

## Better Renting submission: Improving NSW rental laws

Thank you for the opportunity to respond to this consultation paper. Better Renting is a community of renters working together for stable, affordable, and healthy homes, and it's great to see work in this area from the NSW Government. Many renters in our community are also interested in this development and planning to make their own submissions.

In this submission we soon turn to the specific questions in the paper, but let us start by asking: what is the desired outcome from tenancy laws?

This is the central question that should inform reform efforts. Yet no attempt is made to engage with this question in the consultation paper. The paper talks about “improving” laws and increasing “fairness”: these words bring to mind Orwell’s criticism of the “sheer cloudy vagueness” of political language.<sup>1</sup> Orwell argues that this results from “the defence of the indefensible”. The same seems to be the case here: in an attempt to mollify the powerful, the paper implicitly accepts the way things are and steers clear of expressing a concrete vision for a different system. An unwillingness to take an honest stand in favour of making things better for tenants infuses the paper, infects the language, and limits the potential for genuine improvement.

That said, the consultation paper still includes proposals that, if implemented, would make conditions better for renters. In the body of this paper we respond to these proposals and share our views. But let us take the opportunity here to outline the sort of vision that this paper lacks, but which we would love to see coming from the NSW Government.

The 2021 Census records almost 1 million rental households in NSW, with around 2.4 million total residents. This includes at least 378,000 households, roughly two in five, with dependent children. Based upon current trends, a growing number of these people are long-term renters who have been renting at least ten years and are increasingly likely to be renting for the rest of their lives. It's also increasingly likely that these people are pensioners attempting to maintain a secure and affordable home in the rental sector.

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<sup>1</sup> George Orwell, ‘Politics and the English Language’, *Horizon* 13, no. 76 (16 February 2011): 252–65.

Every one of these people needs a decent home. This means more than just a roof over their head. Home entails stability: a place you can plan for the future, put down the roots, and invest in the local community. If you leave, it's because you want to. Home also entails agency: you can live in the place on your own terms. If a pet is part of your family, a pet is part of your home. If you want to adapt your home to meet your needs, you can do so without infantilising processes or the threat of retaliation. A home must also be affordable: we can't have the risk of people pushed out of their homes due to rising rents, or forced to cut back on the basics that make domestic life possible.

Providing decent homes for renters doesn't necessarily conflict with the interests of landlords. In fact, evidence from overseas suggests that both individual and corporate landlords operate quite readily in private rental sectors that are regulated more strongly than Australia's.<sup>2</sup> However, where the interests of renters and landlords do conflict, **the interest of renters must be superordinate**. You cannot serve two masters. If the rental sector is to provide good homes, policy should be designed with that purpose in mind.

The hard part isn't identifying what changes are needed. The hard part is letting go of the current paradigm of tenancy law, which foregrounds the interests of property owners. Once that mental work is done, once you start from the place of asking — what helps to make a home? — everything else flows from that.

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<sup>2</sup> Chris Martin, Kath Hulse, and Hal Pawson, 'The Changing Institutions of Private Rental Housing : An International Review' (Melbourne: Australian Housing and Urban Research Institute Limited, 2017), <https://doi.org/10.18408/ahuri-7112201>.

# Removing 'no grounds' terminations

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

The NSW Government should adopt the ACT model and require a landlord to have a reason when ending any type of lease. Specifically, 'end of a fixed term' must not be able to be used to terminate a tenancy.

Both the Queensland and Victorian models leave renters open to retaliatory eviction. In particular, the Queensland model is an embarrassment, and is easily being skirted by landlords, who simply use the threat of eviction to force tenants to sign rolling fixed-term agreements, thus avoiding periodic tenancies and forever preserving the option to effect a no grounds termination.<sup>3</sup>

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

We are concerned about the proposed new reasons to end a lease. Given that NSW already allows termination when a property was sold and needs vacant possession, it seems unnecessary to add the reason that the property "is being prepared for sale". It's perfectly possible to sell a tenanted property. Forcing tenants to move out simply to prepare a property for sale reduces the utilisation of existing housing stock, results in unnecessary forced moves (as the property may be sold to an investor who would have happily retained the tenants), and opens more possibilities for fraudulent terminations.

