

Residential Tenancies
Policy & Strategy, NSW Fair Trading,
Better Regulation Division
Department of Customer Service
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By online upload

11 August 2023

Submission re Improving NSW Rental consultation paper

To the Real Estate and Housing Policy team,

I refer to the **Improving NSW Rental consultation paper** your department published in July of 2023 that seeks feedback on a series of proposed changes to the rights and obligations of tenants and landlords under the *Residential Tenancies Act 2010* (NSW) (**the Act**).

Thank you for giving the general public the opportunity to comment on these important housing matters. I have outlined my perspectives below stemming from a lifetime of renting and as a recent legal graduate.

Landlords should be required to give reasons for all terminations

With respect to section 3.2 of the consultation paper, landlords should be required by law to give reasons for terminating a lease in all cases. Requiring landlords to provide reasons for terminating a residential tenancy including both periodic and fixed term leases would ensure tenants are protected against terminations that are motivated by retaliatory or vexatious reasons.

Those uncited reasons may often include discontent around being required or asked to undertake repairs even if they are clearly within the scope of a landlord's obligations, leverage for rental increases, disapproval of an application or request to make minor changes to the property or simply an alternative pathway to dispose of a tenant for minor non-compliance with a lease such as falling behind on rent.

Minimum tenure

At the heart of the socio-economic and power imbalances described in this submission is the fundamental lack of assured tenure for renters in NSW. Real estate agents now routinely ask (or only offer) lease periods that run for a mere 6 months. The average cost of moving continues to grow, but most renters will tell you the flag-fall cost of a move **starts at about \$1,000** before taking into account other expenses associated with missed days of work, damaged items

throughout the course of the move, new purchases to accommodate a different living environment and so forth. This means that renters are not only having to pay more towards the rising cost of rents across the state but are also having to absorb the related costs with moving as the average duration of fixed term leases shrinks.

If the NSW Government is serious about improving both housing stability and the cost of living with respect to rental housing, it needs to **expand the scope of this consultation to include consideration for introducing a minimum fixed term lease period**. That period should be no shorter than **1 year**, although longer periods should be normalised to reduce turnover and give tenants some confidence that they can enforce their basic rights without being immediately shown the door.

Realities of renting

The reality of renting is that a huge amount of discussions and negotiations regarding the state of repairs or the appetite for tolerating minor breaches of a lease are consistently advanced on an informal basis. Tenants will routinely forego enforcing provisions of a lease against a landlord even if they clearly enjoy certain rights under the lease or the Act wherever they are concerned agitating the landlord may result in their tenancy being terminated without reason or explanation.

While legally a tenant's rights can be enforced at a tribunal, the current tenancy framework essentially renders those rights worthless as any threat of enforcement increases the risk a tenancy will be terminated without grounds. The current framework does not require landlords to demonstrate that a termination is not in any way connected with previous disputes and tenants currently have no assurances that a termination has not been advanced based on their previous decision to assert their rights.

It therefore makes little sense to discriminate between fixed term and periodic leases since renters that have endured any confrontation with their landlord will have to face the prospect of their tenancy being terminated either within 3 months under a periodic lease or very often at the end of a fixed term lease where the notice period can be as short as 30 days. As mentioned, the duration of fixed term leases has also continued to shrink as a matter of practice across the real estate industry with 6 months now often being the preferred term offered by agents. This means that irrespective of what a renter does with respect to asserting their legal rights, landlords retain ample opportunities to discontinue an existing tenancy arrangement for reasons that do not need to be disclosed.

Evidentiary burden in the lease termination process

As discussed, the current law does not go far enough to ensure tenants are adequately protected against terminations that are motivated by a collateral purpose and places the evidentiary burden related to contesting terminations squarely on the shoulders of tenants.

While a tenant can apply to the tribunal to have a termination notice set aside where it is wholly or partly motivated by vexatious or retaliatory reasons under s 115 of the Act, that right is limited by subsection 3 to a short period of time following termination. Considering that under the current regime most landlords will serve a 'no grounds' termination notice if they wish to end a tenancy, demonstrating that an eviction was in fact retaliatory requires substantial resources from a tenant at a time when they are potentially facing homelessness or urgency to finance their next rental bond while simultaneously seeking alternative accommodation.

