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Dear Real Estate and Housing Policy Team

## Improving NSW Rental Laws

People with Disability Australia (PWDA) welcomes this opportunity to provide feedback on the NSW Government's *Improving NSW rental laws consultation paper* (July 2023).

PWDA is Australia's peak cross-disability Disability Representative Organisation and is also funded to provide cross-disability systemic advocacy on behalf of people with disability in New South Wales under the Department of Communities and Justice's *Disability Advocacy Futures Program*. Nationally 4.4 million Australians have a disability, approximately 18% of the population.<sup>1</sup> In NSW 18.1% of the population have a disability, equivalent to 1,372,400 residents.<sup>2</sup>

People with disability experience discrimination and poorer life outcomes across all life domains when compared with those without disability.<sup>3</sup> For example, people with

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<sup>1</sup> Australian Institute of Health and Welfare, 2022, *People with Disability in Australia 2022*. Accessed 2 August 2023 <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/about>; Australian Bureau of Statistics, 2019, *Disability, Ageing and Carers, Australia: Summary of Findings*. Accessed 2 August 2023 <https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#disability>.

<sup>2</sup> Australian Bureau of Statistics (n 1).

<sup>3</sup> Kayess, R and Sands, T, 2020. *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation*. Sydney: UNSW Social Policy Research Centre; Australian Bureau of Statistics, 2019, *Disability, Ageing and Carers, Australia: Summary of Findings*. Accessed 2 August 2023 <https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#disability>; Australian Institute of Health and Welfare (n 1).

disability are at greater risk of becoming homeless as they receive lower incomes and have less engagement with the private housing market when compared with those without disability.<sup>4</sup>

We also note that support received through the National Disability Insurance Scheme (NDIS) does not include rental support in the private market, and the NDIS itself does not provide housing except for the extremely limited number of people with disability eligible for Specialist Disability Accommodation (SDA). This number is estimated to be only 15,700 people nationally.<sup>5</sup>

People with disability may also have specific housing and support needs. Homes are often not designed to be accessible and can be difficult and expensive to adapt to suit individual accessibility requirements. This is a particular challenge when people with disability are renting in the private market.<sup>6</sup> There is an acute need in NSW for an increase in the supply of affordable housing that is constructed to comply with accessibility standards.<sup>7</sup>

## Response to proposed Government changes

PWDA is largely supportive of the Government's proposed changes to rental laws in NSW as outlined in the consultation paper. These changes include:

- ending 'no grounds' evictions
- a model to make it easier to keep pets. A renter can have a pet as a default, and after informing the landlord the landlord can object within 21 days and take it to the Tribunal
- clarifying the legislation to limit what information can be collected from applicants, how that information is used and disclosed, and how the information is stored and destroyed
- exploring options to protect applicants from discriminatory behaviour where automated decision-making is used
- improving access to information to help renters know when a rent increase is 'excessive', and;

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<sup>4</sup> Australian Institute of Health and Welfare (n 1).

<sup>5</sup> Australian Institute of Health and Welfare, 2022, *People with disability in Australia 2022*, <https://www.aihw.gov.au/getmedia/3bf8f692-dbe7-4c98-94e0-03c6ada72749/aihw-dis-72-people-with-disability-in-australia-2022.pdf.aspx?inline=true>. Accessed 8 August 2023

<sup>6</sup> See e.g., Maryam, G, Murphy, C, Valenta, L, Bertram, N and Maxwell, D, 2021, *Adaptable Housing for People with Disability in Australia: A Scoping Study*. Sydney. Australian Human Rights Commission, Sydney. Accessed 2 August 2023

<https://humanrights.gov.au/our-work/disability-rights/publications/adaptable-housing-people-disability-australia-scoping-study>

<sup>7</sup> See e.g., Ibid; *The National Construction Code 2022; Disability (Access to premises – Buildings) Standards 2010* (Cth).

- exploring options to increase rental affordability such as requiring landlords to prove a rent increase is not excessive, and amending the legislation to better identify criteria for measuring when an increase is excessive.

PWDA particularly supports measures that restrict excessive rent increases, as being something that will benefit all renters in NSW, not just those with disability.

We note that the ongoing and extreme rent increases seen across the country impact most harshly on those on lower incomes such as people with disability,<sup>8</sup> a significant proportion of whom rely on a government income support payment as their primary source of income.<sup>9</sup>

The impact on wellbeing that rent increases have been causing to people with disability is concerning. Nationally as of March 2023 there were just 66 private rental properties affordable to a person whose primary source of income was a Disability Support Pension.<sup>10</sup> Compounding the crisis is that many of these properties are unlikely to meet accessibility standards making them unsuitable.<sup>11</sup>

When considering the proposed changes to NSW rental laws, PWDA would like to direct your attention to further specific items of relevance for people with disability.

## 1. Notice period for eviction

PWDA believes that the notice period for evictions should be longer in the case of people with disability generally, and particularly for those who need modifications in their housing.

