



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PLC/PuLC/IIC/HRC/PDL:CB:gl180823

18 August 2023

NSW Fair Trading
Department of Customer Service
4 Parramatta Square
12 Darcy Street
Parramatta NSW 2150

By email: residentialtenancy@customerservice.nsw.gov.au

Dear Sir/Madam,

Improving NSW rental laws consultation paper

Thank you for the opportunity to comment on the Improving NSW rental laws consultation paper. The Law Society's Property Law, Public Law, Indigenous Issues, Human Rights and Privacy and Data Law Committees have contributed to this submission.

The Law Society is supportive of this review, which aims to improve rental laws and afford greater stability for both renters and landlords. We note that many of the issues raised in the inquiry are underpinned by a recognition of the right to safe, secure and affordable housing for all people.

From an international human rights perspective, the right to housing, which is expressed as a right to an 'adequate standard of living', can be found in Article 25 of the *Universal Declaration of Human Rights* and Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, as well as in a range of other international instruments to which Australia is a party.¹ The UN Committee on Economic, Social and Cultural Rights has expressed the view that the right should not be defined narrowly to refer to 'having a roof over one's head' but should be seen as the right to live somewhere in 'security, peace and dignity'.²

Addressing the challenges of implementing the right to housing demands legislative, fiscal and policy responses. These responses must be carefully tailored to address the interrelated drivers of housing insecurity, which include the lack of social and affordable housing, inadequate income support, the increased cost of living, prices on the private property and rental markets and experiences of financial crisis, illness and other forms of disadvantage.

¹ See, for example, Art 5(e)(iii) of the Convention on the Elimination of All Forms of Racial Discrimination, Art 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women, Art 27 of the Convention on the Rights of the Child and Art 28 of the Convention on the Rights of Persons with Disabilities.

² General comment No. 4, The right to Adequate Housing (Art. 11(1)), UNCESCR, General Comment No 4, 6th sess, [7], UN Doc E/1992/23 (1991).

The Law Society notes the adverse impacts on individuals and families that housing instability can have, particularly for Aboriginal and Torres Strait Islander families. The research demonstrates the adverse outcomes of housing instability, particularly for children,³ and we are informed by our members that housing instability can be a factor in the removal of children.

In addition to seeking to clarify rental laws, as is proposed in this inquiry, the Law Society encourages the NSW Government to continue to focus on addressing the systemic causes of housing insecurity, including by prioritising co-ordination and consistency, as far as possible, between Commonwealth and state responses. We acknowledge that an effective policy response to housing affordability may also require tailored solutions at state and local government levels, including in relation to housing supply generally.

Our detailed feedback on questions in the consultation paper is provided in the attached comments table.

Yours faithfully,

Cassandra Banks
President

Encl.

³ For example, international studies have shown that housing instability can alter a child's academic achievement, emotional regulation and verbal abilities, leading to poorer long-term effects in decreased educational attainment, increased participation in risky behaviours and a greater risk of adult-onset chronic diseases (Gaylord AL, Cowell WJ, Hoepner LA, Perera FP, Rauh VA, Herbstman JB. Impact of housing instability on child behavior at age 7. *Int J Child Health Hum Dev.* 2018;10(3):287-295).