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

We recommend a notice period of at least four months. Being forced to move home is disruptive and costly, regardless of the notice period, but at least with more notice the harm can be reduced. Around two in five rental households have dependent children, so people will understandably need time to find a new rental that meets their needs in terms of education, employment, and/or childcare. By giving people more time to adjust to a

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<sup>3</sup> Joe Hinchliffe, 'Queensland Real Estate Body Tells Landlords How to Skirt New No-Grounds Eviction Laws', *The Guardian*, 4 August 2022, sec. Australia news, <https://www.theguardian.com/australia-news/2022/aug/05/queensland-real-estate-body-tells-landlords-how-to-skirt-new-no-grounds-eviction-laws>.

major life change, longer notice periods help reduce the risk of homelessness, which is otherwise significantly increased at the involuntary end of a private sector tenancy. After receiving a notice to vacate, tenants should have the option to terminate the tenancy without any notice.

Landlords should also be required to pay compensation if ending a tenancy when the tenant is not at fault. This could be achieved through a rent waiver equivalent to four weeks of rent. This would discourage unwarranted terminations and also reduce the financial burden placed on tenants by lessors through a forced move. As an example of an analogous scheme, Portland requires landlords to pay Mandatory Renter Relocation Assistance for various sorts of termination.<sup>4</sup>

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

Any reason that would putatively take a property out of the rental market should result in a temporary ban on renting — the purpose here is to discourage fraudulent terminations. We support a ban of six to twelve months, and tenants should be able to apply for compensation for wrongful termination if this is infringed upon.

We note however that this model may be difficult to enforce in practice and puts too much pressure on renters. A superior model is automatic compensation, payable as a rent waiver, from the moment that a notice to vacate is issued. This would have the same effect of discouraging fraudulent terminations, a further benefit of cushioning renters from the economic shock of a forced move, and would be simpler to enforce.

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<sup>4</sup> 'Mandatory Renter Relocation Assistance | Portland.Gov', 14 December 2020, <https://www.portland.gov/phb/rental-services/renter-relocation-assistance>.

## A new model for keeping pets

### **6. 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?**

We find ourselves wondering where NSW came up with the figure of 21 days.

The three jurisdictions that have a framework in place — ACT, Victoria, and Queensland — all have a 14 day response period. Even if 21 days were better, and it isn't, there's a strong argument just in favour of consistency. Please don't go making life harder for renters who, as it turns out, sometimes move between states.

14 days is plenty of time for a landlord to review an application and, if necessary, apply to the Tribunal. We note that landlords are accepting payment from renters and that it's not too much to suggest that this implies some sort of responsibility to respond to communication within a reasonable timeframe. No self-respecting business would propose to ignore a customer for three weeks; while we understand that landlords are special, we should perhaps encourage them to act a bit more like a self-respecting business with some sense of customer service.

We note, however, that this model still leaves renters vulnerable to discrimination when they are applying for a property. A superior model would prevent landlords from asking about whether applicants have pets, thus preventing any opportunity for discrimination and affirming the right of renters to have control over their homes.

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

The landlord should have to go to Tribunal to refuse a pet on any grounds, unless a tenant voluntarily withdraws their request. The one exception is that the landlord has previously received an exclusion from the Tribunal, and this exclusion was publicised when the property was advertised.

What we want to avoid here is a situation where a landlord can just say no and then all the burden is on tenants to go to the Tribunal. The presumption should be in favour of tenants being able to use their home as they see fit, which includes being able to have a pet. If a

landlord wants to impinge upon this, then the landlord should have to justify it to the Tribunal.

We also have faith in the reasonableness of tenants. Where a pet is clearly unsuitable and the landlord can explain this to the tenants, then it may not be necessary to go to the Tribunal because tenants could choose to withdraw their request. We should err towards respectful conversations between reasonable people, while recognising the latent power imbalance and trying to make it easier for renters to have good homes.

Regarding the reasons given in Appendix A, we are concerned by the anti-renter bias shown therein. If restrictions on pets are intended to secure animal welfare, or human wellbeing, then they should apply equally to renters and owner-occupiers and not be leveled solely on tenants. For example, take the potential restriction on a venomous pet: why? If there is a general concern about venomous pets, then restrictions should apply equally to all forms of tenure. Someones' particular status as a renter should not see them subject to more onerous restrictions when it comes to having a companion animal.