Even if a landlord terminates a tenancy on different grounds, such as the sale of the property, facts that may reveal that the cited reason for terminating a lease was employed merely to disguise a retaliatory termination may not be evident until months after the tenant has moved out. That will often be after the landlord has withdrawn their property from a sale or further renovation has been abandoned with the property being yet again relisted as available for lease. At that point, the outgoing tenants have already endured the expense of moving and will unlikely expose themselves to the additional expense of going to the tribunal to retrospectively vindicate a retaliatory eviction that will ultimately have no beneficial impact on their already altered living arrangements.

Enforcement and restrictions

In order to give the requirement to provide reasons for the termination of a lease any weight at all, the Act must be amended to require landlords to submit evidence that supports the reason they have cited in a termination notice. The evidence required should be in a defined pro forma format that speaks to clear criteria that can be communicated to tenants in a simple information memorandum.

The **presumption should generally be that the reason is not a legitimate reason until proven otherwise**. This could be enforced with a general restriction against renting out the property again for a defined period as described in section 3.5 of the consultation paper, however that restriction should apply for at least **1 year**.

Shorter periods that are referable to the reason for termination may be appropriate but risk incentivising landlords to repeatedly interrupt tenancies and otherwise withdraw useful housing stock from the rental market resulting in enormous costs to multiple successive tenants. Longer bans would also incentivise landlords to consolidate the opportunities they rely on to undertake renovations or improvements to their properties and place positive pressure on fully utilising available housing for the most amount of time rather than simply creating a high turnover of countless short term tenancies.

Other policy approaches that should be seriously considered include lifting the time limits on tribunal actions against landlords for breaching a lease or provisions of the Act to disincentivise retaliatory behaviour. Tribunals should be empowered to order landlords to retrospectively compensate renters who have had their lease terminated for a reason that was either retaliatory or did not match the declared reason on their termination notice.

No new grounds for ending a fixed term

Considering the issues above, introducing new additional reasons to terminate a lease under the Act as described in section 3.4 of the consultation paper could severely jeopardise the rights of renters further and significantly broaden the avenues landlords have to disguise retaliatory terminations.

Simultaneously, introducing additional reasons to terminate a lease will precipitate further pressure to increase the turnover rate of tenants and likely apply downward pressure on already relatively short fixed term leases. Allowing a landlord to end a tenancy merely in anticipation of a sale or to facilitate renovation will further incentivise poor management across the limited rental housing stock available in the market since there will be no economic cost associated with landlords interrupting successive tenancies multiple times in order to conduct piecemeal repairs

or to make minor changes while at the same time sowing opportunities to increase a property's rental price.

Rental increases should be pegged against the CPI

As suggested in section 8.3 of the consultation paper, the government should consider capping rental increases against an index such as the Consumer Price Index (**CPI**). This should be placed as an additional restriction to the existing prohibitions against excessive rental increases discussed in section 7 of the paper.

Pegging rent increases in line with the CPI would further rationalise housing as an essential need and move away from treating housing as a commodity and an entirely risk-free investment. The current framework allows landlords to pass through all of their costs through to tenants without additional regard or planning being paid to inherent market risks which is further incentivising poor behaviour. This also means that landlords readily enter into highly geared investments in residential properties that can continue to create increased profits for them while tenants disproportionately cover the cost of rising interest rates or any capital expenditures associated with the property. This creates perverse outcomes for the rental market as landlords are able to fund cosmetic renovations focused purely on inflating rental prices that may not necessarily improve the quality of housing.

Grounding rental increases against the CPI will bring housing back in line with other cost of living pressures and may assist in rebalancing the distribution of financial risk between landlords and tenants when it comes to the housing market.

Information transparency and security

As acknowledged in section 5 of the consultation paper, urgent action is needed to guard the personal information of renters. This should not only be viewed as a priority from the perspective of rental rights but also within the light of the state's broader strategy towards the mitigation of cybercrime and privacy risks.

