● they intend to reside in the rented premises, or ● the name of the person who will occupy the rented premises, their relationship to the rental provider, and declaring whether the person is a dependent, and ● that the rental provider understands that they must not re-let the premises to any person (other than the person named to be moving in to the rented premises in the statutory declaration) for use primarily as a residence before the end of 6 months after the date on which notice was given, unless approved by VCAT
Sale	Contract of sale, signed by the vendor and purchaser and dated

Table 2: Evidence requirements in Victoria

Our recommendations

6. *A landlord must be required to provide documentary evidence supporting the landlord's reason for the notice when they serve the notice to vacate. A notice to vacate served without the appropriate documentation should not be considered valid.*
7. *The current Victorian evidentiary requirements for termination on the basis of Change of Use; Demolition; Landlord or immediate family moving in; Sale and other 'no fault' reasons provide an appropriate model that NSW might draw – and improve – on.*

Temporary bans on reletting of premises

Q5. Should any reasons have a temporary ban on renting again after using them? If so, which ones and how long should the ban be?

Appropriate compliance protections are required to ensure landlords do not misuse newly introduced 'reasonable grounds' for eviction.

A renter being evicted from their home can be an extremely stressful and expensive experience, especially in the midst of a rental crisis. It is important that if a renter is going to be put through that experience, there is evidence that the eviction is necessary and genuine, and proper safeguards are in place from wrongful evictions.

This should include stopping the landlord from renting out the property for a set period of time when certain termination grounds are used.

There should be a ban on the property being rented out again when a renter is evicted for any of the reasonable grounds for eviction discussed above. This will help safeguard against landlords wrongfully issuing terminations for one of these grounds when their real intention is to have the property vacant to rent out again.

Our recommendation

8. *The following reasons should have a temporary ban on residential re-letting applied as indicated:*
    a. *Change of use* — *12 months*
    b. *Demolition and/or reconstruction* — *6 months*
    c. *Landlord or immediate family moving in* — *12 months*

Additional issue: More compliance & enforcement (penalties for wrongly issuing terminations)

To ensure the effectiveness of the reforms, it is important to have strong compliance and enforcement provisions. It has been important in other jurisdictions to ensure there is a jeopardy for falsely relying on 'reasonable grounds' terms. Temporary bans should be implemented but are not sufficient by themselves. Where a landlord has falsely relied on one of the above grounds to terminate a tenancy, there should be penalties.

As mentioned earlier, in the ACT where wrongful eviction has occurred renters are able to seek compensation or alternatively request their reinstatement as tenant.[8]

We believe both penalties and compensation should be considered, with a tiered approach adopted that distinguishes between cases where the landlord's circumstances have changed invalidating the initial reason for termination, and where a landlord has wilfully misled or misused a reason.

[8] The ACT provides for this within their *Residential Tenancy Act 1997* at section 58(2)&(3).

Our recommendations

9. *Where the landlord intentionally misleads or willfully misuses a termination reason, they should incur a significant penalty (a fine) and be required to compensate the renter, e.g. for loss, including moving costs.*
10. *Alternatively, if the landlord's circumstances have simply changed since the tenancy ended, but they are found to not be using the property as they stated they had intended, the landlord should pay any associated moving costs for the evicted renting household.*

Additional issue: Renter must be able to move out at any time once termination notice served

Section 110 of the *Residential Tenancies Act 2010* allows renters evicted during a periodic agreement to move out and stop paying rent at any time before the termination date listed on the notice.[9] This is not the case at the moment for renters on a fixed term lease served a termination notice for 'no grounds' or termination at the end of their fixed term lease (section 84) until the fixed term has expired.

Renters on fixed term leases should be able to move out and stop paying rent before the termination date listed on the notice. This would help to minimise the costs associated with moving, and help to prevent situations in which a renter must pay double rent to secure alternative accommodation.

Our recommendation

11. *Once a termination notice has been served by the landlord, remove the liability for a renter in a fixed term lease to pay any rent for any period after they have given vacant possession and before the termination date for any newly introduced termination reasons.*

Additional issue: Tribunal discretion

When introducing new reasons for termination, it is important the Tribunal be provided discretion to decide if in the circumstances it is appropriate to terminate the tenancy.

At present the Residential Tenancies Act provides discretion to the Tribunal in most termination proceedings with grounds. Where termination is for breach, for example, the Tribunal must consider the seriousness of the breach and whether it justifies termination.

It is appropriate that for any new reason introduced the Tribunal be provided with discretion to decline termination if it does not believe it is reasonable and proportionate in the circumstances to evict the tenant. The Tribunal must be allowed to consider a range of relevant factors and the circumstances of the case to determine whether it is satisfied it is appropriate to terminate the tenancy.

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[9] Renters on a fixed term lease can also leave at any time once a valid termination notice has been served, apart from termination on for

Circumstances which could be taken into account include the time the tenant has occupied the premises, the age and state of health of the tenant, and the inability of the tenant to obtain other suitable accommodation. It should also require the Tribunal to consider the relative hardship parties may face – the hardship for the landlord in not gaining possession of the premises for the new use balanced against the hardship the renting household faces if evicted from the premises, including any financial detriment.

Our recommendation

12. *The Tribunal be provided with discretion to decline termination if it considers it would not be appropriate – reasonable and proportionate – to do so, having regard to all relevant factors and the circumstances of the case.*

Additional issue: Retaliatory evictions

Consideration of reforms to retaliatory evictions should also be considered as part of this reform because of the potential for misuse of grounds.

While a considerable amount of the very concerning behaviour in relation to retaliatory eviction is currently facilitated by sections 84 and 85 of the Act, it remains a possibility that existing or established grounds within the Act and any newly introduced reasons may be misused by a landlord seeking to avoid a legal obligation or to

Our recommendations

13. *The factors the Tribunal can consider when determining retaliatory action should be broadened.*
14. *The legislation should remove the Tribunal's discretion where retaliatory action is found to have occurred, with the RTA providing that a notice of termination is considered invalid when served in retaliation.*
15. *The onus of proof in relation to retaliatory eviction should shift from the tenant, with the landlord being required to demonstrate that the notice for termination is not invalid due to retaliation*
16. *A preclusion period for another notice should be introduced*

Additional issue: General compensation for renters evicted who are not at fault

Where a renter has not breached their tenancy agreement and is evicted, the costs associated with the forced move should be minimised and fall more heavily on the party who has chosen to end the agreement.

A number of other international jurisdictions require compensation for moving costs or a waiver of rent be provided to renters who receive a 'no fault' eviction (a termination other than for breach by the renter).[10]

Relocation costs for evictions of this type are already available for a limited number of renters in NSW. In public housing in NSW, landlords already generally offer relocation

[10] One example of this is in San Francisco, see City and County of San Francisco's Schedule of Tenant Relocation Payments (December 2022), accessed 28 July 2023

expenses where a renter is forced to move and leave a property to relocate for portfolio management purposes.[11] This includes assistance with moving expenses, utility reconnection fees, or establishment expenses in the new property, as well as where relevant reimbursement for approved alterations made to the renter's current property. In some cases, moving expenses are also covered where a relocation is for tenancy management purposes where the assistance will help them establish and maintain a successful tenancy in the new property. Many community housing providers have adopted a similar approach in their relocation policies and also cover relocation expenses in these circumstances.

In addition, under the *Residential Land Lease Communities Act 2013* compensation is payable to a resident/home owner for the loss of residency under Part 11 Division 6, compensation for termination. Compensation for relocation is also payable for relocation having regard to the cost of moving, inconvenience to the homeowner, the length of time that the occupants of the home have lived on the residential site and any other relevant factor raised by the parties.