The current 30-day notice period for a fixed term lease and 90-day notice period for a periodic lease is not adequate in all cases. An approach that recognises diversity and fully respects the human rights of people with disability should be adopted due to the following reasons:

### a. General needs

People with disability may have specific needs related to housing, such as a disability-related need to live in a specific location. For example, a person with a disability may need to live near informal supporters such as family members, friends, and other informal care

<sup>8</sup> Anglicare Australia, 2023, *Rental Affordability Snapshot. National Report*. Fourteenth Edition. Accessed 2 August 2023 <https://www.anglicare.asn.au/wp-content/uploads/2023/04/Rental-Affordability-Snapshot-National-Report.pdf>.

<sup>9</sup> Australian Institute of Health and Welfare (n 1).

<sup>10</sup> Anglicare (n 6) 8.

<sup>11</sup> Anglicare (n 6) 10.

givers. They may also need to live close to certain service providers, or need to live close to other forms of social and community support that they require to live independently in the community. They may also have a specific budget. Therefore, finding housing in a specific location for disability-related reasons generally takes longer than a general search a person without disability would undertake.

#### b. Housing modifications

Some people with disability may require modifications to their housing to make it accessible. It can take a significant period to find suitable accommodation with existing modifications, or to have modifications carried out to new premises prior to moving in. The costs can also be prohibitive.

The NDIS can provide some limited housing modification assistance to those in the private market, but it is subject to a lengthy process to determine if the housing modification is 'reasonable and necessary', and is not guaranteed, particularly if the cost is high and/or the tenure period of the lease is not long.

There is also very limited support for home modification available by the NSW Government like the *Safe and Supported at Home* initiative.<sup>12</sup>

Considering this limited support, a person with a disability may be unable to move from their current residence to new premises until housing modifications have been completed.

This can have the effect of putting a person with disability into a dangerous 'limbo' situation, increasing the risk of homelessness as they are unable to move into the new premises until it has been modified, but cannot leave the old premises because there would be nowhere for them to go.

Critically, any home modification in the private rental market requires the approval of the landlord. A landlord may not want to allow modifications for various financial reasons. For a modification during a tenancy, the landlord cannot unreasonably refuse a minor modification.<sup>13</sup>

At the application stage however, there may be issues. If a landlord sees on an application that modifications are required, they may reject it. In a busy market it would be difficult to

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<sup>12</sup> SASH Home Modifications Program. <https://www.enable.health.nsw.gov.au/services/home-modifications-sash#:~:text=Home%20modifications%20%28disabilityspecific%29%20may%20be%20funded%20for%20people,require%20home%20modifications%20to%20live%20at%20home%20safely>.

<sup>13</sup> *Residential Tenancies Act 2010* (NSW), s 66(2).



prove a rejection was because of the need for modification. Therefore, the NSW Government should explore options on how to provide incentives to landlords so that applications with modification needs are not dismissed.

We also note that introducing a longer notice period for people with disability could also have the perverse effect of landlords not renting to people with disability.

A safety net clause in a standard tenancy agreement could be explored that provides a longer notice period for people in vulnerable situations, including people who have disability-related housing needs.

Clearly, this is a complex issue for both landlords and tenants with disability. PWDA believes more targeted consultation with key stakeholders, including the wider disability sector, is required, to ascertain a more appropriate and longer notice period for evicting tenants with disability and in what circumstances a longer notice period would apply.

## 2. Assistance animals

The Federal *Disability Discrimination Act 1992* (Cth) (the 'DDA') prohibits discriminating against a person based on them requiring an assistance animal.<sup>14</sup> PWDA is concerned that people with disability who may require an assistance animal within the meaning of the DDA may be experiencing discrimination during the application stage when searching for a rental property.

This is an issue shared by the Tenants Union of NSW (TUNSW), who have previously noted the current rental application process usually requires disclosing of a pet (this would include an assistance animal) and in such cases the landlord or agent may simply reject the application at the earliest stage.<sup>15</sup>

TUNSW notes that while in the case of an assistance animal this would be unlawful, it would be difficult to prove this was the reason for rejection.<sup>16</sup> They note the problem is further 'exacerbated' because of the current low vacancy rates for properties.<sup>17</sup>

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<sup>14</sup> *Disability Discrimination Act 1992* (Cth) ss 8-9. For overview see e.g., Australian Human Rights Commission, 2016, *Assistance animals and the Disability Discrimination Act 1992 (Cth)*, Web Resource. Accessed 2 August 2023 <https://humanrights.gov.au/our-work/disability-rights/projects/assistance-animals-and-disability-discrimination-act-1992-cth>.

<sup>15</sup> Tenants' Union of NSW, 2022, *Keeping Pets in Rental Homes*. Submission to NSW Fair Trading 'Keeping pets in homes' consultation (December 2022). Accessed 3 August 2023 <https://files.tenants.org.au/policy/2022-11-TUNSW-Submission-Keeping-pets-in-rental-properties.pdf>.

<sup>16</sup> *Ibid* 16.

<sup>17</sup> *Ibid*.

