



Submission on
*Residential tenancy law
reform: a new direction*
– proposed changes to
NSW tenancy laws

Shelter NSW

December 2007

About Shelter NSW

Shelter NSW is a community-based, state-wide, peak body, which promotes the housing interests of low-income and disadvantaged people in New South Wales.

Shelter's mission is to work for a just and equitable housing system. We

- promote a coordinated response within the community sector to housing issues impacting on access to housing by low-income and disadvantaged people;
- work with and influence government and relevant community sector organizations to develop housing policies and programs that meet the needs of low-income and disadvantaged people and offer appropriate housing solutions;
- increase public awareness of housing issues and support for adequate and sustainable responses;
- research and develop responses to housing issues;
- provide quality information, assistance and support to the community sector, members and other stakeholders.

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1. Introduction

1.1 This submission from Shelter NSW is a response to select group of proposals presented in the consultation paper entitled: *Residential Tenancy Law Reform – A New Direction*, issued by the NSW Office of Fair Trading in September 2007.

The proposals under discussion in this submission relate to:

- Coverage of the Act;
- Rent arrears and termination; and
- Abandoned and Uncollected Goods.

In its discussion of proposals associated with coverage of the Act, Shelter NSW will comment and make recommendations on the value of a model of Occupancy Agreement.

Shelter NSW commends in principle the following tenancy law reform proposals outlined in the paper related to:

- Mortgagees taking possession (proposals 39-40)
- Co-tenant disputes (proposals 85-87)
- Tenant data bases (proposals 98-101)

We also commend two of the proposals within the Abandoned/Uncollected Goods proposals which relate to 'personal documents' and to compensation. We understand that currently the Act makes no special provision for 'personal documents such as passports, birth certificates, photographs etc.

Shelter NSW will not seek to address the full range of issues canvassed in the Consultation Paper as this is a task more appropriately left to the Tenants' Union of NSW.

2. The context

2.1. The Shelter NSW submission will confine its comment to discussion of some key issues contained in the review paper which have the potential to diminish the tenancy rights of people on low incomes to have a fair, just and equitable housing system.

Fairness suggests balance, and in the case of the Residential Tenancies Act and its reforms, the balance between landlord and tenant is critical. However a reading and analysis of the Consultation Paper indicates a heavy bias towards the landlord lobby. Evidence of this imbalance is reflected in the reliance on incorrect assumptions concerning proposed changes in the Act and how they could influence the expansion of the rental housing market.

Shelter NSW notes with concern, the suggestion¹ that the reform proposals set out in the 2007 Consultation Paper may in some sense assist with overcoming the 'current affordability crisis in housing'.

We note that the Minister is of the view that the proposed changes will assist by:

‘not making it so difficult for landlords to be landlords, as that will encourage more people with rental properties back into the market. The feedback we have had from the Real Estate Institute and other such organisations is that they believe that will be the effect of the changes we are making’

Shelter NSW disputes this contention and refers the reader to our previous Submission on the Residential Tenancy Options Paper in August 2005, which sets out strong evidence to show that residential tenancy law and regulation have minimal impact on investors’ decisions but that consideration of tax and capital gains are the major drivers for investment and disinvestment.

Causes and remedies for availability of rental properties

A brief recapitulation of our earlier argument concerning the causes and remedies for availability of rental properties, revolves around changes in investment patterns and ultimately a loss of stock at the bottom end of the market.² This argument can be supported by the following observations from our earlier submission:

- Paris³ explained explains the relative prosperity of Australia’s private rental market in terms of the effect of the interaction of the expansion of home ownership and the advantageous tax treatment of rental property investment - the latter being largely the combination of negative gearing and a modest capital gains tax:

“The distinctive combination on these two dimensions of Australian housing provision has transformed the private rental sector from an investment vehicle providing long term rental income yield to one which primarily provides short-term capital appreciation...only realisable through sale into a market where prices are primarily determined by demand from home-owners”

This encourages relatively short term investments

- In the past decade there has been an unprecedented level of investment in private rental housing. Yates, Wulff and Reynolds⁴ attribute the reason for this to taxation provisions that encourage negative gearing amongst investors facing high marginal tax rates and which, through the interaction of depreciation allowances and capital gains taxes, encourage investment in new rental dwellings.
- However, the overall increase in the rental housing stock masks an important fact. The increase in private rental stock has been largely at the top end of the market. At the same time there has been a loss of stock at the low priced end of the market. Low income tenants, as well as facing a dwindling supply of stock, are also facing competition from better-off tenants for lower cost housing.⁵

Supply-side strategies

Berry, Whitehead, Williams and Yates⁶ state that one of the persistent recommendations of policy reviews and enquiries over the last decade in Australia has been the need to encourage increased private investment into affordable housing at the lower end of the rental (and owner-occupied) market.

Shelter NSW in its earlier submission noted that supply side strategies that encourage institutional investors into the private rental market would effect arrangements between landlords and tenants. We noted that it was more likely that long term tenancies would be created with these types of investors.

It is evident from the Consultation Paper discussion on long term leases that consideration of arguments by tenant advocacy groups on the necessity for supply side strategies has had a part to play in the dropping of proposals canvassed in the previous Options Paper. Accordingly Shelter NSW endorses proposal 48 in the Consultation Paper and welcomes the opportunity to participate in further examination and consultation on the issue of long term leases. We note that long term leases are possible under the current laws and believe the issue is how to support long term tenancies.

We wish to reiterate our concern about the absence of supply-side strategies that encourage more institutional investors into the private rental market. There is little likelihood of long term tenancies becoming common place without this type of investor.

While we acknowledge that the Minister for Fair Trading does not have the brief to look at supply-side issues, it is a matter that governments must address if talk of long-term tenancies is to be more than rhetoric.

