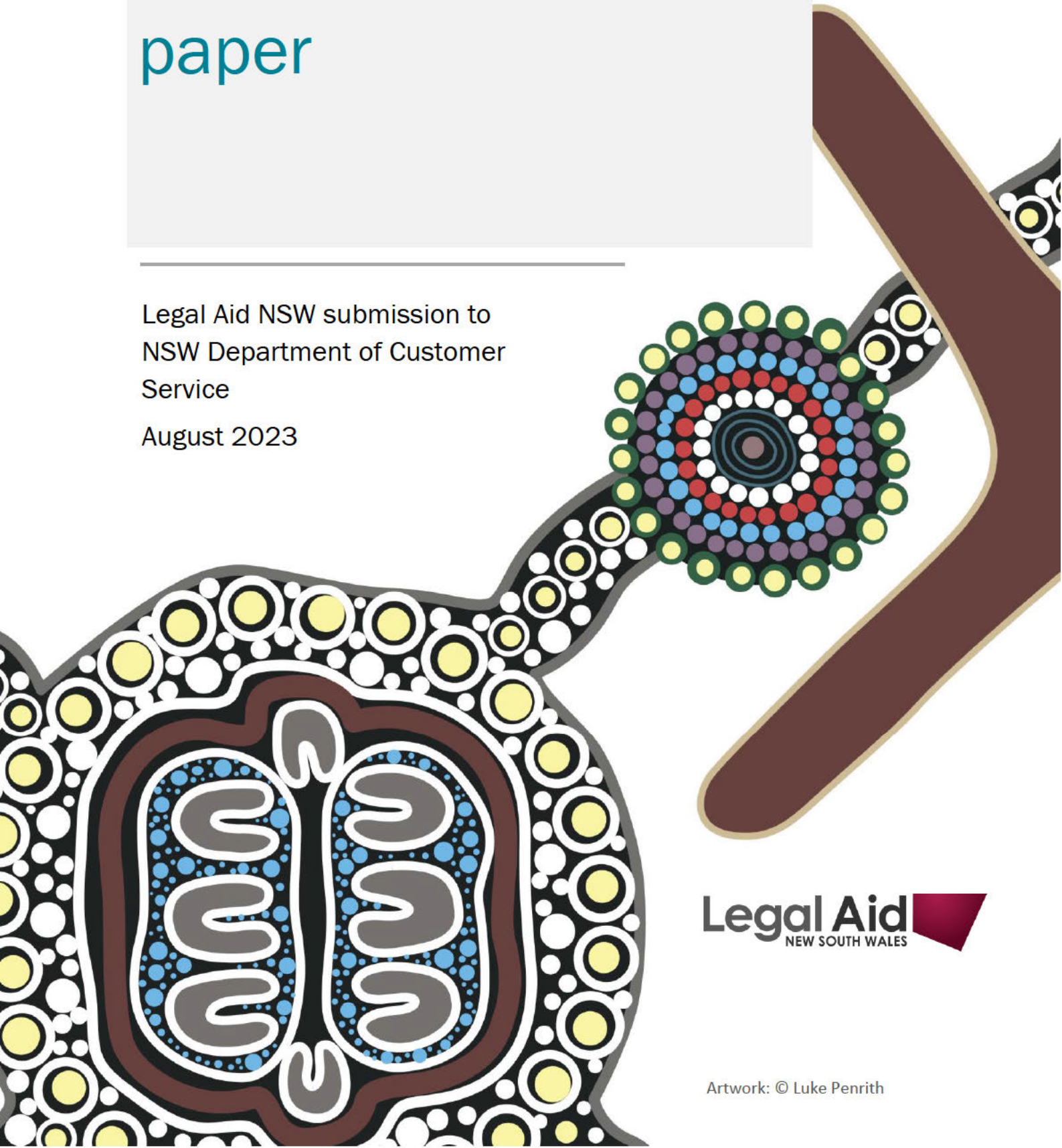
Improving NSW rental laws consultation paper

Legal Aid NSW submission to NSW Department of Customer Service

August 2023



Legal Aid NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

2. Executive Summary

Legal Aid NSW welcomes the NSW Government's commitment to make renting in NSW fairer and more affordable, and to provide greater protection for renters. We welcome the opportunity to make a submission in response to some of the matters in the Department of Customer Service's consultation paper on improving NSW rental laws.

Legal Aid NSW provides legal services across NSW in criminal, civil and family law, with an emphasis on assisting socially and economically marginalised people.[1] Access to stable and affordable housing is a consistent theme across all areas of our casework, with the overwhelming majority of our clients either renting, privately or in social housing, or experiencing homelessness.

Our Civil Law Division provides advocacy to tenants in social housing and private tenants, as well as owners and tenants in caravan parks, in matters such as rent arrears, repairs and damage, alleged anti-social behaviour and eviction notices. However, a lack of housing affordability and stability is also an issue that regularly intersects with other legal issues that our clients need advice about. In some instances, it exacerbates those other legal problems.

In this submission, we focus on the issues in the consultation paper that are of most importance to our clients. These include:

- "no grounds" terminations (questions 1-5)
- renters' personal information (questions 10-18), and
- rental affordability (questions 28-30).

Recommendations

Recommendation 1: "No grounds" terminations

"No grounds" terminations should be limited in relation to both periodic and fixed term leases.

Recommendation 2: The property is being prepared for sale

Preparation of a property for sale should not be included in the Act as a valid reason for a landlord to terminate a residential tenancy agreement.