The data that landlords and real estate agents are allowed to gather from renters needs to be strictly confined to a standardised form in order to prevent the widespread inappropriate use of personal information. The information that agents should be allowed to request from prospective tenants at the time of a rental application ought to be narrowly limited to:

- a NSW Driver's Licence or proof of age card;
- a passport (only where a licence or other ID is not available); and
- Payslips or other evidence of income

Renters should generally only be required to identify themselves using the lowest-level credentials that are available to successfully establish their identity. For example, agents should not be permitted to require copies of a passport where a prospective tenant has provided a digitally verified NSW Driver's Licence.

Further information gathering should only be permissible where the circumstances fit pre-defined criteria under legislation. Some of these may include where a tenant has disclosed a name change, previous conviction, bankruptcy, or is a foreign national subject to certain visa conditions.

Under the current framework tenants also do not have any ability to decline to provide their details for assessment against a tenancy database nor is there any standardised cost-free method for tenants to retrieve the records held by various information brokers. While there may be an argument for the preservation of tenancy databases, tenants should not be required to pay a fee in order to verify whether information brokers hold adverse listings that may affect their rental applications.

If renters are to continue to be subject to mandatory tenancy database checks as part of the regular procedure of applying for a property, **the information that may be published on a tenancy database should be limited to cases where there has been an adverse court or tribunal decision against the tenant.** Minor breaches of a lease or those resulting in putative sums owed to a landlord that have not been argued before a tribunal or court should not be permitted to appear on database listings.

Similarly, the utility of gathered information from tenants has a very short shelf life around the time a rental application is assessed and serves no further purpose after a tenant has entered into a lease or moved on to seek other accommodation. That considered, there is no reason real estate agents or landlords should be allowed to hold onto the information gathered for these purposes beyond **1 month** of submitting an application during which an offer to lease a property may be considered and processed.

Portable rental bonds should be accessible for all tenants

Provisions facilitating a portable rental bond scheme will undoubtedly be warmly welcomed by renters and should not form the basis for any argument from landlords seeking additional security or larger bonds beyond the currently permitted statutory limit of 4 weeks rent.

Section 6.2 of the consultation paper posits that there may be circumstances where the portable rental bond scheme would be inappropriate such as when a tenant has failed to pay back a bond on an earlier occasion. This reasoning risks undermining the scheme's objective of enabling more equitable access to the rental market. Limiting the accessibility of a portable rental bonds scheme also risks excluding those renters who are at the highest risk of rental stress and who may benefit the most from additional liquidity during times when they are required to move homes.

A portable rental bond scheme should be universally compulsory for all rental bonds irrespective of a renter's previous renting history. Nothing in the current proposal would necessarily undermine a landlord's ability to seek further remedies with the tribunal or to seek court orders in pursuit of having outstanding amounts paid. A limited opt-out pathway for portable bonds should be reserved at the option of tenants under circumstances where it is in their interest to maintain separate bonds, such as where they are named under multiple leases.

Rental bond top ups and periods

As discussed in section 6.2 of the consultation paper, although provisions to enable rental bonds to be topped up may be required where there is a shortfall, renters should be given an extended period to make up the difference. A period of 7 or 14 days is insufficient at a time when renters need to contribute a significant amount of money to moving costs. More appropriate intervals may be between **3-6 months** considering that landlords will already have the benefit of positive cashflow when a new tenant moves in. It must also be recognised that access to rental bonds remains restricted to circumstances where there is an actual claim against the bond as a result of loss stemming from unpaid rent or damage to the rental

premises. That considered, the funds locked up in a rental bond is not practically required immediately at the commencement of a lease and renters that are making genuine efforts to top up their required bond balance should not be disadvantaged at a time when they also have to front considerable moving costs.

If the government determines that there is significant liquidity risk that needs to be mitigated, it should make provisions to assist at least partially guaranteeing those shortfalls free of charge as part of the portable rental bonds scheme. Those assistive measures could be conditional on the renter agreeing to make consistent payments towards topping up the rental bond over the initial period of their lease; for example, making weekly repayments to towards their bond top up calculated at a rate of 10% of their agreed rent.