We acknowledge that in some instances where a landlord initiates an eviction this may be because of financial hardship. A change in financial circumstances may require a landlord to sell their property, or to move their family into their investment property. Where a property has become uninhabitable, a landlord may not have capacity to cover the cost of repairs required to bring it up to habitable standards requiring them to issue a termination, and possibly causing financial hardship for the landlord. A landlord's own circumstances should not impact whether or not a renter is able to access compensation, nor should they be pushed into further financial hardship. In these circumstances a hardship fund, or other mitigation strategy, may be required to address or minimise significant hardship or disadvantage. This could, for example, provide that where a landlord is experiencing hardship that renders them unable to meet their obligation to compensate the tenant, either the landlord or the tenant could directly apply for assistance (e.g. a hardship fund available in circumstances of landlord hardship that either directly enables a landlord to meet this obligation, or for the tenant to directly apply for an equivalent compensation from the fund in lieu of landlord compensation where landlord hardship has been established).We have previously discussed how this could be achieved in some detail, see 6.3 Addressing the challenges in implementing hardship reforms, *Eviction, Hardship and the Housing Crisis (2022)*.

Our recommendations

17. *Consideration should be given to making a landlord liable to compensate a renter for any moving costs incurred where they terminate a tenancy for a reason other than the renters' breach.*
18. *Compensation of this nature could be provided to the renter in the form of a lump sum payment, or through an equivalent rent-free period.*

[11] See Section 6. Assistance with the relocation process (including returning to a property after redevelopment) in the DCJ Housing (2023) Tenancy Management Policy Supplement, updated 29 June 2023

Additional issue: Removing ability to evict for sale of premises

Sale of property alone is not a reasonable ground to evict a tenant. There is no reason to assume that if the property is sold it will no longer be available for rent.

The current provision in the Act allowing for termination on the basis of sale of premises (section 86) does take account of this, allowing termination only where the landlord has entered into a contract for the sale of the residential premises *and* that contract requires the landlord give vacant possession of the premises. In addition, a section 86 Sale of Premises termination notice cannot specify a termination date before the end of the fixed term where there is a fixed term agreement in place.

The intention of section 86 is to provide vacant possession in order that a new owner can move into the property, or alternatively put the premises to some other purpose. Where the intention is that the property remains an investment property there is no good reason to evict a sitting tenant.

If new reasons including landlord or immediate family are moving in; change of use; and demolition and reconstruction are introduced, there is no good reason to retain termination for sale of premises (section 86).

Our recommendation

19. Remove the ability of landlords to evict on the basis of sale of premises.

Additional issue: Termination of long term tenancies (section 94)

Reforms to remove 'no grounds' evictions must ensure all renters are provided with a valid reason for ending a tenancy. This must include renters in long term tenancies – that is, in a tenancy where a renter has been in continual possession of the same residential premises for a period of 20 years or more.

Attention must be paid regarding how to ensure those in long term tenancies can only be evicted where either a breach has occurred, some other existing ground is provided, or a newly introduced reason is given.

This could be done by removing clause 94(2) of the Act, which allows a landlord to terminate the agreement without service a valid notice of termination. This would ensure discretion remains available to the Tribunal to decline termination unless it is satisfied that it is appropriate to do so in the circumstances of the case taking account of a broad range of factors – including for example length of tenure, and age of tenant. Tribunal would continue to be required to ensure vacant possession can be ordered no earlier than 90 days after the order is made.

We would also suggest that if Tribunal discretion is not provided for new reasons for termination that reforms consider varying the requirement of continual possession of the residential premises down from the current 20 years, to better reflect community's understanding of a 'long term' tenancy. Removal of the requirement at section 94(1)b – that 'the tenant occupied the premises under a fixed term agreement, the fixed term of the

original agreement has expired' – would also usefully simplify the provision and, in fact, help clarify its intention.

Our recommendations

20. *Require the landlord provide a valid termination notice to the renter when terminating a long term tenancy*
21. *Consider a variation at section 94 of the RTA of the requirement of continual possession of residential premises down from 20 years*

A new model for keeping pets

Guiding principle

Renters should decide whether they have a pet, with reference to the appropriateness of the dwelling for that animal and any relevant animal welfare or community safety considerations.

Timeframe for response to request

Q6. Is 21 days the right amount of time for a landlord to consider a request to keep a pet? If not, should the landlord have more or less time?

Landlords should be required to respond in a timely manner to a request for a pet. In the ACT, for example, landlords are provided 14 days once a request has been received to respond and must apply to the Tribunal within this time if they are seeking to refuse the request for a pet.

For many people pets are part of the family. Pet ownership in Australia is among the highest in the world, and keeping pets has been shown to significantly improve physical and mental health and wellbeing. Renters require a response to their request within a reasonably short time frame in order for them to make an informed decision in relation to their pets (or planned pets) and plan appropriately, minimising any anxiety or concern in relation to the request.

Where a landlord wishes to refuse a request they will be provided much more time to gather evidence and prepare an argument for their refusal once an application to Tribunal is made. After an application is made a hearing will generally take between 7 - 10 days to be scheduled, and the matter is very unlikely to be determined at the first occasion unless by consent. If the tenant is seeking to contest the landlord's refusal the first hearing is likely to be a directions hearing, and in this way the Tribunal process will provide sufficient further time and direction for both parties in relation to provision of evidence and arguments.

Our recommendations

22. *Fourteen (14) days is a reasonable amount of time for a landlord to consider and respond to a renter's request to keep a pet.*
23. *Where a landlord is seeking an order to refuse a request for a pet they should be required to do this within a 14 day timeframe from the date on which the renter made a written request.*

Refusing a request

Q7. What are valid reasons why a landlord should be able to refuse a pet without going to the Tribunal? Why?

There should not be a list of valid reasons for a landlord to say no to a pet. The landlord should go to the Tribunal for all reasons where the tenant does not agree. This is a model similar to those that apply in Victoria, the ACT and the NT.

The model being proposed in the Discussion Paper puts the onus on the renter to go to the Tribunal if they believe the landlord has wrongly refused permission for a pet. Landlords have greater resources and ability to access the Tribunal. This is demonstrated by the fact they initiate Tribunal proceedings at a much higher level than renters – over three quarters (77.7%) of all Tribunal applications for tenancy matters in NSW are made by landlords. Renters face many barriers in accessing the Tribunal, such as financial and time constraints, a lack of confidence to navigate Tribunal processes, and concern about potential retaliation for accessing the Tribunal. More broadly, there is a significant power imbalance between landlords and renters.

Given it is the landlord who is seeking to restrict the actions of the renter, and to limit the renters' contractual rights to peace, comfort and privacy the responsibility to apply to the Tribunal and the onus of proof should be placed on them.

Animal welfare considerations

The Tribunal should be guided to consider the suitability of the specific pet for the residential property primarily by reference to existing animal welfare guidelines on companion animals, and/or existing law including council zoning laws or council ordinances.

We are not aware of any appropriate or sufficient guidelines currently available that apply across the state. We suggest guidelines should be developed in consultation with animal welfare groups and the broader community and provide clear guidance on the welfare needs of companion animals in relation to residential premises. We would further suggest these must provide sufficient specificity to the variety of companion animals kept in residential premises, and take account of factors such as the animal's exercise needs, size, outdoor space, proximity to neighbours, and the security of the property.

Any further regulation around responsible pet ownership, welfare standards, and residential premises should be applied through relevant companion animal regulations rather than tenancy law. Regulation must apply to all pet owners regardless of their tenure.

Our recommendations

24. *Landlords must be required to seek an order at Tribunal if they wish to refuse a request for a pet. The onus of proof must be placed on the landlord to demonstrate why it is reasonable to refuse the request.*
25. *The Tribunal should consider the welfare of the animal as the primary consideration when determining whether it is reasonable to refuse a request for a pet at the*

property. They should be guided to determine this with reference to relevant animal welfare guidelines and/or other companion animals regulation, and any other relevant legislation or applicable regulation.