Recommendation 3: Demolition, reconstruction, renovation and repair of premises

[1] Due to our grant eligibility policies, very few people we provide a grant to are homeowners.

- A landlord should only be permitted to terminate a tenancy agreement on the ground that they are demolishing, reconstructing, renovating or repairing the property, where they have obtained all necessary permits.

- In relation to terminations on the grounds of reconstruction, renovation or repair, the landlord should only be able to rely on this ground where the work cannot be carried out unless the renter vacates the premises, and the Act should prescribe a minimum period the property must be uninhabitable for.

Recommendation 4: Change of use of property

Landlords should be permitted to terminate a residential tenancy agreement on the basis of a "change of use" to the property, subject to appropriate legislative safeguards.

Recommendation 5: Landlord or immediate family member is moving into the property

Landlords should be permitted to terminate a residential tenancy agreement on the basis they, or a member of their "immediate family", are moving into the property, subject to appropriate legislative safeguards.

Recommendation 6: Notice periods

Landlords should be required to provide a notice period of:

- a minimum of 120 days when terminating a lease on the grounds of demolition, reconstruction, renovation or repairs, and
- a minimum of 90 days when terminating a lease on the ground of the landlord or an immediate family member moving into the property.

Recommendation 7: Ceasing to pay rent

Renters on fixed term leases who receive a termination notice from their landlord should be permitted to cease paying rent from the date they provide vacant possession to the landlord.

Recommendation 8: Evidentiary requirements for landlords

NSW should adopt Victoria's approach to the evidentiary requirements placed on landlords to substantiate the grounds for terminating a lease.[2]

Recommendation 9: Temporary bans on renting

There should be a temporary ban of six months on a landlord re-leasing a property as a residential tenancy, where the previous tenancy was terminated due to the property:

- being demolished, reconstructed, renovated or repaired

[2] Director Consumer Affairs 'Residential Tenancies Act 1997 – Documentary Evidence Requirements' in Victoria, *Victorian Government Gazette,* No S 142, 25 March 2021, 1.

    - being subject to a change of use, or
    - being occupied by the landlord or an immediate member of their family.

- The Act should provide for tenants to be able to seek compensation from a landlord who breaches the Act by renting out the property as a residential tenancy within the prohibition period.

- The Act should provide NSW Fair Trading with the power to issue a fine to a landlord entering into a new residential tenancy agreement within the prohibition period.

Recommendation 10: Limits on the information applicants can be asked for

Landlords and agents should only be able to obtain limited, and specific, information as part of a tenancy application.

Recommendation 11: Limits on the information landlords and agents can collect

Landlords and agents should be restricted in the information they can collect, but legislative exceptions should be provided for in relation to people with disability.

Recommendation 12: Standard tenancy application for

A standardised rental application process should be established, but with sufficient flexibility for people with a disability.

Recommendation 13: Disclosure of a renter's personal information

The Act should be amended to provide that information obtained during the rental application process can only be used for the purpose for which it was collected.

Recommendation 14: Securing of renter personal information

The Act should create a statutory duty on landlords and agents to appropriately secure the personal information of rental applicants and tenants.

Recommendation 15: Retention of renter personal information

The Act should provide that the personal information of rental applicants and tenants be destroyed after a prescribed period of time, in line with South Australia's approach in the Residential Tenancies (Protection of Prospective Tenants) Amendment Bill 2023.

Recommendation 16: Access to, and correction of, personal information

The Act should be amended to provide that rental applicants have a right to access, and correct, their personal information.

Recommendation 17: Rent increases

The Act should be amended to provide that only one increase in rent can occur in any 12-month period, irrespective of whether there has been a change to the type of tenancy agreement.

Recommendation 18: Rent increases for fixed term leases of less than 2 years

- The Act should be amended to provide that rent increases cannot occur, even by agreement, in a fixed term lease of 12 months or less.

- The Act should be amended to provide that for fixed term leases of over 12 months, but less than two years, only one increase in rent in a 12-month period is permitted and only when the agreement specifies the increased rent or the method of calculating the increase.

Recommendation 19: Regulation of rent increases

- The Act should be amended to provide that rent increases can only occur in line with the CPI for fixed term leases of longer than 12 months, subsequent leases and periodic tenancies, unless the landlord has obtained an order from NCAT permitting a greater increase.
- Section 44 of the Act should be amended to provide that when the Tribunal is considering whether a rental increase is excessive, it may have regard to the percentage increase in rent.

3. Removing “no grounds” terminations

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

We support the removal of “no grounds” terminations in NSW, except for in limited circumstances, which should be prescribed in the *Residential Tenancies Act 2010* (NSW) (**the Act**).

Legal Aid NSW has extensive experience providing advice to private tenants in relation to “no grounds” terminations.[3] We submit that an important step to improving housing stability is to limit the circumstances in which landlords can issue “no grounds” evictions.

The Tenants Union of NSW estimates that the basic cost of moving houses is $2,250 and that generally the cost is more likely to be around $4,075.[4] Therefore, a reduction in the number of times a tenant is required to move will reduce the financial burden of renting, not to mention the other benefits that can flow from a person remaining in the same residence and community.

The importance of housing is reflected in Australia’s international human rights law obligations, which provide for “the right of everyone to an adequate standard of living for himself and his family, including adequate… housing”.[5]

A 2018 report by the Australian Housing and Urban Research Institute (**AHURI**) noted that compared to most comparable countries, Australian tenancy laws provided for less security of tenure.[6] They also expressed the view that the “foremost approach to assuring tenants security is to allow landlords to terminate on prescribed grounds only”.[7]

Since this time, Queensland, the ACT and Victoria have all taken steps to limit, to varying degrees, the ability of landlords to terminate tenancy agreements without grounds. South Australia has also indicated an intention to legislate to limit the circumstances in which “no grounds” terminations can be used.