Additional changes to bond provisions required for share houses and sub-tenants

The proposals regarding the portable bond scheme in section 6.2 of the consultation paper fails to afford sufficient consideration to share houses and arrangements where there are sub-tenants involved under a head-lease with the landlord or homeowner.

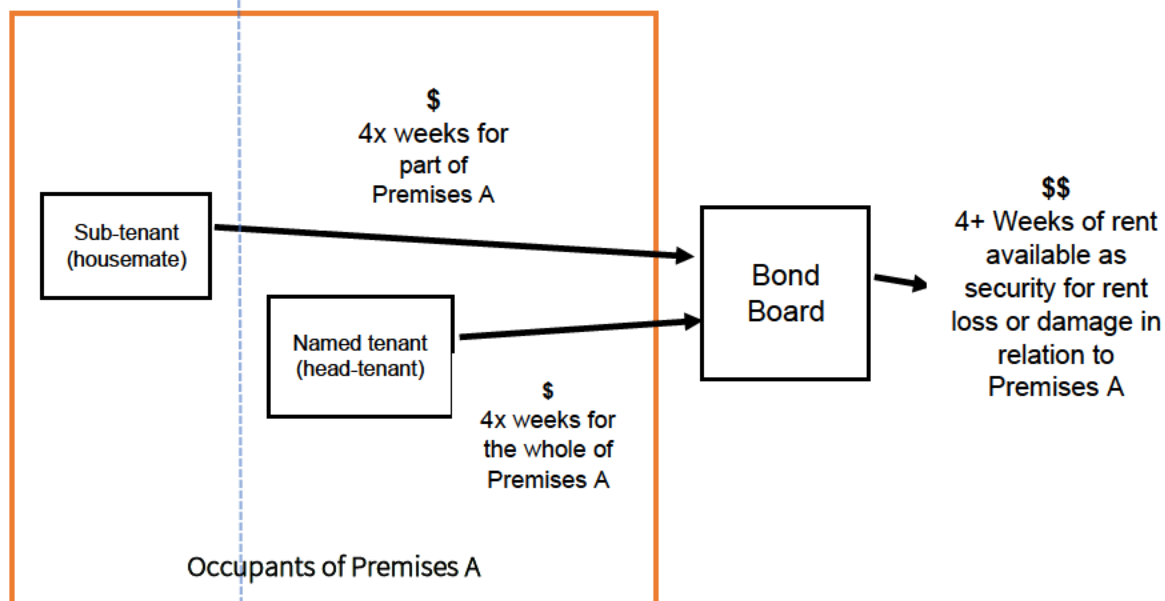
Share housing is now one of the most common methods for renters to share the rising cost of living with friends or peers, yet despite its popularity share housing is scarcely addressed in the residential tenancy legislation. Indeed, the Act continues to view renting through the lens of traditional property relationships modelled off 18th century feudal leasehold interests that do not accurately reflect the complexities of today's modern housing market.

One of the key areas where this is most apparent is the way the Act assigns statutory obligations upon renters without acknowledging the level of legal control (or lack thereof) that members of a share house have over their home. Share houses will often have people regularly move in and out throughout the lifetime of the share house. While some arrangements may have a fairly consistent member of the share house named in the lease with the landlord, other share houses may see multiple tenants rotate through that role as they move in or out. In many instances share houses might even continue to operate with none of the current occupants being formally named in the lease with a landlord.

Although some share houses choose to have new housemates added to the lease agreement directly with the landlord, many will simply take on new housemates on an informal arrangement. Under section 13 of the Act a residential tenancy agreement is defined broadly to include any express or implied agreement that may be oral or in writing which grants a right to occupy a residential premises. This means that most tenants that have rented out their spare room to a housemate or sub-tenant have entered into a residential tenancy agreement for the purposes of the Act. Although section 10 of the Act was supposedly inserted to address uncertainties in those situations it retains limited utility since it merely re-affirms that a housemate under an informal agreement will be regarded as a 'sub-tenant' where the head-tenant has some form of written agreement with the landlord or homeowner.