Improving NSW rental laws consultation paper – July 2023

Feedback from the Law Society of NSW

No.	Question	Law Society comments
3 Removing 'no grounds' terminations		
3.3 Ending a fixed term lease		
1.	What is your preferred model for ending fixed term leases and why?	<p>We note that National Cabinet will shortly be considering significant housing and planning reforms, including proposals to increase housing supply and affordability. We note that the outcome of those discussions may provide a path to national consistency on housing affordability, including in relation to renters' rights.</p> <p>We note that in April 2023, the ACT implemented reforms to remove the ability of a landlord to end a tenancy with 'no cause' for fixed term and periodic tenancies. However, we understand that Queensland has a model that has removed 'no cause' agreement terminations for renters on periodic tenancy agreements. In Queensland, ending a tenancy at the end of the fixed term is now a prescribed reason for termination.</p> <p>Data obtained from the 2021 ABS Census shows that more than half of Aboriginal and/or Torres Strait Islander households were rented (56.1%). Housing instability is associated with negative effects on children's physical health, learning outcomes and social and emotional wellbeing. Reforming the grounds for termination of rental agreements therefore has the potential to improve housing and health outcomes for Aboriginal and Torres Strait Islander renters.</p> <p>While adopting the Queensland model of removing no cause terminations may provide increased stability for those on periodic tenancy agreements, there is some risk that such provisions could be circumvented by transitioning renters to shorter fixed-term agreements.</p>
3.4 New reasons for ending a lease		
2.	Are there any other specific situations where a landlord should be able to end a lease?	<p>The Consultation Paper suggests a number of grounds be added as reasonable grounds for termination, to replace 'no grounds' terminations. We provide our comments in respect of these proposed grounds. We also note that limited detail has been provided at this stage, and that we would appreciate the opportunity to provide further advice on the effectiveness of such grounds, as further detail emerges of their planned implementation.</p> <p>The property is being prepared for sale</p> <p>In jurisdictions where 'intention to sell' has been introduced as a reason for termination, we understand some tenants' advocates have suggested stronger enforcement measures to prevent misuse of the provisions. We suggest careful consideration will need to be given to a range of evidence that would reasonably demonstrate a genuine intention to sell. For example, if a real estate agency agreement for</p>

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		<p>the sale of the property is specified as evidence, we suggest that the landlord should be able to redact certain information, such as the commission and expected sale price, before furnishing the agreement as evidence.</p> <p>The property will be renovated or repaired, or demolished</p> <p>Demolition and reconstruction of a property may be a valid reason for the landlord to end a tenancy agreement. However, there is a risk that incorporating "repair" as a reason for eviction might create an avenue to intentionally allow a property to deteriorate, and for the subsequent eviction of tenants under the pretext of repairs. This could enable some landlords to sidestep contractual responsibilities pertaining to maintenance and repairs throughout the tenancy.</p> <p>If the language of repair and renovation is included, it must be made clear that this is only permitted where the landlord genuinely intends to carry out <i>significant</i> repair and renovation of the residential premises and where repairs are not required as a result of the landlord's breach of the agreement.</p> <p>The landlord wants to use the property differently</p> <p>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, imposing a requirement to demonstrate the intended changed use should be considered, for example, provision of an approved development application.</p> <p>The landlord or a member of their immediate family is going to move into the property</p> <p>A landlord or their immediate family may need to move into a property that is currently being rented. However, in these circumstances landlords should be able to demonstrate a genuine intention to use the property as a principal place of residence.</p> <p>A renter being evicted from their home is often a fraught and costly experience, particularly during a rental crisis. It is critical that if a renter is going to be put through that experience, there is evidence that the termination is necessary and genuine, and proper safeguards are in place to protect against wrongful terminations.</p> <p>To prevent misuse of these termination reasons, a penalty could be considered where a notice of termination is wrongfully issued for one of these grounds.</p>