Periodic and fixed term leases

[3] We provided the following number of advice services on “no grounds” terminations in recent years: 2020/21: 240, 2021/22: 410, 2022/23: 330.

[4] Jemima Mowbroy, ‘The True Cost of Eviction’, This Renting Life- The Tenants’ Union Blog (Blog Post, 22 February 2022) < https://www.tenants.org.au/blog/true-costeviction#:~:text=Renting%20households%20in%20NSW%20face,of%20around%20%244%2C075%20to%20move.&text=Landlords%20also%20face%20a%20number,landlord%20at%20between%20%241%2C100%20%2D%201%2C400.>.

[5] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1).

[6] Chris Martin, Kath Hulse and Hal Pawson, The Changing Institutions of Private Rental Housing: an international review (AHURI Final Report No. 292, January 2018) 52.

[7] Ibid 5.

We submit that "no grounds" terminations should be removed in relation to both periodic and fixed term leases, as is the case in the ACT.

We note that in Queensland, where a fixed term lease can be terminated without grounds, the Real Estate Institute of Queensland recommended that property managers ensure that their tenants on fixed term leases did not roll over onto periodic leases.[8] Therefore, removing "no grounds" terminations only for periodic leases may result in only a marginal improvement in security of tenure for tenants, as landlords may be less likely to agree to tenants being placed on periodic leases.

We also note that between 2 August 2021 and 30 September 2022, NSW Fair Trading conducted an "end of tenancy" survey. Of those who completed the survey, the majority were on a fixed term lease.[9] Furthermore, of those who had responded to the survey and had received a "no grounds" termination, the majority reported being on a fixed term lease.[10] Based on this data, removing "no grounds" terminations only in relation to periodic tenancies will not even benefit the majority of renters. This is concerning given renters are the fastest growing tenure type in Australia.[11]

In Victoria, "no grounds" terminations are only permitted at the end of an initial fixed term lease.[12] However, we caution against such an approach given the risk of providing even less security of tenure than permitting "no grounds" terminations for all fixed term leases, given landlords will have an incentive to terminate leases at the end of each initial fixed term, which is most commonly six or 12 months.

A further problem with allowing "no grounds" terminations for fixed term tenancies relates to retaliatory evictions. Under the current retaliatory eviction provisions, the NSW Civil and Administrative Tribunal (**NCAT**) may find that a termination notice is retaliatory if satisfied that the landlord gave the termination notice due to being wholly, or partially, motivated by:

- an application, or proposed application, by the tenant to NCAT seeking orders
- the tenant having taken, or proposed to take, any other action to enforce a right, or

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[8] Joe Hinchliffe, 'Queensland real estate body tells landlords how to skirt new no-grounds evictions laws', *Guardian* (online, 5 August 2022) <Queensland real estate body tells landlords how to skirt new no-grounds eviction laws | Housing | The Guardian>.

[9] 'Explore metadata', *Data NSW* (Web page) < End of Tenancy Survey | Data.NSW>.

[10] Ibid

[11] Census 2021 – Jemima Mowbroy, 'Renters are the fastest growing tenure in Australia', This Renting Life- The Tenants' Union Blog (Blog Post, 4 July 2022). Between the 2016 and 2021 censuses, the number of renting households in NSW increased by 17.5%. This figure is based on an analysis of 2016 and 2021 Census data by Tenants' Union of NSW.

[12] *Residential Tenancies Act 1997* (Vic) ss 91ZZD- 91ZZDA.

- an order being in force between the parties.[13]

In our view, the protections for tenants are inadequate for a number of reasons. Firstly, the grounds to substantiate a retaliatory eviction are drafted very narrowly as they require either proceedings to have occurred or be on foot, or for the tenant to have taken, or proposed to take, other action to "enforce a right". For example, a landlord terminating a tenancy in response to a tenant negotiating a proposed rent increase or requesting a rent decrease in response to a change in the rental market, would not be considered retaliatory.

Secondly, even when NCAT is satisfied that the termination notice is retaliatory on the basis of any of the above reasons, this only engages NCAT's discretion to declare that the termination notice has no effect or refuse to make the termination order.[14] In our experience, NCAT often declines to exercise its discretion.

Thirdly, even if NCAT did invalidate the termination notice or refuse to make a termination order, a landlord may issue a subsequent termination notice the next time the fixed term lease is coming to an end, and it is very difficult for the tenant to substantiate that the newer termination notice was issued for retaliatory reasons.

Therefore, retaliatory evictions will remain an issue until "no grounds" terminations are limited in relation to both periodic and fixed term leases.

Recommendation 1: "No grounds" terminations

"No grounds" terminations should be limited in relation to both periodic and fixed term leases.

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

We submit that the reasons for a landlord being permitted to end a lease should be the same irrespective of whether it is a fixed term lease or a periodic lease. We address each of the proposed new reasons for ending a lease below.

3.2.1 The property is being prepared for sale

We do not support the fact a property is being prepared for sale as a valid reason for a tenancy to be terminated.

[13] *Residential Tenancies Act 2010* (NSW) s 115(2).

[14] Ibid s 115(1).