The resulting effect of categorising the relationship between a head-tenant and a housemate or sub-tenant as being analogous to that of a landlord-tenant is that all the requirements of having to lodge a separate bond, condition report and issue timely termination notices apply to the head-tenant in the same way they do to a landlord. Although in practice these matters may scarcely make it to a tribunal hearing, legally a 'head-tenant' with little control over the premises or the ultimate landlord's intentions will have to assume all those liabilities.

This becomes particularly perverse where the lodgement of bonds are concerned as a 'head-tenant' essentially creates a new lease with respect to their sub-tenant or housemate even if there is no written agreement whatsoever. Legally speaking, that new lease requires any bond money to be lodged with the Bond Board. Strict compliance with the Act actually results in the Bond Board **double dipping** into both the wallets of the head-tenant and that of their sub-tenants or housemates. This also means the board holds additional bond capital but only with respect to share houses or where there is a subleasing arrangement since the landlord must lodge a bond with respect to the head-lease and the head-tenant is obliged to also lodge the sub-tenant's (or housemate's) bond with the board. This is the case despite the fact that the head-tenant has already committed funds to the initial bond to cover any potential damage or shortfall in rent with respect to the landlord's property even though the landlord has not taken on any additional financial risk. In fact, in those circumstances the risk of a rent default from the perspective of a landlord will likely *fall* since additional income streams from different tenants are now being used to pay the rent.



Nevertheless, this has the real potential to cause additional financial pressures to head-tenants or housemates seeking to leave share houses or move to a new share house. Indeed, housemates may often be required to file transfer forms with the Bond Board between various other co-tenants that may have already moved out. If a head-tenant has previously financed a bond directly with a landlord they will invariably need to make additional funds available to cover another bond where they are moving to a new share house as a sub-tenant.

While the process with respect to retrieving a *complete* bond when offering up vacant possession of an entire property is reasonably straightforward, housemates and sub-tenants will commonly be asked to wait until somebody has been found to replace them before they get their bond back for the room or part of the property they have occupied. This remains fairly common amongst share housing as it becomes difficult to deal with formal bond filings at short notice and there is no ability for a co-tenant to withdraw their share of a bond with a landlord while the head-lease remains on foot.

The Bond Board has a form that enables named tenants under an existing bond to be swapped out but this still requires head-tenants to fund payouts to outgoing sub-tenants in the interim until new sub-tenants are found. The process is also not well adapted to arrangements where new tenants are not also simultaneously being added to the head-lease and is prone to create further confusion. The Rental Bonds Online system in certain ways has made matters worse as

co-tenants have to elect a 'principal tenant' who is solely responsible for dealing with the lodgement of online bonds via the Bonds Board portal.

Although the current policy position might be justified in terms of strict legal relationships it does little to service the subset of renters that are already suffering under rental stress and who are also often those engaging in share housing arrangements. At the same time, the current framework potentially locks up unnecessary capital in duplicate rental bonds that are covering the same level of risk to a landlord's property, essentially acting as an inflated insurance fund for homeowners.

In reality, the compliance with lodging bonds for sub-tenants and housemates is poor and most renters do not fully understand their obligations. Worse, members of share houses may seek to keep arrangements as informal as possible to avoid agitating real estate agents or landlords that may endanger their existing living arrangements. That often results in bonds not being lodged at all, being held privately or being lost or misappropriated by named tenants of the head-lease.

A portable rental bond scheme that is properly designed with share housing in mind presents a unique opportunity to recognise the diverse nature of living arrangements throughout NSW and protect the rights of all renters. This necessitates that a portable rental bond scheme acknowledges share housing arrangements and makes appropriate provisions for sub-tenants and housemates to retrieve their bond and be paid out with flexibility and ease when they move.

Such a scheme may require a rethink of how bonds are handled. A portable bond scheme that makes provisions for modular bonds that can be paid out partially on the basis of sub-tenants and are easy to transfer between housemates should be considered.

Further queries or information

If you have any further queries or would like additional clarification with respect to this submission please do not hesitate to contact me. Please feel free to publish a de-identified version of this submission where appropriate.

Kind Regards,