## **8. Should the Tribunal be able to allow a landlord to refuse the keeping of animals at a specific rental property on an ongoing basis?**

If a landlord can establish to the satisfaction of the Tribunal that they are justified in preventing all pets under all conditions, then the Tribunal should allow them to refuse keeping animals on an ongoing basis. It is hard to imagine the circumstances where this would apply. Such restrictions should be disclosed in rental advertising. This will avoid frustration and unnecessary bureaucracy.

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

Tenants already have a legal obligation to return the property in substantially the same condition, and this doesn't change if they have a pet. Landlords should not be able to impose extra requirements for carpet cleaning or fumigation: if such remedies are actually necessary, they will be covered by other aspects of the law. The law shouldn't kowtow to landlord bias against pets.

## Renters' personal information

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

Yes, please, start limiting the information that property managers can ask for. It's the wild west out there and tenants are being asked to give away more and more information, it's rarely treated with respect, and renters have no market power whatsoever to opt-out. It's a farce.

### **11. 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.**

We are deeply concerned about the proposed information requirements. One form of photographic ID should be sufficient. In addition, this shouldn't be required through the application process, but only once an application has been accepted — reducing the collection of personal information is much better practice than allowing unnecessary collection and then attempting to enforce secure storage of data. While a passport may be used as photographic identification, landlords should not be authorised to request visa status, as this leaves renters open to exploitation and abuse.

As for ability to pay rent, the NSW Government unequivocally should not empower agents to request bank statements. If a tenant has payslips and an employer who can verify their income, that should be sufficient. In some cases tenants with other forms of income may need to demonstrate this using means other than payslips, they should have that option, but agents should not be requesting bank statements.

As for suitability, we need to step back a bit here. Housing is an essential service. That is, people need it. You can't opt out. So it's unclear why suitability is relevant here. We would argue that any person is suitable for housing, because everyone needs a home. If the agents have assessed capacity to pay rent, what more do they need? Does it matter if the tenants have nice hobbies or volunteer for a soup kitchen? Does this change their need for a home? Should it be a basis for a landlord to choose one tenant over another?

The uninterrogated existence of this column is an example of 'landlord brain' and signals a sad lack of appetite to genuinely re-examine tenancy and the power imbalance between landlords and renters. A landlord should be able to request a rental ledger or rent receipts

as part of assessing the ability to pay agreed rent, they shouldn't be able to collect character references or get the option to punish tenants for historic claims against their bond.

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

We support the use of a prescribed tenancy application form. This is the best way to stop the chicanery that we see out there with different agencies making up their own application forms and competing to see how much more intrusive they can be. It will also in fact simplify administration for tenants, landlords, and agents. It makes perfect sense.

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

Yes.

Do landlords have the right to select the most appropriate person to rent their property to, as is claimed in this paper? We question this. Housing is an essential service. If a government chooses to outsource that service, and a private individual attempts to profit from delivering the service, it's reasonable to put a framework in place to ensure the service is still delivered well. It's not clear what "appropriate" means in this context other than "in line with a landlord's subjective preferences". Until such a time as people don't need housing, you should be restricting the potential for landlords to make arbitrary distinctions between prospective tenants on the grounds of 'appropriateness' or 'suitability'. Limiting the information that is collected is one way to do this.

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

The NSW Government should consider completely disallowing the use of automated decision-making to assess rental applications. It's just far too likely that any automated system will perpetuate existing biases, but with even less scrutiny or transparency.

## Portable rental bond scheme

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

The NSW Government should consider offering no-interest bond loans. This is another solution to the issue of double bond when changing tenancies. It may be simpler to implement and reduce friction for landlords or possible issues with shortfalls: if a tenant doesn't make a repayment it becomes a matter between them and the NSW Government, rather than an issue that could threaten their tenancy and get a property manager offside.

We also support improved data collection through Rental Bonds Online, for example gathering better data on why tenancies end and the length of tenancies, and making this data publicly available.

## Information to help renters know when a rent increase is 'excessive'

### 26. Do you have any concerns about the NSW Government collecting information on rent increases and making it publicly available for renters?