We note the Act already permits a periodic tenancy to be terminated on the basis that the landlord has entered into a contract for the sale of the premises and under the contract the landlord is required to give vacant possession.[15] The termination notice must also provide a termination date that is not earlier than 30 days after the notice is given.[16]

We have a number of concerns in relation to the inclusion of an "intention to sell" as grounds to terminate a tenancy. Firstly, if a property is sold to an investor as opposed to an owner-occupier, it is often the case that a tenant will be able to remain in the property after sale. By providing grounds for a landlord to remove a tenant prior to even being aware of who the purchaser is, there is a risk that a tenant is being removed from a property when this may not have even been necessary or even desired by the buyer.

Secondly, allowing a landlord to terminate a tenancy on the basis of an "intention to sell" is, in our view, too speculative. For a range of reasons, a landlord may not end up proceeding with the sale of a property, therefore there is a greater risk that tenants will be required to vacate a premises when it may not have even been necessary. We also believe that such a ground for terminating a tenancy is open to abuse as it can be difficult to determine whether a landlord's purported intention to sell is genuine. Although, we note that there may be ways to include in the Act evidentiary requirements for landlords that may reduce the risk of such a ground for termination being abused. This is discussed further below.

Recommendation 2: The property is being prepared for sale

Preparation of a property for sale should not be included in the Act as a valid reason for a landlord to terminate a residential tenancy agreement.

3.2.2 The property will be reconstructed, repaired, renovated or demolished

We have no objection to a tenancy agreement being terminated on the basis of the proposed demolition of a property. Although, we submit that a termination on the basis of the landlord wanting to demolish the property should only be valid where the landlord "has obtained all necessary permits and consents to demolish the premises".[17]

There is a need for caution in legislating that the repair or renovation of a property will be grounds for a landlord to terminate a tenancy.

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[15] Ibid s 86(1).

[16] Ibid s 86(2).

[17] *Residential Tenancies Act 1997* (Vic) s 91ZY(1)(b).

Firstly, we note that it is a term of every residential tenancy agreement that "[a] landlord must provide and maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises".[18] Permitting a landlord to terminate a tenancy on the basis that a premises requires "repair" or "renovation" risks allowing landlords to avoid their legal obligation to maintain a premises in a reasonable state of repair, then using the state of disrepair as justification to terminate a tenancy.

If this proposal is proceeded with, there is a need for the Act to stipulate conditions around when landlords can rely on the need to conduct repairs or renovation work to justify the termination of a lease.

In Victoria, it is a requirement that before terminating a residential tenancy agreement on the grounds of wanting to carry out repairs, a renovation or reconstruction, the landlord must have first "obtained all necessary permits and consents to carry out the work", and it must be the case that "the work cannot be properly carried out unless the renter vacates the rented premises".[19]

We would support such an approach in NSW. Although, we submit that NSW should go further by only permitting a termination on the grounds of repair, renovation or reconstruction, when the property will be uninhabitable for a minimum period of time.

Secondly, we recommend that the Act expressly state that a landlord is not permitted to rely on this ground where the work required to be done has arisen due to the landlord's breach of their obligation to maintain the premises in a reasonable state of repair (as above).

Recommendation 3: Demolition, reconstruction, renovation and repair of premises

- A landlord should only be permitted to terminate a tenancy agreement on the ground that they are demolishing, reconstructing, renovating or repairing the property, where they have obtained all necessary permits.
- In relation to terminations on the grounds of reconstruction, renovation or repair, the landlord should only be able to rely on this ground where the work cannot be carried out unless the renter vacates the premises, and the Act should prescribe a minimum period the property must be uninhabitable for.

[18] *Residential Tenancies Act 2010* (NSW) s 63(1), (4).

[19] *Residential Tenancies Act 1997* (Vic) s 91ZC(1)(c).

3.2.3 Change of use of the property

We have no objection to a landlord being permitted to terminate a lease on the basis of a proposed change of use. However, to ensure that this ground to terminate is not subject to abuse, the Act should place an evidentiary onus on the landlord, and provide a disincentive for landlords attempting to exploit this ground. Precisely how this might be achieved is detailed in sections 3.4 and 3.5.

Recommendation 4: Change of use of property

Landlords should be permitted to terminate a residential tenancy agreement on the basis of a "change of use" to the property, subject to appropriate legislative safeguards.

3.2.4 The landlord or a member of their immediate family is moving into the property

We have no objection to a landlord being permitted to terminate a lease on the basis that the landlord or a member of the landlord's immediate family intends on moving into the property. Once more, to prevent this ground being subject to abuse, there should be an evidentiary onus placed on the landlord and also a disincentive for landlords attempting to exploit this ground. Precisely how this might be achieved is detailed in sections 3.4 and 3.5.

We also submit that the Act should include a definition of "immediate family".

Recommendation 5: Landlord or immediate family member is moving into property

Landlords should be permitted to terminate a residential tenancy agreement on the basis they, or a member of their "immediate family", are moving into the property, subject to appropriate legislative safeguards.

3.3 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 submit that an appropriate notice period for a landlord terminating a fixed term or periodic tenancy on the ground the property is being demolished, reconstructed, renovated or repaired is at least 120 days. For leases terminated on the ground the landlord, or a member of their immediate family, is moving into the property, we submit that an appropriate notice period is at least 90 days.

We note that currently, a fixed term lease can be terminated with 30 days' notice, while a periodic lease can be terminated with 90 days' notice.[20] We submit that a decision by a landlord to put a property on the market, to change the use of a property, or to demolish, reconstruct or renovate a property, are significant decisions and are not decisions property owners generally make lightly. In some instances, it may even be necessary for the landlord to have sought approvals from local government to change the use of a property, or to have obtained appropriate approvals to demolish, reconstruct or renovate a property. Also, in the case of a termination notice that is issued on the basis that works at the property will be undertaken, the landlord will ordinarily have contracted with third parties to undertake the work, which again requires a level of pre-planning on the part of the landlord.