Conditions and/or ongoing restrictions on pets in a property

Q8. Should the Tribunal be able to allow a landlord to refuse the keeping of animals at a specific rental property on an ongoing basis? Please explain.

Q9. What other conditions could a landlord reasonably set for keeping a pet in the property? What conditions should not be allowed?

Each pet request should be assessed on its own merits, and with reference to the particular circumstances of the specific companion animal and the property at the point in time that the request is made.

The landlord should not be allowed to put special conditions on the keeping of a pet in the property, including conditions such as not allowing a pet inside or providing specific compensation for any pet damage or changes to the property.

If any damage does occur inside a property, renters already pay bonds to cover potential damage to the property, whether this damage is from a pet or human. There is also recourse for landlords to recoup any potential costs above the bond amount. Renters are already required to make a request about any changes they wish to make to the property and must pay for these (including, for example, installing a dog door).

Other legislation such as the *Companion Animals Act 1998* already provides rules based on welfare concerns for keeping pets. Local government ordinances and rules that may set certain conditions on pet owners already apply to renters once they move into the area, and these do not need to be specified again in a tenancy agreement. While conditions or restrictions reflecting other laws may not seem unreasonable, it is unnecessary to duplicate the regulation within tenancy law or the contract (agreement) as these already apply.

Renters should not be subject to additional rules that others in the community are not required to follow (see also further discussion regarding animal welfare regulation above).

Our recommendation

26. *The Tribunal should not be able to give the landlord the ongoing right to say no to animals at the property.*

Additional issue: Addressing discrimination at application for renters with pets

While changes proposed in the Consultation Paper if introduced will make it easier for renters to request to keep a pet, further consideration is needed in relation to minimising the discrimination pet owners face when applying for rental properties.

At present renters are generally asked to disclose if they have a pet when applying for a

new property. Landlords and agents may simply reject all applications where applicants have indicated they have a pet. It can be extremely difficult to prove that discrimination is the reason for any individual application to be rejected, and currently only in instances where the pet was an assistance animal would such discrimination be unlawful.

To address this problem the RTA could be amended to prohibit landlords and agents from asking about pet ownership at the application stage. Renters would still be required to make a request to keep a pet once their application was successful and they enter into an agreement. If the landlord does not believe their property is fit for a pet, or for the type of pet that the renter has, the landlord may then take the matter to the Tribunal to obtain an order allowing them to refuse permission.

To ensure renters are able to make a well informed decision before entering into a tenancy agreement, landlords should disclose in listings and at viewings any specific property characteristics or factors or local government ordinances or rules that may make the premises unsuitable for certain types of pets. Clear guidelines or guidance regarding animal welfare needs and suitability of residential premises (as discussed above) would also be helpful for renters in guiding their decision making as to whether any potential rental they are considering will be able to meet the welfare needs of their pet.

Our recommendation

27. Amend the Residential Tenancies Act 2010 to prohibit landlords and agents from asking about pet ownership at the application stage.

Additional issue: Pet bonds

Rental pet bonds should not be considered as an additional condition for keeping a pet. As we have mentioned earlier renters already pay bonds to cover potential damage to the property and landlords can recoup any potential costs above the bond amount. There is no reason why landlords should be able to request an extra bond from renters with pets.

It is currently prohibited in NSW for landlords and real estate agents to request pet bonds. This should remain the case. Pet bonds are unnecessary and may result in inequity.

Our recommendation

28. Continue to prohibit landlords and real estate agents from requesting pet bonds.

Renters' personal information

Guiding principle

Renters should retain control of their personal information and have confidence that its use is to their benefit. Personal information gathered during the application process should only be for the purpose of assessing whether the prospective tenancy agreement is likely to be sustained.

Regulation of collection of information during the application process

Q10. Do you support limiting the information that applicants can be asked for in a tenancy application? Why/why not?

Q11. Do you have any concerns with landlords or agents only being able to collect the information set out in the table above to assess a tenancy application? Please explain.

Q12. Do you support the use of a standard tenancy application form that limits the information that can be collected?

Q13. Do you think that limiting the information that may be collected from rental applicants will help reduce discrimination in the application process?

Regulation of the application process for private rental housing is required to provide greater protection against discriminatory and/or intrusive requests for information at application, as well as greater transparency regarding the decision making process for applicants.

There has been ongoing creep in terms of the information requested at application, driven by the competitive nature of the application process and the failure to regulate it until now. We surveyed renters earlier this year about the kinds of information they had been asked to share when applying for a rental property. We found:

- 10.4% of respondents had been asked to provide details of their social media profiles (handles, accounts)
- 9.7% provided or were asked for evidence of household insurance
- Almost half (48%) have been asked to undertake a tenancy database check, and 39.5% have been asked whether they have gone to Tribunal. Some renters noted they had been asked to pay a fee (e.g. $25 for a “professional reference check” to run a check)
- 7.3% of respondents told us they had been asked for or had provided medical records when applying for a rental property.

Limits on the information that can be collected must be put into law This should be done through the introduction of a prescribed standard rental application form. This would provide greater protection against a landlord or agent from unlawfully discriminating against an applicant by ensuring they are not able to request any information about a renter that could be discriminatory under the *NSW Anti-Discrimination Act 1977.*

As well as limiting information allowed to be collected on a prescribed standard rental application form, an explicit restriction on a request for information that could be used to unlawfully discriminate against an applicant could be introduced into the RTA.

Our colleagues at Women’s Legal Service in their advocacy usefully raise the importance of ensuring that the NSW Anti-Discrimination Act captures all forms of appropriate discrimination. In their work they are regularly confronted with the limits of the Anti-Discrimination Act in relation to protections for women who are experiencing or have experienced gender based violence. We strongly urge consideration of their recommendation that being a survivor of gender-based violence be included as a protected attribute in the *NSW Anti-Discrimination Act 1977.*

An appropriate model for limiting information collected from renters

We support a model that combines prescribing a standard rental application form, alongside specifying what additional information or documentation might reasonably be collected to support the application.

The Table provided in the Consultation Paper, pp10-11 (the Table) usefully distinguishes the categories of information or documents that may be required to assess an application into: Proof of identity; Ability to pay agreed rent; Suitability. It sets an appropriate limit of 2 on the number of documents or types of personal information that can be collected from each category.

Our support for this model is conditional on renters, not the landlord or their agent, being able to choose which of the documents or information they will provide. Landlords must be restricted from specifying a preferred type of information or refusing to accept a type of information.

The types of information provided within the Table are broadly appropriate. However, some flexibility may need to be built into the model to ensure that within each category of information (Proof of identity; Ability to pay agreed rent; Suitability) applicants are able to meet the requirements of the category without being limited by too restrictive a specification regarding the 'types' of information (or documents) that can be provided. We are particularly concerned for applicants who may find it difficult to obtain some of these specific types of information in a timely manner in order to provide them to secure housing, e.g. newly arrived migrants or temporary migrants, international students, Aboriginal and culturally and linguistically diverse communities, sex workers and other workers concerned about discrimination on the basis of their occupation.

Additionally we note the following about the types of information in the Table:

- **Personal identification documents to be sighted not stored** It should only be required that an original document for the purposes of personal identification be sighted rather than a copy provided and stored/held. This is current best practice for Real Estate Agents recommended by the Fair Trading Commissioner's Guidance on Personal information and tenancy applications. The sighting and noting down of any details that may be necessary to keep (for example, if it is necessary in future to confirm the identity of the tenant for providing a reference or providing access if they are locked out of a property) is considered sufficient to prevent fraud.