No.	Question	Law Society comments
5 Renters' personal information		
5.2 Proposed new model		
10.	Do you support limiting the information that applicants can be asked for in a tenancy application? Why/why not?	<p>We support limiting the information that applicants can be asked for in tenancy applications to certain specified categories of information, that are reasonably necessary to ascertain the identity and suitability of the applicant. At present, tenants in NSW are asked to provide a variety of personal information (PI) and sensitive information (SI). In the experience of our members, the information collected in tenancy applications is often comparable to that required by banks in loan applications. In some cases, it has been observed that tenants have been asked for personal information comparable to that required for criminal background checks, or even security level clearance checks.</p> <p>In our view, the current system places an undue burden on tenants to produce PI and SI and represents a very significant privacy risk. The large amount of PI and SI being collected and handled by real estate agents requires appropriate security and training to ensure that tenants' information is managed and stored safely. The real estate industry also represents a high value target for malicious actors, including individuals and state-based operators, seeking to exploit tenants' SI and PI. As noted in the Consultation Paper, only 45% of real estate agents are currently subject to the <i>Privacy Act 1988</i> (Privacy Act). The majority of real estate agents have no formal privacy obligations under the Privacy Act, and, therefore, may not have implemented any policies and procedures to securely handle PI and SI. Relevantly, we note that human error also accounts for a large proportion of data breaches in the data sets collected by the Office of the Australian Information Commissioner.</p> <p>Accordingly, we suggest that information that can be requested in tenancy applications should be codified in law.</p> <p>Any changes to the law should clearly set out that the information obligations apply to real estate agents (and their firms), and landlords. Further, agents and landlords should also have chain of custody requirements in relation to any PI and SI that they disclose to a third-party service provider for the purposes of fulfilling obligations under the tenancy, such as tradespersons.</p>
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.	<p>While we do not wish to comment on the specific documents that should be required to satisfy the proof of identity and suitability requirements, we again note that the PI and SI collected should be limited to that which is reasonable and necessary and should be prescribed by law.</p> <p>In relation to character references, we note that this information is regularly provided by a close friend or family member and is often difficult to verify. Accordingly, the value of the information in a written character reference, to demonstrate an applicant's suitability, may not be sufficient to justify the disclosure of additional personal information in that reference.</p>

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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 standardised form, which would, in our view, promote consistency across the industry in relation to the collection of PI and SI, as well as compliance with the privacy requirements under the proposed new model.
14.	Do you support new laws that set out how landlords and agents can use and disclose renters' personal information? Why/why not?	Yes. Landlords and agents should have very limited rights, and importantly these rights should be very clear about how and when information can be used, whether it can be disclosed to a third party (such as tradespersons) and obligations on the parties to ensure they, and relevant third parties, keep the PI secure and otherwise destroy it immediately once the purpose for which it was collected has lapsed.
15.	What should applicants be told about how their information will be used before they submit a tenancy application? Why?	We suggest that tenants should be given a specific information disclosure notice. This notice should be simple and easy to read in a language appropriate to the tenant.
16.	Do you support new laws to require anyone holding renter personal information to secure it? Why/Why not?	<p>We support legislation requiring the holders of tenants' PI and SI to securely store and handle such information, noting the severe impact of data breaches on victims and their families.</p> <p>In this regard, we note that it is a common tactic for threat actors to target individuals working in critical or sensitive occupations, including government agencies, many of whom may be tenants. PI and SI derived illegally from tenant disclosures can be used to exploit or extort individuals directly, or pressure individuals into giving the threat actor access to their employer organisations.</p>
17.	How long should landlords, agents or proptechs be able to keep renter personal information? Please explain.	<p>In our view, holders of renter personal information should retain the information only for the immediate purpose for which it was disclosed.</p> <p>This means that if a tenant applies to rent a specific property, once the application has been considered and rejected, the purpose has been completed. As such, for rejected applications, information destruction should be occurring in a very short period, ideally within days. For approved applications, the agents and landlords should only keep such information from the application that is reasonable and necessary for the tenancy to function, and as required by law. Other information should be promptly deleted. Proptechs have no ongoing relationship with the parties and should therefore be deleting PI and SI on a frequent basis.</p>
18.	<p>18. Do you support requiring landlords, agents or proptechs to:</p> <p>(a) give rental applicants' access their personal information,</p> <p>(b) correct rental applicants' personal information? Please explain your concerns (if any).</p>	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>In our view, access to this information should be free, and the cost of any necessary correction should be borne by the agent or landlord. In both cases the agent or landlord must make the PI available in an easily accessible and secure format. Access requests should also come with a reasonable identity verification method which does not require the individual to provide any new documentation.</p>