Given the thought and pre-planning that goes into making such decisions, we submit that it is reasonable to expect landlords to provide a termination notice at least 120 days prior to termination of the tenancy for both fixed term and periodic leases. In relation to a termination being issued on the basis the landlord or a member of their family is moving into the premises, we are open to the notice period being less, however not less than 90 days. This position is formed on the basis that we acknowledge less foreseeable events may occur that necessitate the landlord or an immediate member of their family needing to move into the residence.

The current notice period of 30 days that applies to fixed term tenancies is inadequate. This is especially so at times like the present, where vacancy rates are at record lows[21] and average rents at record highs.[22] We submit that tenants should be provided with adequate time to find appropriate and affordable housing. Such an approach is consistent with Australia's human rights obligations, which require "adequate and reasonable notice for all affected persons prior to the scheduled date of eviction".[23]

Lastly, we note that the Act currently permits a tenant who is evicted during a periodic tenancy to move out of the property and cease paying rent prior to the termination date.[24] However, tenants who are subject to fixed term tenancies and who receive a "no

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[20] *Residential Tenancies Act 2010* (NSW) ss 84(2), 85(2).

[21] In February 2023 the vacancy rate across Australia was reported to be 0.8%, the lowest on record- 'Vacancy rates: February 2023', *Domain* (Web page, 2 March 2023) <https://www.domain.com.au/research/vacancy-rates-february-2023-1198404/>. Since then, it has increased to 0.9% in May 2023- 'Vacancy rates: May 2023', *Domain* (Web page, 2 June 2023) <https://www.domain.com.au/research/vacancy-rates-may-2023-1216380/>.

[22] For example, rents are reported to have increased by 19.6 per cent in Sydney in the 12 months up until 20 July 2023- 'Weekly Rent- City: Sydney' *SQM Research* (Web page, 20 July 2023) < https://sqmresearch.com.au/weekly-rents.php?region=nsw%3A%3ASydney&type=c&t=1>.

[23] Committee on Economic, Social and Cultural Rights, *General Comment No 7: The right to adequate housing: forced evictions,* 16th sess, E/1998/22 (16 May 1997) [15].

[24] *Residential Tenancies Act 2010* (NSW) s 110.

grounds" termination notice must continue to pay rent until the termination date irrespective of whether they move out of the property.[25]

We submit that renters who are on fixed term leases should also be permitted to cease paying rent prior to the termination date, if they provide vacant possession to the landlord. This will reduce the cost of having to move on tenants, who are often forced to pay rent at two properties at once. This is more likely to occur when the rental market is tight and renters may be forced to accept a new lease whenever it comes up. Introducing this measure will hopefully reduce the financial burden on tenants around the time they are forced to move house.

Recommendation 6: Notice periods

Landlords should be required to provide a notice period of:

- a minimum of 120 days when terminating a lease on the grounds of demolition, reconstruction, renovation or repairs, and
- a minimum of 90 days when terminating a lease on the ground of the landlord or an immediate family member moving into the property.

Recommendation 7: Ceasing to pay rent

Renters on fixed term leases who receive a termination notice from their landlord should be permitted to cease paying rent from the date they provide vacant possession to the landlord.

3.4 What reasons should require evidence from the landlord? What should the evidence be?

We submit that where a landlord seeks to rely on any of the proposed new reasons for termination, they should be required to provide documentary evidence.

3.4.1 The property is being prepared for sale – evidentiary requirements

As noted above, we oppose this ground of termination being incorporated into the Act. However, if this ground is ultimately included in the Act, we submit that landlords should

[25] *Residential Tenancies Act 2010* (NSW) s 84.

be required to provide a signed contract of engagement to sell the property with a licenced real estate agent. This is consistent with the approach taken in Victoria.[26]

We submit that this approach is the best way to ensure that a landlord is genuine with their intention to sell the property as they will have contractual obligations to the licenced real estate agency.

This is preferable to the approach in the ACT where documentary evidence must be given of an intention to sell, but the Act only provides examples of types of evidence that might be satisfactory, including a statutory declaration.[27] It is also preferable to the approach in Queensland where there is no requirement for documentary evidence to be provided.[28] Although, in Queensland it is a criminal offence for a landlord to provide a tenant with a termination notice on the basis of an intention to sell the property, when that is actually false.[29]

3.4.2 The property will be reconstructed, repaired, renovated or demolished- evidentiary requirements

We submit that where a landlord seeks to terminate a lease on the basis that the property will be undergoing reconstruction, repair, renovation or demolition, the landlord should be required to provide documentary evidence.

We support the Victorian approach, which requires that when a landlord wishes to terminate a residential tenancy agreement based on needing to repair the property, they must provide:

- photographic evidence that the repairs are required, and
- a contract with, or a quotation from, a suitably qualified tradesperson for carrying out the repairs, which must also state:
    - the nature of the repairs
    - the reason why the premises needs to be vacated to allow the repairs to be carried out, and
    - an estimate of how long it will take for the repairs to be carried out.[30]

[26] *Residential Tenancies Act 1997* (Vic) ss 91ZZO(e), 486A; Director Consumer Affairs 'Residential Tenancies Act 1997 – Documentary Evidence Requirements' in Victoria, *Victorian Government Gazette,* No S 142, 25 March 2021, 1, 2.

[27] *Residential Tenancies Act 1997* (ACT) s 96(1)(d), (2).