- **Information about refund of bonds** Requests for information about the refund of bonds at previous properties is inappropriate. Whether a bond has been refunded in full or only partially at a previous tenancy is not a reliable indicator of a tenants' ability to meet the terms of the tenancy agreement, and may inadvertently screen out suitable applicants where explanations are misunderstood and/or not clarified with the applicant.

- **Redaction of personal information** The redaction of sensitive personal information on bank statements and or other financial documents – including BSB and Account numbers – would provide greater assurance to applicants given the cyber security risk in relation to this type of information.

- **Provision of information to renter** Where a reference is received directly, such as through an online portal, without the applicant viewing it this should be supplied to the applicant at the same time the agent receives it or as soon as possible after.

The utility of information gathered not through the direct application should also be included in the limitations on gathering information. In particular the use of oral reference checks, information held in tenancy databases and investigations on social media should be strictly restricted.

These information sources should only be used in service of assessing the sustainability of the tenancy. Oral reference checks are inscrutable and inappropriate information easily shared without accountability. We are not aware of any evidence suggesting that the use of tenancy databases holds predictive value to the sustainability of the tenancy. Social media information is often at least an incomplete and sometimes inaccurate picture of a person's life. We are aware of people posing with a photo of a friend or family member's animal and an assumption of pet ownership being made to the tenant's detriment. The Department should consider on what basis the collection of external information is being used and investigate whether they are appropriate.

We have had the opportunity to read Linda Przhedetsky's submission to this Consultation and recommend her discussion of the challenges the introduction of new rental application technologies have brought in terms of the risk of scaling, exacerbating and occluding existing harms, and potentially catalysing new harms. We agree in general with her recommendations, and draw attention in particular to the following raised by Przhedetesky:

- the need for prescribed questions limiting what a referee can be asked in relation to an applicant's suitability.
- the need to regulate not only what information can be requested, but what information can be *considered* when determining an application.

These considerations are particularly important as the application process becomes more regulated, as it is likely some landlords, agents and proptech will seek alternative avenues to find information about renters where the information remains either freely available (not directly requested from the tenant) and unregulated. We also recommend to you her discussion of the further regulation and protections required in relation to Automated Decision Making (and see our further discussion on ADM below).

Compliance and enforcement to ensure new model being adopted, and to better address and deter unlawful discrimination during the application process we recommend the adoption and resourcing of Fair Trading to undertake 'shadow shopping' auditing of agents and online platforms both to spotcheck the legal compliance and practice of individual agencies and/or platforms as well as broadly assess the standard of the industry in relation to adoption of any newly implemented model of information collection.[12]

[12] Shadow shopping has been regularly undertaken by the Australian Securities and Investment Commission in their role as regulator in order to research and better understand the standard of practice and consumer experience in certain industries, including Retirement Advice, Mortgage Brokers and Home Loan Purchasing, and Financial Planning. We are also aware Consumer Affairs Victoria has undertaken 'shadow shopping' to run compliance checks under Australian Consumer Law (ACL) in line with the legitimate investigative powers of the regulator.

Our recommendations

29. *A standard rental application form should be prescribed*
30. *An explicit restriction on a request for information that can be used to unlawfully discriminate against an applicant be introduced into the RTA.*
31. *Being a survivor of gender-based violence be included as a protected attribute in the Anti-Discrimination Act 1977*
32. *Limits should be placed on the types of additional information and the number of pieces of information that can be requested for specific categories of information (i.e. Information relating to: Proof of identity; Ability to pay agreed rent; Suitability)*
33. *Renters, not the landlord or their agent, must be able to choose which of the types of information they will provide for each category for which information can be requested.*
34. *Appropriate limits should also be placed on the information that can be collected in relation to suitability, for example only written character references should be allowed addressing a list of prescribed questions relating to suitability.*
35. *Consideration be given to how to regulate not only the information that can be asked for, but information that can be considered in the assessment of a rental application.*

Use and disclosure of renters' personal information

Q14. Do you support new laws that set out how landlords and agents can use and disclose renters' personal information? Why/why not?

Q15. What should applicants be told about how their information will be used before they submit a tenancy application? Why?

Q16. Do you support new laws to require anyone holding renter personal information to secure it? Why/Why not?

Q17. How long should landlords, agents or proptechs be able to keep renter personal information? Please explain.

Q18. Do you support requiring landlords, agents or proptechs to:

(a) give rental applicants' access their personal information,

(b) correct rental applicants' personal information?

Please explain your concerns (if any).

Stronger protections that provide specific guidance on how renters' information can be used and shared are required. These should apply not only to real estate agents, but also landlords, and property and rental technology (PropTech and RentTech) companies.

The Consultation Paper usefully seeks to develop a better articulation of the obligations and rights of landlords, agents and PropTech/RentTech and renters in relation to renters' personal information, and how it will be collected, stored and used.

Digital Rights Watch, an advocacy organisation focused on digital rights including in relation to information privacy, digital security, online safety, made a number of recommendations in relation to regulating use and disclosure of renters' personal information, and minimising privacy and security risks in their submission to the consultation. We have had an opportunity to read their submission, and encourage engagement with the issues raised in their submission and its eight key recommendations.

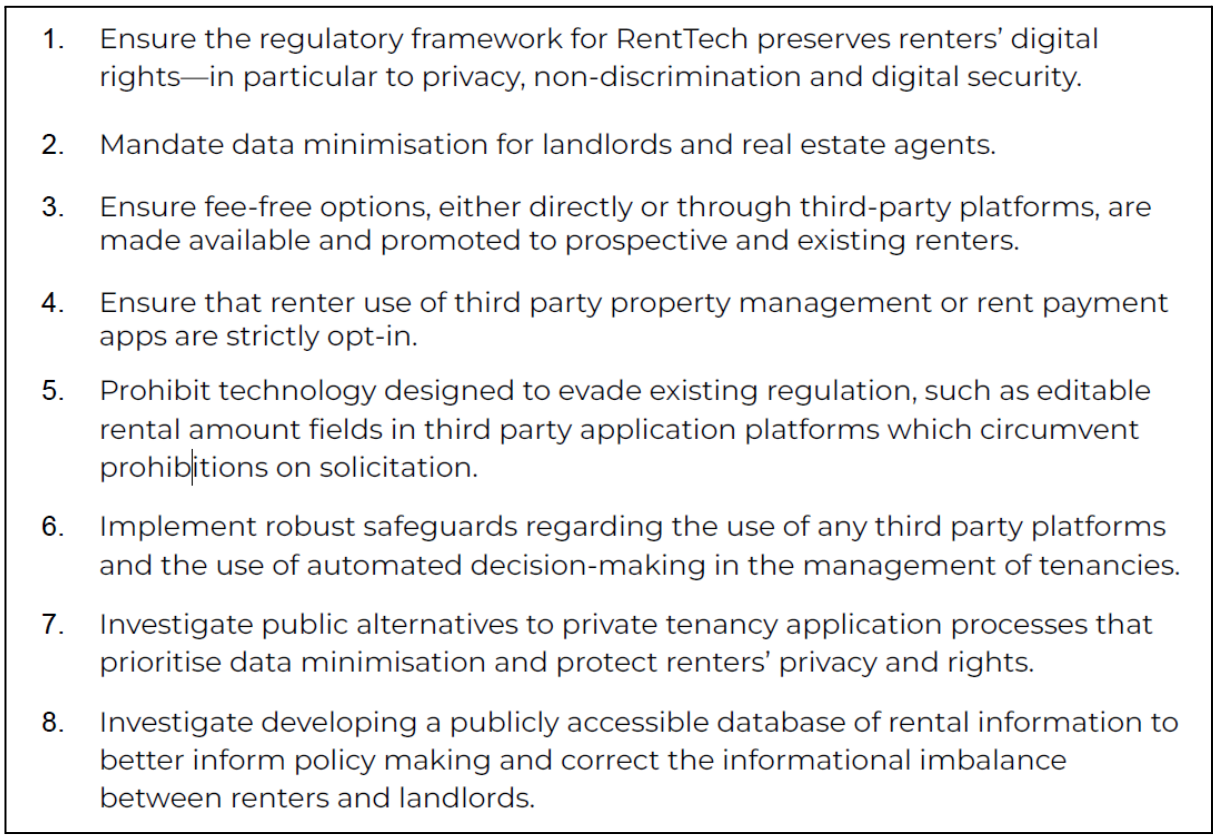

Image 1: Digital Rights Watch' 8 key recommendations

Use of personal information

Renters give their personal information over to these parties for the specific purpose of assessing the renter's suitability for a rental property. This is the only way in which the data should be used, and there should be clear restrictions against using information collected for marketing purposes, or for it to be shared with or sold to other parties.