To address this TUNSW recommended that the *Residential Tenancies Act 2010* (NSW) (RTA) be amended to:

*prohibit landlords and agents from asking about pet ownership at the application stage, and to explicitly prohibit 'no pets' terms in residential tenancy agreements. With these changes, renters could still be required to disclose whether they have a pet to their landlord once they have entered into an agreement, with the rules stipulating for example that renters must disclose within 14 days if a pet is at the property and what type. 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.*<sup>18</sup>

We note that in the case of the animal being properly accredited and registered as an assistance animal, the grounds to refuse permission would be very limited.

PWDA supports the position and recommendations of TUNSW that the RTA be amended to:

- prohibit landlords and agents from asking about pet ownership at the application stage, and
- prohibit 'no pets' terms in residential tenancy agreements.<sup>19</sup>

PWDA also notes that the NSW Court of Appeal has recently held that a blanket ban on pets in a strata scheme by-law was "harsh, unconscionable or oppressive".<sup>20</sup>

### **3. Privacy, information, automated decision-making**

PWDA is concerned that artificial intelligence (AI) or automated decision-making can be used to discriminate against prospective tenants with disability. This is an area linked to what personal information is or may be collected by agents and landlords, how it is stored, and how it is used. Information that may be collected and used to discriminate against a person seeking housing includes, but it not limited to:<sup>21</sup>

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<sup>18</sup> Ibid 16-17.

<sup>19</sup> Ibid 17.

<sup>20</sup> *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250.

<sup>21</sup> For overview see e.g., Maalsen, S, Wolifson, P, Rogers, D, Nelson, J, and Buckle, C, 2021, *Understanding discrimination effects in private rental housing*, AHURI Final Report No. 363, Australian Housing and Urban Research Institute Limited,

- whether a person has a disability and/or mobility issue,
- whether they receive a government payment as income,
- the person's age
- their current postcode (discriminate based on living in an area associated with a lower socio-economic status, or a particular cultural or ethnic identity),
- whether they have a history of needing housing modifications, and;
- whether they have a pet or assistance animal.

While the collection of some of the above information may be legitimately necessary to collect through the normal course of an application process (for example, age and postcode could be found on a NSW driver's license or NSW proof of age card); the issue is not just the collection of such information and its safe storage, but also how the information can be subsequently used (especially with the use of automated decision-making) to discriminate against an applicant. For example, to exclude applicants based on age, disability, or perceived socio-economic status. In many cases this would be unlawful.

Presently, protections are inadequate to ensure that people with disability are not discriminated against in the private rental market process through data collection and automated decision-making.<sup>22</sup> This is particularly worrisome when algorithms being used are not transparent and/or there is little to no human oversight of the process.

The Australian Human Rights Commission (AHRC) has recommended the adoption of a human rights approach to all new technologies, putting the protection of a person's universal human rights at the center of all decision-making.<sup>23</sup>

In the AHRC's *Human Rights and Technology* report, the AHRC stated that AI-informed (or automated) decision-making should be "lawful, transparent, explainable, used responsibly, and subject to appropriate human oversight, review and intervention."<sup>24</sup>

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Melbourne. Accessed 3 August 2023 <https://www.ahuri.edu.au/sites/default/files/documents/2021-09/AHURI-Final-Report-363-Understanding-discrimination-effects-in-private-rental-housing.pdf>; Mowbray, J, 2023, *Privacy, data and discrimination in renting*, The Tenants Union Blog, 24 March 2023. Accessed 3 August 2023 <https://www.tenants.org.au/blog/privacy-renting>; Bate, B, 2020, *Unlawful and lawful discrimination: how the selection process disadvantages some private renters*, The Tenants Union Blog, 17 August 2020. Accessed 3 August 2023 <https://www.tenants.org.au/blog/unlawful-and-lawful-discrimination>.

<sup>22</sup> Farthing, S, Howell, J, Katerina, L, Paleologos, Z, Saintilan, P, and Santow, E, 2021, *Human Rights and Technology*. Final Report 2021, Australian Human Rights Commission, Sydney. Accessed 7 August 2023 [https://tech.humanrights.gov.au/downloads?\\_ga=2.222802075.1270461568.1691366540-1955468351.1690950507](https://tech.humanrights.gov.au/downloads?_ga=2.222802075.1270461568.1691366540-1955468351.1690950507).

<sup>23</sup> Ibid 10-11.

<sup>24</sup> Ibid 12.

PWDA supports the position of the AHRC and recommends more consideration is needed to ensure that any automated decision-making in rental applications does not discriminate against people with disability.

While PWDA is largely supportive of the NSW government's approach to amending NSW rental laws as outlined in the consultation paper, the issues raised in this letter need further investigation, specifically on:

- targeted consultations on what appropriate notice periods for people with disability should be;
- the need to introduce stronger protections from discriminatory behaviour for people with disability who use an assistance animal, and finally;
- the need for stronger protections to prevent AI driven or automated decision-making unlawfully discriminating against people with disability.

Yours sincerely

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