[28] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 286.

[29] Ibid s 365A(1)(a).

[30] *Residential Tenancies Act 1997* (Vic) ss 91ZX, 91ZZO ; Director Consumer Affairs 'Residential Tenancies Act 1997 – Documentary Evidence Requirements' in Victoria, *Victorian Government Gazette,* No S 142, 25 March 2021, 1, 1.

Alternatively, the landlord can provide a building permit for any proposed renovation or repairs.[31]

We also support Victoria's approach to when a landlord terminates a residential tenancy agreement on the ground of an intention to demolish the property. This requires a landlord to provide documentary evidence in the form of a planning permit for demolition, and a contract with a builder-demolisher, stating the date on which the demolition will occur.[32]

3.4.3 Change of use of the property – evidentiary requirements

When a landlord terminates a residential tenancy agreement on the ground that they intend to change the use of the property, they should be required to provide documentary evidence in a form similar to what is required in Victoria.

In Victoria, the landlord must provide a statutory declaration which details:

- the intention to use the premises for a business
- the details of the particular business
- the fact the premises will not be leased as a residential tenancy for at least a period of six months after the termination notice was given, and
- either the ABN of the business, the business registration or licence, or the council planning permit.[33]

3.4.4 The landlord or a member of their immediate family is moving into the property- evidentiary requirements

We submit that where a landlord seeks to terminate a lease on the ground that they or an immediate family member will be moving into the property, they should be required, as is the case in Victoria, to provide a statutory declaration detailing either:

- that they intend on residing at the premises, or
- the name of the person who will be residing at the premises and the landlord's relationship to that person, and
- acknowledge that they are aware that they are unable to lease the premises as a residential tenancy, other than to the immediate family member, within six

[31] Ibid.

[32] Ibid ss 91ZY, 91ZZO; Director Consumer Affairs 'Residential Tenancies Act 1997 – Documentary Evidence Requirements' in Victoria, *Victorian Government Gazette,* No S 142, 25 March 2021, 1, 1.

[33] Ibid ss 91ZZ, 91ZZO; Director Consumer Affairs 'Residential Tenancies Act 1997 – Documentary Evidence Requirements' in Victoria, *Victorian Government Gazette,* No S 142, 25 March 2021, 1, 1.

months of providing the termination notice, unless approval has been given NCAT.[34]

Recommendation 8: Evidentiary requirements for landlords

NSW should adopt Victoria's approach to the evidentiary requirements placed on landlords to substantiate the grounds for terminating a lease.[35]

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

We submit that a temporary ban on renting should exist in relation to circumstances where a tenancy is terminated due to:

- it being demolished, reconstructed, renovated or repaired
- it being subject to a change of use, and
- it being occupied by the landlord or a member of their immediate family.

We submit that an appropriate length of the ban is six months.

We believe such an approach is necessary because there is a need to ensure that landlords do not abuse any of the grounds available to them to terminate a residential tenancy agreement in circumstances where the termination is not occurring in response to a breach of the agreement by the tenant. The evidentiary requirements will go some way to addressing this, but we also submit that there should be a prohibition on a landlord re-leasing their property as a residential premises.

In addition, we submit that the Act should provide grounds for a tenant to seek compensation from a landlord, in circumstances where a landlord re-leases a property as a residential tenancy within any prescribed prohibition period. We believe this is appropriate given, as indicated above, moving residential premises can be a very costly process.

Lastly, the Act should also provide NSW Fair Trading with the power to issue a fine to a landlord for breaching any prohibition period.

[34] Ibid ss 91ZZA, 91ZZO; Director Consumer Affairs 'Residential Tenancies Act 1997 – Documentary Evidence Requirements' in Victoria, *Victorian Government Gazette,* No S 142, 25 March 2021, 1, 2.

[35] Director Consumer Affairs 'Residential Tenancies Act 1997 – Documentary Evidence Requirements' in Victoria, *Victorian Government Gazette,* No S 142, 25 March 2021, 1.

Recommendation 9: Temporary bans on renting

- There should be a temporary ban of six months on a landlord re-leasing a property as a residential tenancy, where the previous tenancy was terminated due to the property:
    - being demolished, reconstructed, renovated or repaired
    - being subject to a change of use, or
    - being occupied by the landlord or an immediate member of their family.

- The Act should provide for tenants to be able to seek compensation from a landlord who breaches the Act by renting out the property as a residential tenancy within the prohibition period.

- The Act should provide NSW Fair Trading with the power to issue a fine to a landlord entering into a new residential tenancy agreement within the prohibition period.

4. Renters' personal information

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

We support limits being placed on what information applicants can be asked for as part of their tenancy application for the following separate, but inter-related reasons.

Firstly, such an approach will mean tenants are less likely to be subjected to intrusive requests for information from landlords and agents regarding personal matters. For example, recent media reporting has raised the fact that tenants are being asked for increasing amounts of information, and subjected to increasingly intrusive questioning, including applicants being asked for criminal history checks, credit checks, whether they have previously taken legal action against a landlord, and for their social media details.[36]

Secondly, "data minimisation" or restricting the amount of information landlords and agents are able to access from tenants may limit the opportunities for discrimination towards tenants that exists at the application stage of the rental process.

Thirdly, reducing the amount of information held by landlords and agents could mitigate the impact of any privacy breach.

Recommendation 10: Limits on the information applicants can be asked for

Landlords and agents should only be able to obtain limited, and specific, information as part of a tenancy application.

4.2 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.