We are seeing companies profit from the collection and use of large amounts of renters' personal information, where there is no benefit to the renter – and in some cases where there is harm to the renter. Strict restrictions against the onselling of data to third parties should be implemented, with penalties to apply for non-compliance.

How much and how long personal information should be collected and held

No more data than is necessary to make an assessment of their application should be collected. Their data should not be stored for longer than is needed to assess an application. Rules clarifying what information can be collected, and for how long this can be stored, developed with a 'data minimisation' approach would not only benefit renters, but help reduce the risk profile of agents and landlords who currently may be 'over

collecting' personal information because they are unsure of what data and privacy obligations require.

Renters information should be kept (or stored) securely, and there should be appropriate time limits on how long information about a renter can be kept. Time limits may appropriately vary for unsuccessful applicants vs successful applicants (those who enter into a tenancy agreement). In both cases, data should not be held by a landlord, agent or proptech company for any longer than it is reasonably necessary.

Renters' access to information

Where renters have provided information or aware information has been collected about them, they should be able to request access to this. Landlords, real estate agents and PropTech/RentTech companies should be required to correct rental applicants' personal information as necessary.

Our recommendations

36. *Landlords, agents and PropTech must only use information collected about an applicant to determine their suitability for a rental property*
37. *Renters should have confidence that any information collected about them is held only for the period it is beneficial to the renter to do so. This means*
    - ***a. For landlords and agents***
        - *i.* For a successful applicant
          Contact information such as phone and email address needed for the ongoing relationship should be stored securely.
          The tenant should be provided with copies of any information held about them and then all non-contact information destroyed within 2 months of entering into the agreement.
        - *ii.* For unsuccessful applicants
          Information and documentation should be destroyed once an agreement has been entered into, unless the unsuccessful applicant gives explicit and withdrawable consent for the retention of information in response to a plain language explanation of its use for a specific time frame of no more than 6 months or as directed by the person. At the end of that time frame, information must be destroyed or consent renewed.
    - *b.* ***For third parties***
      Information should be destroyed upon completion of the application unless the person gives explicit and withdrawable consent for the retention of information in response to a plain language explanation of its use for a specific time frame of no more than 6 months or as directed by the person. At the end of that time frame, the information must be destroyed or consent renewed.
    - ***c. For all***
      Renters should be given access to personal information (including specifying this be free, reasonably accessible, and clear timeframes for response)

Further comment on information: Landlord Registration

A significant area of concern expressed is the imbalance between information gathered about potential renters compared to the information available about the owner of the property.

Landlords are essentially the retailers of an essential service, and the responsible party for performance of the contract. Real estate agents provide a service to the owner but do not take on responsibility for performance.

Especially in times of tight markets, rental scams where people pretend to be the owner of a property in order to defraud people of bond, rent in advance and holding deposits are able to thrive.[13] In the same way tradespeople, including real estate agents, and other service providers can have their identity confirmed through a publicly accessible register to provide consumers with trust they are dealing with the appropriate person, this can be applied in the rental sector as well.

Scotland, Wales and Northern Ireland, and many English councils, have progressively introduced and expanded registration for many years, with plans for an English national scheme in development.[14] In NSW short-term holiday letting providers are also required to register their properties regardless of how commercially they intend to operate, as are land lease community operators, boarding houses, hotels and motels.[15]

Registration schemes have many other benefits, including better data for the sector, communication pathways between government and service providers, as well as accountability measures. The user cost of schemes in overseas jurisdiction are minimal, but could contribute significantly to the cost of regulation and other recommendations within this paper such as rent increase information.

Our recommendation

38. *NSW consider introducing a registration scheme for landlords in the private rental market*

Automated Decision Making

Guiding principle

Automation of decision-making or assistance should only be used where the automation rules are transparently published and reliable and have been tested by an independent and expert entity.

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[13] Emily McPherson (2023) *Social media scammers are exploiting desperate house hunters looking for rentals*, 9news.com.au, accessed 11 August 2023; Rayane Tamer, The insidious Facebook scams targeting people in Australia desperate for rentals, SBS News, accessed 11 August 202300

[14] Shelter (2023) *Why a landlord register is good for tenants and landlords*, accessed 11 August 2023

[15] NSW Planning (2023), *Short term rental accommodation*, accessed 11 August 2023

Q19. Are you aware of automated decision making having unfair outcomes for rental applicants? Please explain.

Q20. What should we consider as we explore options to address the use of automated decision making to assess rental applications?

While new technology can help streamline the application process for both renters and landlords or their agents, certain protections must be in place to ensure equity and transparency as their use becomes more widespread.

- Renters must be provided with the option to apply with a paper form and paper applications must be accepted and considered equally alongside online applications.
- Any information that can be used to unlawfully discriminate against a renter (renter's age or suburb) should not be allowed to be used by computer programs for decision making.
- Full transparency regarding how a computer program will make recommendations or decisions about renters' applications should be required. Information about this should be made publicly available by those relying on the program.
- Before the automation is used above an identified threshold to allow for limited, small-scale pilots, the automation should be tested by an authority resourced to do so testing both the technology itself and the appropriateness of the technology.

Our recommendations

39. *Work to create a pathway for automated decision-making that can test technology before widespread adoption and ensure legal compliance.*
40. *Disallow further use of automated decision-making including elements such as 'scores' that may influence decision-making until appropriate regulatory protections, monitoring and enforcement powers are in place.*

Portable bond scheme

Guiding principle

A rental bond is a surety against a renters' potential not actual liability that is provided at the start of the tenancy. Where a renter is facing financial difficulty at the start of a tenancy, they should be offered appropriate support to sustain their tenancy rather than face a breach and risk losing their home and placed at an increased risk of homelessness.

Timeframe for renter to make up difference in bonds

Q21. How long should a renter have to top up the new bond if some or part of the bond has been claimed by the previous landlord?

If there is a difference between the bond required, renters should be given flexibility and an appropriate amount of time to pay the difference in bond between properties.

At a minimum renters should be given no less than 14 days to top up the new bond. More time – 30 days, or more than 30 days – would provide renters greater flexibility and help minimise the financial disruption moving often causes.

Entering a payment plan for the top up required within the timeframe provided should be considered as satisfying the requirement. Failure to comply with the payment plan may lead to a default.

Our recommendation

41. *Renters should be provided a minimum of 14 days to top up the bond if there is a difference between the bond required at a new property and the bond refunded from their old property.*

Responsibility for liability, support to sustain tenancy

Q22. What should happen if the renter does not top up the second bond on time? Please explain why.

Moving house can be very expensive for renters, an average of $4,000 per renting household. The proposed portable bond scheme is intended to reduce the financial disruption that moving often causes. Renters struggling to pay the difference in bond amounts should be supported to make the payment while they recover from the financial difficulties associated with moving house.