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5.3 Automated decision making		
5.3.2 Potential options to support fairness for applicants		
20.	What should we consider as we explore options to address the use of automated decision making to assess rental applications?	<p>In our view, the use of automated decision making (ADM) in assessing rental applications should be regulated. Research by the Office of the Australian Information Commissioner has confirmed that 96 per cent of Australians want conditions to be in place before organisations use artificial intelligence to make decisions that might affect them. The conditions considered to be essential include:</p> <ul style="list-style-type: none"> • the right to have a human review the decision (73 per cent) • that individuals are told when AI is being used (71 per cent) • a requirement to comply with privacy rules (69 per cent) • the right to request information about how decisions are made (68 per cent) • the right to challenge AI-made decisions (64 per cent).¹ <p>We consider that rental applicants should have the right not to be subject to a decision based solely on automated processing, including profiling, except:</p> <ul style="list-style-type: none"> • where the applicant has provided voluntary and informed consent; or • in specified circumstances where exemption is deemed necessary, as specified by regulation, <p>in which case suitable measures to safeguard the applicant's rights and interests should be required to be in place.</p> <p>Applicants should at least be afforded the right to obtain human intervention and the opportunity to voluntarily provide information relevant to the assessment of their application and to contest a decision if it adversely affects them.</p> <p>With respect to privacy protections, we note that:</p> <ul style="list-style-type: none"> • not all landlords and agents are subject to privacy laws; and • the Privacy Act has recently undergone a major review, the results of which have not yet been finalised. <p>In the absence of adequate coverage under existing privacy laws, we submit that NSW tenancy laws should provide specific protections for rental applicants that conform to generally accepted privacy</p>

¹ Office of the Australian Information Commissioner, *Australian Community Attitudes to Privacy Survey*, August 2023, at 77, online: https://www.oaic.gov.au/data/assets/pdf_file/0025/74482/OAIC-Australian-Community-Attitudes-to-Privacy-Survey-2023.pdf

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		<p>principles (for example, the General Data Protection Regulation Principles² and the OECD Privacy Principles)³, including:</p> <ul style="list-style-type: none"> • Data minimisation (collection, use, disclosure and storage must be limited to what is necessary for the legitimate and disclosed purpose and must be permanently deleted when no longer needed) • Transparency (so that the applicant is made aware of how automated decision making is applied to applications) • Lawfulness (including adherence to anti-discrimination and consumer laws) • Fairness (for example, prohibiting the use of the applicant's age and address or suburb to exclude applicants, and providing applicants who do not consent to ADM the option to submit non-digital applications with no penalty or cost to the applicant) • Accountability (including obligations for those carrying out the processing activity relating to accuracy of the data and security to protect the data from unauthorised access, use, disclosure or loss). <p>Prohibiting the use of certain data, including age and suburb, would be consistent with GDPR principles. Requiring agents and landlords to accept non-digital applications with no penalty to applicants would also be consistent with GDPR principles, as would requiring organisations that use ADM to make transparent what and how ADM is used by their organisation. However, we suggest that these options do not go far enough to satisfy art 22 of the GDPR (which provides for the right not to be subject to a decision that significantly affects a person, or has legal effects concerning them, based solely on automated processing), and regulation should also at least include a right to a review and reconsideration of the application that involves human intervention (and which does not take into account the initial decision made via ADM).</p> <p>The process of assessing rental applications may involve consideration of information provided by tenancy "blacklists", whether formal or informal. In our view, the operation of these blacklists (including the entry of tenants' names onto these databases, and how their personal information is made available) should also be the subject of regulation, to the extent they utilise any form of ADM.</p>
6 Portable rental bond scheme		
6.2 Design of the portable bond scheme		
21.	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?	Where part of the prior bond has been claimed by the previous landlord, tenants should be granted flexibility and a reasonable period to top up the bond. For example, tenants could be given a minimum

² Regulation 2016/679 (General Data Protection Regulation), in particular article 22 in respect of automated decision making including profiling.