Broadly, we support landlords and agents only being permitted to request from applicants the information provided in the table, for the reasons provided in the consultation paper. Namely, that there are three types of information generally required by a landlord to assess a tenancy application: identity information, financial information, and suitability information.

[36] Stephanie Convery, "'They're held over a barrel': in the overheated rental market, tenant vetting can go too far" *Guardian* (online, 29 May 2022) < They're held over a barrel': in the overheated rental market, tenant vetting can go too far | Housing | The Guardian>.

However, we submit that there needs to be an exception to permit landlords to collect information concerning an applicant's disability by consent, such as the nature of the disability and reasonable adjustments or facilities which the applicant may require. This is because one of the ways in which a claimant under the *Disability Discrimination Act 1992* (Cth) can overcome threshold issues in disability discrimination complaints is by first establishing that they have a disability and that they communicated the nature of their disability to the "service provider" (landlord), and therefore the landlord was on notice of their disability and should have made adjustments. In turn, this enables claimants to demonstrate, either at the conciliation stage or later in court, that the landlord knew about their disability and their request for reasonable adjustments. We note there may be a need for further consultation on this issue with social housing providers who provide housing to people with a disability.

Recommendation 11: Limits on the information landlords and agents can collect

Landlords and agents should be restricted in the information they can collect, but legislative exceptions should be provided for in relation to people with disability.

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

Broadly, we support a standard tenancy application form being incorporated into the Act or Regulations. This could be done in a manner similar to the prescribed tenancy agreement.[37] Although, we note that there is a need to consider the accessibility of a standardised form, and the fact there may need to be a degree of flexibility to address any accessibility barriers for people with a disability. Further consultation may need to be undertaken on this point with disability service providers and people with a disability.

Recommendation 12: Standard tenancy application form

A standardised rental application process should be established, but with sufficient flexibility for people with a disability.

[37] *Residential Tenancies Act 2010* (NSW) s 15; *Residential Tenancies Regulation 2019* (NSW) Sch 1.

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

Again, broadly we agree that limiting the information that may be collected by agents and landlords will reduce the likelihood of discrimination occurring in the application process. However, there is a need to ensure that increased regulation around the application process does not inadvertently create additional barriers for people with disability in being able to firstly complete any standardised application process, and secondly being able to disclose the nature of their disability and adjustments that may be required.

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

Yes, we support new laws that set out how landlords and agents can use and disclose a tenant's personal information. We submit that the Act should be amended to provide that the information that is obtained during the rental application process can only be used for the purpose for which it was collected, as is the case with the *Privacy Act 1988* (Cth). We note the *Privacy Act 1988* (Cth), only applies to real estate agencies that have turnover of less than $3 million per year, and landlords who are individuals.

We support the Act stating that the information could be used for the purpose of assessing tenancy applications for other properties in the future, however only where express consent has been provided.

Lastly, we note that landlords and agents may need to seek permission to disclose an applicant's or tenant's personal, health or disability related information to third party contractors if there is a need for a property to be assessed for modification or repair. It is important that agents and landlords be permitted to provide such information to third parties, however only where express consent has been provided by the applicant or tenant and where the information itself has been deidentified. It may be necessary for the Office of the Australian Information Commissioner to issue guidance to landlords and agents on the collection, use, retention, disclosure and deletion of personal information.

Recommendation 13: Disclosure of a renter's personal information

The Act should be amended to provide that information obtained during the rental application process can only be used for the purpose for which it was collected.

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

Information disclosure requirements should be consistent with the personal information protections afforded to other essential services. Residential tenancies are an essential

service, and improper use of information can obstruct easy access to that essential service. We note it is mandatory for an entity to which the Australian Privacy Principles under the *Privacy Act 1988* (Cth) apply, to have a privacy policy that sets out the management of personal information by the entity. The policy must be available for free upon request.

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

Yes, we support a legislated approach especially given the fact, as the consultation paper notes, many real estate agencies are not captured by the *Privacy Act 1988* (Cth), and individual landlords are also not captured by that Act.

We support such an approach given landlords and agents possess very personal and sensitive information regarding rental applicants and tenants. Even with a tightening around the information that agents and landlords may be able to request, the information they will be provided is still very personal, and they will still hold information from rental applicants and tenants from before any legislative change.

Inevitably data breaches will occur, and therefore it is important that the impact of data breaches is limited. One way to lessen the impact is to ensure that landlords and agents possess less information.

Recommendation 14: Securing of renter personal information

The Act should create a statutory duty on landlords and agents to appropriately secure the personal information of rental applicants and tenants.

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

We support an approach in line with the South Australian Bill referred to in the consultation paper, for the same reasons provided above in section 4.7.

Recommendation 15: Retention of renter personal information

The Act should provide that the personal information of rental applicants and tenants be destroyed after a prescribed period of time, in line with South Australia's approach in the Residential Tenancies (Protection of Prospective Tenants) Amendment Bill 2023.

4.9 Do you support requiring landlords, agents or proptechs to: (a) give rental applicants' access to their personal information, (b) correct rental applicants' personal information? Pease explain your concerns (if any).

Yes, we support this approach. The *Privacy and Personal Information Protection Act 1998* (NSW) (**PPIPA**) contains similar provisions.[38] Given the PPIPA does not apply to landlords, agents and proptechs, we support this proposal for the same reasons provided in 4.7 above.

Recommendation 16: Access to, and correction of, personal information

The Act should be amended to provide that rental applicants have a right to access, and correct, their personal information.