If a renter is not able to pay the difference in bond within the time limit, the new landlord's bond should be guaranteed by the government. Where the government guarantees the bond, they may then seek repayment of the difference in bond and offer appropriate support if the renter is facing financial hardship. Support could be provided through a NILS loan (i.e. a no or low interest loan scheme) or some form of payment plan arrangement. The Department of Communities and Justice already has a bond loan scheme with structures in place to facilitate repayment of the loan into the Bond Board, and statutory protection of interests. The loans are only available to low income households eligible for social housing and the rate of default is reported to be almost non-existent. In the case of rare defaults on the loans these are best referred to government debt collection services.

Our recommendations

42. *A renter should not be barred from the portable bond scheme in future, though there may appropriately be a temporary limit placed on use if you have not kept up with payments on a previous portable bond for the difference in bond (i.e. renter is currently defaulting on the guarantee)*
43. *Landlords should not be able to end the lease, as their interests (the bond) is secured by Government, who should be provided with alternative appropriate pathways to seek repayment from the renter as a debt where the difference in rents is not 'topped up'.*
44. *Appropriate hardship support should be made available for those renters struggling to pay the difference because they are experiencing financial hardship.*

Availability and use of scheme

Q23. Should this scheme be available to all renters, or should it only be available to some? Please explain why.

Q24. Who should have a choice on whether to use the scheme?

Q25. What other (if any) things should we consider as we design and implement the portable bond scheme? Please explain.

This scheme should be available to all renters, and optional for renters to use. Eligibility requirements for example in relation to income would significantly alter the intention of the scheme, and create a barrier to use – even for those eligible to the scheme due to the administrative burden placed on them to apply and demonstrate eligibility within the timeframe required to secure a new property.

Universality (a scheme that is available to all) is significantly less complex to administer, reducing the costs to the government. It also reduces the already very low risk of default.

Landlords should be informed only that a bond is in place. Their interests are secured within the system, and it is already acknowledged that government support (for example, an applicant's use of Department of Communities and Justice' Housing's Rentstart Bond Loan) is used to discriminate against applicants. Additionally and for this reason landlords, their agents and PropTech should not be allowed to ask an applicant about potential use of the Portable Bond Scheme during the application process.

We understand the cost of implementation may be significant due to required rebuilding of Rental Bond Board systems. This represents an opportunity to better deal with bonds between co-tenants and subtenants, especially in relation to people in instances of family and domestic violence whose bond can currently be used as a tool of further violence. Once new systems are in place, a new portable bond scheme should also allow a former co-tenant to transfer their portion of the bond to a new rental property.

Our recommendation

45. *The Portable Bond Scheme should be universally accessible but optional for renters to use*

Excessive rent increases

Guiding principle

Access to timely and accurate information is important for renters to make informed decisions and exercise their rights. Easier access to information for renters is required to help address the information deficit renters have compared to landlords and their agents.

Reliable and timely data on rents will provide much greater visibility of rent movements (change in rents) across the private rental market, and better ensure evidence driven policy making and deliver better outcomes for renters.

Collection and publication of information on rent increase

Q26. Do you have any concerns about the NSW Government collecting information on rent increases and making it publicly available for renters? If yes, please provide details.

27. What do you think is the best way to collect this information?

Currently the information that is available regarding rents and rent movements in NSW is based on the rental bond data held by NSW Fair Trading. NSW Fair Trading publishes data for recent rental bond lodgements and refunds, as well as data on the total rental bond holdings. This provides timely and accurate information about movements in the market rent for properties recently leased to a new tenant according to location, property type and number of bedrooms.

The Department of Communities and Justice publishes this data in an authoritative way in the Rent and Sales Reports and is able to clean the data. The Tenants' Union converts the open source version of this data into a number of tools, in particular as part of our Rent Increase Negotiation Kit.[16]

There is currently no equivalent reliable dataset to provide visibility over rent movements (an increase – or decrease – in rent within a tenancy) for properties with a sitting tenant. Recently published insights by the Australian Bureau of Statistics and the Reserve Bank of Australia have begun to give some visibility at a national level, but this source is unlikely to become available in a way that is available for renters.[17]

We support collection of this type of information to provide greater transparency and visibility across the private rental market. Publishing data concerning increases will significantly increase the value of tools such as the Rent Increase Negotiation Kit to renters, owners and the Tribunal. We would be pleased to work with the Department to identify how to ensure this data is most usefully published.

In relation to the question of the best way to collect the information, we would note a voluntary survey will be costly to administer if the intention is to proactively seek information from renters, landlords or real estate agents via regular correspondence. It is unlikely response rates would be high without considerable resourcing of the survey.

Even with a very strong response rate, a survey would only provide broad or general guidance on rent movements. While this would still provide a useful new lens on what is occurring in the private rental market, it would not be a representative picture of rents across all locations or housing type or rent price. It would also not be possible to provide information in a timely manner – lag time would be considerable.

This may impact its overall trustworthiness as a tool and reliable measure for assessing excessive rent increases at the level of the individual tenancy for renters, landlords and the

[16] Tenants' Union of NSW, Rent Increase Negotiation Kit, available at https://www.tenants.org.au/resource/rink, accessed 11 August 2023

[17] Hanmer, F. and Marquadt, M. (2023) 'New Insights into the Rental Market', Australian Bureau of Statistics, accessed 11 August 2023. Drawbacks of the current data available through the ABS include a lag in reporting, and a lack of reliable data with any specificity regarding location, property type, and amenity.

Tribunal. As such, it would not achieve the objective outlined in the Consultation Paper of providing renters with the information they need to more easily assess if a rent increase is excessive, and allow comparison of rents across similar properties in similar locations.

A more effective way for the NSW Government to collect this information would be by requiring landlords or their agents to report rent increases. This could be achieved by requiring that the increase be registered (with the appropriate agency or using an online system) and confirmation of this provided to the renter before the increase is considered valid. Reporting an increase would occur after written notice had been served, and the required 60 days written notice would still apply.

Our recommendation

46. *To ensure the data is reliable and timely, landlords or their agents should be required to report a rent increase to the NSW Government using an online system (such as Rental Bonds Online).*

Rental affordability

Guiding principle

Housing is an essential service. Having a secure, safe, affordable home is vital to ensure decent life. There are other essential services – energy, health, education and more – where the cost is regulated to ensure the service is accessible for everyone.

Regulation of prices in the private rental housing market may be necessary to stabilise rents and ensure access to affordable housing at a decent standard. This may appropriately include regulation of how often rents can be increased, and by setting fair and reasonable limits on how much.

Limit of one increase every 12 months

Q28. Do you think the 'one increase per 12 months' limit should carry over if the renter is swapped to a different type of tenancy agreement (periodic or fixed term)? Please explain.

Q29. Do you think fixed term agreements under two years should be limited to one increase within a 12 month period? Why or why not?

Rents have been increasing sharply for many renters in NSW. The limited protections currently available are not adequate for renters who face an excessive increase during a tenancy. At present the *Residential Tenancies Act 2010* places a limit of one rent increase in 12 months for renters on a periodic lease. This is an appropriate, though limited, protection.

Unfortunately, we are aware some landlords are swapping renters between lease types in order to bypass the existing rent increase protections and increase rents more than once in a 12 month period. We are also aware of landlords currently using evictions in order to avoid either the 12 month limit in periodic agreements or scrutiny through the Tribunal of the rent increase. The limit on changes to the rent should apply for at least 12 months, regardless of the particular form of agreement in place.

For fixed term agreements under two years placing a limit on the number of times an increase can occur within a 12 month period is not as necessary. Within fixed term agreements, a renter must be informed of and agree to an increase being written into the agreement before they sign the lease. A reasonable limit and transparency on the quantum, rather than the frequency, is needed. Some renters signing on to a fixed term tenancy may prefer to negotiate more increases, but for smaller amounts each time to stage the increases in line with their expectations regarding wage increases or similar, and/or smooth the impact of an increase.