³ Online here: <http://oecdprivacy.org/>

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		of 14 days to top up the new bond, and this flexibility would assist to reduce the financial disruptions and stress frequently associated with moving house.
25.	What other (if any) things should we consider as we design and implement the portable bond scheme? Please explain.	Consideration will need to be given as to how the portable bond scheme might operate in situations where the tenancy is terminated in circumstances of domestic violence under s 105B of the Act.
8 Other changes to improve rental affordability		
8.2 Clarifying the limits on rent increases		
28.	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.	Although the Act currently places a limit of one rent increase per 12 months for renters on a periodic tenancy agreement, we understand from our members that some landlords appear to be circumventing this protection by swapping renters between agreement types from periodic to fixed term to increase rents more than once in a 12-month period. Given this, we support the introduction of anti-avoidance measures to prevent a landlord from increasing the rent more than once per 12 months per renter, regardless of what kind of tenancy agreement the renter has.
29.	Do you think fixed term agreements under two years should be limited to one increase within a 12 month period? Why or why not?	<p>Currently, fixed term agreements under two years do place a limit on the number of times an increase can occur: a renter must be informed of, and agree to, an increase being written into the agreement before they sign the lease. The agreement must specify the date on which, and the amount by which, the rent payable under that agreement will be increased (s 41(1A) of the Act).</p> <p>Given this, introducing a further limit of one increase within a 12-month period for a fixed term agreement under two years may not be necessary.</p>
8.3 Other options to address affordability		
30.	What do you think about the above options? Please provide detail.	<p>We note again the work currently undertaken on a national level on housing affordability. In our view, effective policy responses to housing affordability requires both national coordination and local-specific responses. This may require tailored responses at state and local government levels targeting housing supply as an ongoing concern.</p> <p>Our members have differing views on adopting measures to target rental price stability, and note the myriad permutations that such measures might take. In this regard, the evidence available demonstrates that depending on the local context and the nature of the model adopted, housing stability can be achieved for intended beneficiaries⁴ and that in Australian jurisdictions, tenancy law is rarely a</p>

⁴ Rajasekaran P, Treskon M, Greene S, "Rent Control: What does the research tell us about the effectiveness of local action?" January 2019, *Urban Institute*

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		factor in decisions to dispose of properties. ⁵ However, poorly designed rental price intervention models have been shown in the US to result in unintended consequences, ⁶ including concerns in respect of housing supply and quality of accommodations; accruing those benefits to renters who may not require the extra protection; and ineffectiveness in realising other aims such as promoting economic opportunity social mobility, ⁷ or reducing racial disparities. ⁸
9 Other changes to make rental laws better		
9.1 Telling renters about the use of embedded networks		
9.1.2 Options to ensure renters know about embedded networks		
31.	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?	Yes, it is appropriate for tenants to be aware of any embedded network for the provision of services and utilities at the premises prior to entering into a tenancy agreement. We suggest that any legislative provisions to this effect will need to clarify the types of embedded networks that must be disclosed.
32.	When should a rental applicant be told that a property uses an embedded network?	We support the provision of a standard information sheet (as suggested in the Paper) to prospective tenants at open house inspections and prior to signing a residential tenancy agreement.
9.2 Free ways to pay rent		
9.2.3 Options for a free and easy way to pay		
34.	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.	We suggest that the agent or landlord should be obliged to allow payment of rent by electronic funds transfer into a bank account nominated by the landlord. Payment in person by cash or cheque is no longer practicable in all cases.

⁵ 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, <https://www.ahuri.edu.au/research/finalreports/391>.

⁶ Diamond R, "What does economic evidence tell us about the effects of rent control?" October 2018, *Brookings Institute*

⁷ Diamond, Rebecca, Tim McQuade, and Franklin Qian. 2019. "The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco." *American Economic Review*, 109 (9): 3365-94

⁸ See notes 3 and 5.