[38] *Privacy and Personal Information Protection Act 1998* (NSW) ss 14, 15(1)

5. Other changes to improve rental affordability

Data from NCAT reveals that the overwhelming majority of termination applications for private tenants and social housing tenants are in relation to rent arrears.[39] While there is a lack of data to indicate the reasons for the non-payment of rent, there is strong circumstantial evidence to indicate that it is a result of "systemic housing affordability problems".[40]

This is supported by our casework experience, where we observed a significant reduction in social housing tenants seeking assistance in relation to rent arrears, during the period when *Jobseeker* was increased due to the economic impact of COVID-19. We did however observe an increase in private tenants accessing our services during this time in relation to rent arrears, particularly households that had experienced a decline in income because of the pandemic, but who may not have been eligible for any of the additional government assistance available.

The fact the evidence indicates that rental arrears is a consequence of "systemic housing affordability problems" is important in determining appropriate policy responses to the rental crisis.

5.1 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

Yes, we believe that the "one increase per 12 months" limit should carry over if the tenancy changes from a fixed term tenancy to a periodic tenancy. We note that the consultation paper expressed concern that such an approach "may create an incentive for landlords to terminate a tenancy so that they can get a new tenant and increase the rent". However, this situation will be addressed if the government legislates to limit "no grounds" terminations in relation to both periodic leases and fixed term leases, as we recommend above.

[39] Chris Martin, 'Australian's Incipient Eviction Crisis: No going back' (2021) 46(2) *Alternative Law Journal* 134, 137.

[40] Ibid.

Recommendation 17: Rent increases

The Act should be amended to provide that only one increase in rent can occur in any 12-month period, irrespective of whether there has been a change to the type of tenancy agreement.

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

We submit that landlords should be prohibited from increasing the rent during a fixed term lease of 12 months or less. For fixed term leases of over 12 months, but under two years, we submit that a rental increase should only be able to occur once in the period of the lease and only when the agreement specifies the increased rent or the method of calculating the increase. This ensures greater consistency with longer fixed term leases and with periodic leases.

In NSW, a private landlord can increase the rent during a fixed term tenancy of less than two years, but only where the agreement states the amount of the increase or provides the method for calculating any increase in rent.[41] For fixed term leases of longer than two years and for periodic leases, rental increases can only occur once in any 12-month period.[42] There is no clear policy reason for why such a difference should exist.

Recommendation 18: Rent increases for fixed terms leases of less than 2 years

- The Act should be amended to provide that rent increases cannot occur, even by agreement, in a fixed term lease of 12 months or less.
- The Act should be amended to provide that for fixed term leases of over 12 months, but less than two years, only one increase in rent in a 12-month period is permitted and only when the agreement specifies the increased rent or the method of calculating the increase.

[41] *Residential Tenancies Act 2010* (NSW) s 42(1).

[42] Ibid ss 41(1B), 42(2).

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

We support greater regulation around rent increases as we believe that the current legislation does not appropriately balance the interests of tenants and landlords as outlined below.

While a tenant may challenge a proposed rent increase in NCAT, this is not a straightforward process for unrepresented tenants, given:

- an application must be filed within 30 days of receiving notice of the rent increase[43]
- the onus is on the tenant to substantiate that the proposed rent increase is excessive[44]
- there is a filing fee of $54 for any application,[45] and
- the tenant will need to lead evidence that speaks to any of the matters the Tribunal may have regard to in considering whether the proposed rent increase is excessive.[46]

There is often a power imbalance, particularly between unrepresented tenants, who may experience vulnerabilities such as a psychosocial disability and limited education or literacy, and a landlord, who is often represented by their agent. In our view, the current provisions not only fail to account for this power imbalance, but also do not strike an appropriate balance between competing interests.

We suggest this could be achieved by capping rent increases in line with the Consumer Price Index (**CPI**) for fixed term leases of longer than 12 months, subsequent leases and periodic tenancies. If the landlord wishes to seek an increase in rent more than the CPI, the onus should be on the landlord to seek orders from NCAT to this effect.

In relation to the option of altering the criteria that NCAT may have regard to in determining whether a rental increase is "excessive", we submit that the Act should expressly state that the Tribunal may consider the proposed increase in rent in terms of a percentage.[47] This is in line with the Tribunal also being able to consider "when the last increase occurred".[48]

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[43] Ibid s 44(2); *Residential Tenancies Regulation 2019* (NSW) reg 39(1).

[44] *Residential Tenancies Act 2010* (NSW) s 44(1).

[45] We note that the fee may be waived in circumstances where a tenant can show extreme financial hardship. A tenant simply being in receipt of Centrelink will not be sufficient, and in our experience, it is very unlikely a private tenant would be granted a fee waiver.

[46] The matters the Tribunal may have regard to are prescribed- *Residential Tenancies Act 2010* (NSW) s 44(5).

[47] Ibid.

[48] Ibid s 44(5)(g).

It is important that any reforms around rental caps are considered alongside the amendments to “no ground” terminations. Otherwise, there is a risk that legislated restrictions on rent increases will result in worsening security of tenure for tenants, as landlords may look to turn over tenants more frequently so that any rent increases are not subject to statutory or contractual restrictions. Most significantly, it is vital that “no grounds” terminations be restricted in relation to both fixed term and periodic tenancies.

Recommendation 19: Regulation of rent increases

- The Act should be amended to provide that rent increases can only occur in line with the CPI for fixed term leases of longer than 12 months, subsequent leases and periodic tenancies, unless the landlord has obtained an order from NCAT permitting a greater increase.
- Section 44 of the Act should be amended to provide that when the Tribunal is considering whether a rental increase is excessive, it may have regard to the percentage increase in rent.