A limit of one increase within a 12 month period for a fixed term agreement under two years could have more impact, if introduced alongside a fair limit or formulation regarding quantum of the increase (see below for further discussion). If rent increases are considered to be set to unregulated market level, and not ameliorated by other considerations, then the increase may appropriately apply to the property and not merely the current lease.

Our recommendation

47. *Rent should not be able to be increased more than once in 12 months regardless of changes to contract type. Unless changes to rent increase rules are also implemented, these limits should also be considered to apply to the property.*

Landlord to prove rent is not excessive

Q30. What do you think about the [below] options? Please provide detail.

> *Require a landlord to prove that a rent increase is not 'excessive' where, for example, a rent increase exceeds CPI over a certain period.*
>
> *Amend the criteria in the Act for when a rent increase is 'excessive'. Currently, the list of factors that may be taken into account in considering if an increase is 'excessive' includes the market level of rent for comparable properties and the state of repair of the property.*

Currently, the onus is on individual renters to challenge a rent increase, and the only basis to do this is if they believe it is excessive. Many renters do not feel confident challenging an excessive rent increase, and they may worry the landlord may retaliate in response.

For renters it can also be very hard to access and provide the information and evidence required to demonstrate a rent increase is excessive to the Tribunal. This kind of information has generally been much more easily available to real estate agents and landlords.

If implemented well, the proposal set out in the Consultation Paper to collect more information about rent increases could improve accuracy and understanding of current market rents across new and older tenancies and make it more directly accessible/ available for renters. However, as we outlined above, our current reliance on market rents as the primary consideration for assessing whether an increase is excessive has failed to achieve reasonably stable or predictable rent pricing. The current financial pressure facing renting households, a large part of which is because of the steep increases in rents experienced over the last 12 months, suggests further reforms are required.

In the ACT, a landlord is required to prove that a rent increase is not 'excessive' where a rent increase exceeds 110% of the change in CPI since the last rent increase or since the tenancy agreement began. Unless the renter consents to the increase a landlord must apply to the Tribunal for the increase, and provide evidence for why an increase above the threshold is justified. If the increase is below that threshold (110% of change in CPI for rents) the increase is considered reasonable. In this case, the renter who wants to challenge an increase must apply to the Tribunal and provide evidence as to why they feel it is excessive in the circumstances.

If a model of this kind was introduced in NSW, the landlord may be able to increase rents above any threshold set. However, the responsibility to justify and provide evidence for the increase would be more fairly allocated to the landlord or their agent. A renter would not bear the onus of proving an increase is excessive in these circumstances.

Serious consideration and consultation would need to be given to the best measure to be used to determine the threshold. A measure or mechanism should be determined, in substantial part, on how reliable it is as an indicator and reflection of renting households' capacity to pay. While the ACT draws on a % change in CPI for rents, we have also previously raised the idea of empowering an independent agency or body to make regular (for example quarterly, 6 monthly) determinations on thresholds having considered all relevant factors and stakeholder feedback on these. This would allow for thresholds that are responsive to local conditions, as well being able to factor in a range of data and measures – such as general costs, wages and other relevant factors.

Our recommendation

48. *Landlords should be required to justify a rent increase if it is over a reasonable threshold (set by a measure appropriately determined by a relevant independent agency). The responsibility to prove a rent increase is not excessive should sit with the landlord.*

Factors to be considered regarding excessive rent increases

Other factors must be considered equally with, or even above, market rent when determining whether a rent increase is excessive. The failure of the rental housing system – with tight supply and little to no regulation of rents – has resulted in a current situation in which market rents for residential properties are not generally in line with what the community considers 'fair market value'. 'Fair market value' is generally considered to be a price both parties are willing to enter into, where both are acting in their own best interests and are free of undue pressure.

Under the current system, rents are being set at a price that renters are 'willing to pay', that is – they accept the rent increase and may not move out – but this is only because they feel forced to. They are facing undue pressure given the current housing crisis.

Currently, the list of factors that may be taken into account in considering if an increase is 'excessive' at section 44(5) includes, as the first concern listed, the market level of rent for comparable properties. In most cases this is taken as the primary consideration by the Tribunal when determining whether an increase is excessive. It is weighted substantially in comparison to the other seven (7) factors provided in the section.

Section 44(5), *Residential Tenancies Act 2010*

The Tribunal may have regard to the following in determining whether a rent increase or rent is excessive—

(a) the general market level of rents for comparable premises in the locality or a similar locality,
(b) the landlord's outgoings under the residential tenancy agreement or proposed agreement,
(c) any fittings, appliances or other goods, services or facilities provided with the residential premises,
(d) the state of repair of the residential premises,
(e) the accommodation and amenities provided in the residential premises,
(f) any work done to the residential premises by or on behalf of the tenant,
(g) when the last increase occurred,
(h) any other matter it considers relevant (other than the income of the tenant or the tenant's ability to afford the rent increase or rent).

The market sets a self referential value on rents, it pushes rents as far as it is able whatever market conditions prevail – even if those market conditions are causing serious harm. To ensure fairer rents and access to housing market rents should not be the primary consideration when determining whether a rent increase is excessive.

While the list of concerns allows the Tribunal to consider 'any other matter it considers relevant', the Act explicitly restricts consideration of the renter's ability to pay an increase and by inference the lack of any alternative affordable accommodation. The lack of any direct reference to motivating factors means landlords are also not minded to consider their reasons for increasing the rent before issuing a notice to their tenant.

Our recommendation

49. *The Tribunal should consider at Section 44(5)(a) the fair market value of rents for comparable premises to allow consideration of whether the general market level is reflective of market failure*
50. *The Tribunal should be able to consider the question of affordability, and other questions relating to the landlord's motives for increasing the rent if warranted, when considering whether a rent increase is excessive.*

Additional issue: Rent increases between tenancies

To help stabilise rents in the private rental market reasonable limits could also be placed on increases to rents for a property that is being re-let (between tenancies). For example new rents for a property could be required to be set within a reasonable range of the median rent of comparable houses in the area. Similar reforms around limits on rents are being considered in a number of other countries also facing the same problem of an increasingly unaffordable rental housing market.

NSW already ensures that increases for rent between occupants is stabilised in land lease communities. New rents (known as site fees) cannot exceed the highest of either the rent paid under previous tenancy or within a range of median fees for comparable properties.

Other changes to make rental laws better

Renting and Embedded networks

Guiding principle

Renters must be made aware of embedded network arrangements, and what this would mean for the supply of their essential services, when considering whether to view and then apply for a property so they can make an informed decision regarding the suitability of the tenancy for them.

> *Q31. Do you support new laws to require landlords or their agents to tell rental applicants if a rental property uses any embedded network? Why/why not?*
>
> *Q32. When should a rental applicant be told that a property uses an embedded network?*
>
> *Q33. What information should a renter be told about a rental property using an embedded network? Please explain.*

An increasing number of renters – including many in the private rental market through strata schemes, and renters in residential land lease communities – find themselves renting properties that use an embedded network to supply energy utilities. This is where the contract for supply of electricity or other services is held by the owner or operator of a building, or the Owners' Corporation, and is then sold on to residents. In some cases a renter may have a direct relationship with a retailer (rather than one mediated through their landlord or the Owners' Corporation), but they will be locked into the retailer as the only available provider.

While there can be some advantages for some consumers, there are a number of disadvantages for those in embedded networks that renters should consider before applying for a property. These may include:

- uncompetitive pricing arrangements; including methods of calculation of charges
- limited access to information about charges and supply
- inconsistent billing
- lack of access to hardship provisions and protections
- lack of equivalent safeguards in relation to safety and reliability of energy and other utility service supply through embedded networks

From March 2020, landlords and their agents have been required to disclose if electricity or gas is supplied to the rented property from an embedded network in the residential tenancy agreement.[18] There is currently no requirement to disclose prior to the renter signing on to the tenancy agreement.