We have some concerns about the proposed model of making information more publicly available. Firstly, there is a risk that this information could be used by agents or landlords to justify higher rent increases. While the paper discusses making rent increases "fairer and more transparent", our priority is in fact making rent lower and cheaper. Further, even if renters have this information it doesn't really help them. The key problem at the moment isn't rent increases that meet the technical criteria of being 'excessive': it's rent increases that *don't* meet those criteria, but are nonetheless too expensive and put people's tenancy and wellbeing at risk.

However, if the NSW Government were to pursue greater information transparency, the information should not focus just on *advertised* rents. Advertised rents don't actually reflect what the vast majority of tenants are paying. Any transparency scheme should also consider *incumbent* rents being paid by the majority of tenants, that is, people within current tenancies. The Reserve Bank of Australia recently completed an analysis based on

this sort of data, and the NSW Government could look into obtaining and publicising the same information, or resourcing a regular survey of renters to understand the actual market rents being charged, not just advertised rents.

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

As noted, the NSW Government could collect information on incumbent rents by obtaining this information from MRI Real Estate Software, as the Reserve Bank of Australia has recently begun doing.<sup>5</sup>

In addition -- and this is worth doing regardless -- the NSW Government should require landlords to issue rent increase notices through a prescribed online form. This is the best means of ensuring that tenants receive correct information when they get a rent notice. It also means that the government can log data on rent increases in real-time, building a comprehensive picture of this information - which could then inform policy-making and assist with the work of the new Tenancy Commissioner.

## 8 Other changes to improve rental affordability

### 30. What do you think about the above options? Please provide detail.

The NSW Government should do more to protect renters from excessive rent increases.

The approach in the ACT has much to offer NSW. The key thing about this approach is that a proposed increase above a specified threshold doesn't take effect unless either the tenant agrees or the landlord applies to the Tribunal for approval. While the level of the threshold obviously matters, more important is shifting of the onus, such that the landlord is responsible for justifying the rent increase, rather than the tenant being responsible for opposing it.

That said, there are options to improve upon the ACT model, and NSW should pursue these. These options are:

- **The protections should apply more broadly.** The ACT protections only apply within periodic tenancies, so agents avoid them by insisting upon lease renewals.

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<sup>5</sup> Fred Hanmer and Michelle Marquardt, 'New Insights into the Rental Market | Bulletin - June 2023' (Reserve Bank of Australia, 2023), Australia, <http://www.rba.gov.au/publications/bulletin/2023/jun/new-insights-into-the-rental-market.html>.

NSW should introduce protections against excessive rent increases that apply to lease renewals or when the type of tenancy agreement changes.

- **The threshold should be simpler.** The ACT threshold is set at 110% of the change in CPI for rents since the last increase. This is highly esoteric and difficult for renters or landlords to understand. Instead, the threshold should be a simple percentage amount, eg, 2%. Possibly the amount could be determined and updated on an annual basis, possibly based on changes to wages or inflation.
- **Tribunal should have different considerations to review increases.** When considering whether a rent increase is excessive in NSW, the Tribunal may consider market rents for comparable properties, and may consider the landlord's costs, but is forbidden from considering the tenant's financial situation or ability to afford rent. We recommend that the market level of rents for comparable premises should not be grounds to allow a rent increase, as that is simply a landlord taking advantage of scarcity. The Tribunal should also be *required* to consider the financial situation of tenants and potential impacts if an increase is approved. If the 'market level of rents' is to be retained, it should be clarified that this includes incumbent rents, not just advertised rents.

## Implement minimum energy efficiency standards for rental homes

We are disappointed to see no discussion of minimum energy efficiency standards for rentals in this paper. Some sort of regulated minimum standard is essential to ensure that the homes people are renting are healthy and fit to live in.

The challenge for people renting in NSW is that there is little market pressure pushing landlords to rent out decent properties. With vacancy rates so low, people are forced to take what they can get, and this includes properties that are glorified tents, freezing in winter and boiling in summer. This means that renters face higher energy costs, but also spend much more time living in unhealthy temperatures.

NSW is part of the cross-jurisdictional process of developing a National Framework for Minimum Rental Requirements. The timeline for this has jurisdictions beginning processes to implement rental schemes before the end of 2023. And Treasurer Mookhey previously committed to begin consultation on implementing rental standards. This consultation paper was a missed opportunity to begin this consultation. Delaying action on this means higher energy costs for renters, and more avoidable sickness and death from allowing landlords to rent out unhealthy homes.