We believe disclosure should be required at the time of listing (advertising) a rental property and again at inspection. Information about embedded networks disclosed on a listing must include specific information about the utilities or services provided at the

[18] This only applies to tenancy agreements signed from 23 March 2020.

property through an embedded network and the retailer/s (where appropriate).

Disclosure of an embedded network must be accompanied by more information, in plain language, regarding what embedded networks mean for consumers in practical terms, including expected costs, reduced consumer protections, lack of choice and where to get further information.

Our recommendation

51. *Landlords or their agents should be required to disclose where any services are provided via embedded networks when listing (advertising) the property for rent, at inspections for the property, as well as in the tenancy agreement.*

Free ways to pay rent

Guiding principle

Renters should not be charged a fee to pay their rent. Renters must be provided with at least one free, reasonably convenient and easy to use way to pay their rent.

Q34. What would be the best way to ensure that the free way for renters to pay rent is convenient or easy to use? Please explain.

Q35. Should the law require a landlord or agent to offer an electronic way to pay rent that is free to use? Why/why not?

The law currently sets out that renters must be offered at least one free way to pay rent. However, some renters are still being offered cash or cheque as their only 'free' option, and often as the alternative to an electronic third party rent payment service that incurs fees for use.

According to the Australian Payments Network, only 5% of people still had chequing accounts as of 2021. Many banks no longer offer cheques for personal accounts, especially everyday personal accounts. At the Commonwealth Bank, most consumers are able to order a cheque book for free with most personal accounts, but will be charged $3 per cheque written. The law states that bank fees 'usually payable for the tenants' transactions' don't count when considering whether a given way to pay rent is 'free'. However, fees charged for cheques where the only transactions a renter is using a chequing account for is to pay rent, then in practice all fees associated with that account are fees to pay rent.

Paying rent in cash also incurs various costs. For some renters, physically travelling to their real estate agent's office on a regular basis to pay their rent in cash is not possible due to work or carer commitments. For others, the time and money spent on travelling to pay rent in cash are costs that can grow quite significant.

Our recommendation

52. *The law should require a landlord or real estate agent to also offer an electronic way to pay rent that is free to use, such as a direct bank transfer option.*

Renting in Strata Schemes

Guiding principle

Tenants are part of the shared community living in a strata and there should be a tenure-neutral approach to the experience.

> *Q36. What are the issues faced by renters when moving into a strata scheme? Would better disclosure about the strata rules for moving in help with this?*

Much of strata scheme management is focussed on creating harmonious relationships between people sharing a building. Renters can find themselves excluded from this process by not being treated as a part of the community.

Strata renters face many of the same issues as other renters, but with the added complexity of an additional level of ownership structure. This comes out in a number of ways.

- **Repair and maintenance disputes** Resolution of repairs and maintenance issues in strata building suffers from lack of clarity around who bears responsibility for the maintenance. Strata and the landlord as a lot owner may dispute whether the area requiring repair or maintenance is a lot or common area responsibility, or may dispute the quantum (in terms of cost) required to address the issue, and/or an appropriate or reasonable timeframe for undertaking the repairs and maintenance.

  Currently once a landlord has shown they have acted 'with reasonable diligence' to get the strata committee to act a tenant can be stuck at an impasse, with no further recourse despite a home in disrepair. Further consideration is required within strata law to provide greater clarity and/or appropriate pathways for addressing and resolving disputes of this nature in a way that ensures the landlord can meet their legal obligations under the RTA to their tenant within a reasonable timeframe.

  We also recommend the RTA can through the tenancy agreement place a positive obligation on the strata landlord to procure repairs and maintenance through the strata committee to make explicit the requirement a landlord must act with diligence to have strata undertake required repairs and maintenance through strata as we are aware of some cases in which landlords have sought to shirk responsibility for chasing required work.

- **Failure to provide renters with strata by-laws or notify the strata scheme** Tenants moving into the property report not being given a copy of the by-laws or the required notification of a new tenant being given to the strata secretary. This may lead to an issue that they are also not routinely informed of meetings to which they are entitled to attend (though without ability to speak), such as the Annual General Meeting.

- **Eviction for breach of the strata by-laws** Unlike owner occupiers, renters can be evicted for breach of the by-laws. The current setting means a renter can be much more harshly punished for the same behaviour than an owner-occupier. Also unlike owner-occupiers, renters are generally unable to participate in the management structures that both set by-laws and decide the strategy for enforcement.

Particularly where a dispute arises between neighbours, renters are at a disadvantage in resolving the dispute.

- **Renters being asked to pay strata 'moving bonds'** Many renters when moving into a property in a strata scheme are incorrectly being told by the strata owners' corporation or the landlord they are required to pay a 'moving bond'. This is a bond some strata request of lot owners to cover any damage that may occur to common areas during a move. The RTA should make explicit that a landlord is responsible for any strata fees or bonds attached to the property/lot and that these are not costs that can be passed on to the renter.

- **Disclosure of major strata works** Where major works are planned by a strata scheme this should be required to be disclosed to a renter before they enter into a tenancy agreement.

Our recommendations

53. *Owners should be directly responsible for repairs and maintenance issues and then empowered to pass on costs to strata.*
54. *By laws should be provided with the tenancy agreement with penalties for failure to provide. They should also be published and available through the Strata Hub.*
55. *A breach of by-laws should not constitute a breach of the tenancy agreement.*
56. *Landlords are responsible for any strata fees or bonds and the Act should make clear these can not be passed through to the renter*
57. *All major works planned by strata must be disclosed to a renter prior to the renter signing a tenancy agreement*

Further comment on rental reforms and their impact on the rental market

Proposals to strengthen protections for renters are often met with concern that landlords will leave the private rental market due to tenancy law reform. However, the findings of recent AHURI research on impacts of rental reform on the Australian rental market marries up with previous comparative research on private rental markets overseas.[19] It found increased regulation does not adversely impact investment in the private rental sector.

The 2022 AHURI report, *Regulation of residential tenancies and impacts on investment*, considered the impact of the 2010 tenancy law reforms in NSW and the Victorian statutory review in 2015. Examining the bond data available through the rental bond lodgement systems administered by the governments of NSW and Victoria, it found minimal impact on the supply of rental housing following the reforms in either jurisdiction. The report found no change in the numbers of houses coming onto market in NSW after the reforms, and a smaller than expected decrease in properties leaving the rental market.

[19] Martin, C., Hulse, K., Ghasri, M., Ralston, L., Crommelin, L., Goodall, Z., Parkinson, S. and O'Brien Webb, E. (2022) *Regulation of residential tenancies and impacts on investment*, AHURI Final Report No. 391, Australian Housing and Urban Research Institute Limited, Melbourne, accessed 11 August 2023; Martin, C., Hulse, K. et al. (2017) *The changing institutions of private rental housing: an international review,* AHURI Final Report No. 292, accessed 11 August 2023

In Victoria there was a small decrease in the number of properties immediately coming onto market after the reforms, but no change in the number of properties exiting the market.

The survey of property investors undertaken for the research found investors were primarily motivated by capital gains and that tenancy law reforms were at the bottom of the list of reasons why investors sold their properties.[20] Again this reflects earlier research findings in the Australian context that found Australian investors see their rental property as a stable, secure 'long term investment' and that again capital gains is the most important reason for investment.[21] Tenancy legislation does not affect overall investment, and investors do not discuss changes to tenancy legislation as having a significant influence on their decision if they had sold their investment property.

[20] Martin et al (2022), Chapter 5, pp 43-51
[21] Seelig, Thompson et al (2009) *Understanding what motivates households to become and remain investors in the private rental market*, accessed 11 August 2023