Coverage of the Act

We reiterate our disappointment that the previous Options Paper did not give consideration to extending coverage of the Act to persons living in rental accommodation who are not covered by tenancies legislation. Indeed we note that the current Consultation Paper proposes more exclusions from the New South Wales Residential Tenancies Act.

Shelter NSW concurs with the view of Tenants Union in its dismay that it is especially vulnerable tenants who will lose the protection of the Act. We are especially concerned about the proposed exemption of refuge and crisis accommodation from the tenancy laws and we strongly endorse the Tenants Union Submission in response to the NSW Office of Fair Trading Residential Tenancy Law Options Paper from 2005, on this matter.

In the cause of achieving a fair and balanced set of recommendations to reform the Residential Tenancies Act, Shelter NSW wishes to argue for wider

inclusion and coverage of renters who are without effective means of legislative protection for their tenancies and disputes resolution.

Shelter NSW believes that there are already tenants in many of the categories proposed for exemption from the Act who are at present successfully covered by it and have a landlord which is a Registered Housing Association Provider⁷. In light of the experience of Churches Community Housing Ltd in managing a large portfolio of supported housing tenancies in partnership with a range of church and community support agencies, we make three recommendations.

Recommendation 1

Do not exclude refugees and crisis accommodation from the Residential Tenancies Act.

Recommendation 2

Amend the Residential Tenancies Act to make provision for occupancy agreements.

Recommendation 3

Include boarders and lodgers within coverage of the Residential Tenancies Act.

Occupancy Agreements

The Tenants' Union have developed a briefing paper on: Occupancy Agreements – A new model of law reform for boarders, lodgers and other renters excluded from the *Residential Tenancies Act 1987* (NSW).⁸

The model is based on recent legislation in the Australian Capital Territory for 'occupancy agreements' (Residential Tenancies Amendment Act 2004 (ACT), Part 5A).

The elements of this new model of law reform are:

- Broad application
- Some basic, non-prescriptive legislated rights
- Provision for the creation of standard terms
- Dispute resolution by the tribunal

The Tenants' Union preferred model of legislation creates a statutory scheme of enforceable agreements for all renters not covered by current residential tenancies legislation, and a statutory process for the creation of a range of specific standard terms, each made according to the different conditions of the sort of accommodation to which it applies.

Shelter NSW strongly believes that such an Occupancy Agreement Model has merit and warrants further in-depth discussion and consultation – both with parties representing the interests of individuals living in and providers of: short to medium term accommodation, crisis accommodation, supported

accommodation and all others who rent accommodation and are excluded from NSW residential tenancies legislation.

It could be expected that consultation would focus on and interrogate practical and relevant mechanisms for application of Occupancy Agreements under an amended NSW Residential Tenancy Act.

We note from observations in the Consultation Paper⁹ that there is recognition of the specific needs of various forms of accommodation under the Act:

'Housing co-operatives and medium term supported accommodation providers are different in many respects to the average landlord. Therefore, the same laws that apply to the general tenancy market should not necessarily always apply to these types of tenancy arrangements. There is a case for introducing separate termination grounds and other flexibility in order to assist co-operatives and supported accommodation providers to better manage their properties'

Just as the current Consultation Paper made Proposal 74 for specific provisions to be introduced to better deal with issues faced by housing co-operatives and supported accommodation providers, it appears equally reasonable that a similar process should take place with relevant players interested in the ambit of a potential occupancy agreement.

Proposals of Concern to Shelter NSW

Proposals of concern to Shelter NSW are those which reflect a grave imbalance against tenants, especially those tenants who are vulnerable due to low literacy skills, tenants with cognitive impairments, tenants from non English speaking background and tenants from groups who have had negative experiences in the justice system, such as Aboriginal tenants.

Shelter NSW views proposals on Rent Arrears & Terminations (proposals 12-18) and Abandoned /Uncollected Goods (proposals 19-24) as draconian and unjust.

Rent Arrears & Terminations

We concur with the Tenants' Union's concern regarding the proposals in the so called 'streamlined' process for dealing with rent arrears.¹⁰ Along with the Tenants' Union, Shelter NSW strongly opposes the proposed change where the landlord takes action in the Consumer, Trader and Tenancy Tribunal (the Tribunal) to terminate the tenancy on the grounds of rental arrears. We note that under the current regime, the onus is on the landlord to apply for a hearing of the Tribunal. Whereas under the proposed new regime: the tenant would have to apply for a hearing, and if they do not apply for a hearing, the landlord could apply to the Tribunal for a termination order without a hearing (an 'administrative order').

Shelter NSW commends and endorses in the section of the Tenants' Union of NSW submission to this enquiry, dealing with Rent Arrears and Termination.

Abandoned/Uncollected Goods

Similar to the abovementioned rental arrears proposals, these proposals have the effect of compounding the already vulnerable positions of those tenants subject to termination or eviction, by not providing fair and equitable process with dealing with goods that have been left behind by a former tenant.

Shelter NSW supports the Tenants' Union contention that the regime proposed will represent an extraordinary interference in tenants' personal property rights. We also note that 'disputes about goods left behind often arise when a landlord withholds the goods from a former tenant, or where a landlord seeks to dispose of goods hastily.'

We note along with the Tenants' Union that the range of circumstances in which goods may be immediately disposed of is too wide. The class of goods subject to immediate disposal (that is, 'any items which [do not] appear to have been accidentally left behind') is badly defined and too wide. The seven day time frame for disposal of goods left behind accidentally and goods left behind after eviction is too short. This raises the question of whether it is envisaged that the Tribunal will have a role in resolving disputes about goods left behind. If it were, it is unlikely that it can be initiated and performed within seven days of an eviction.

Endnotes

¹ Cited in Gareth Griffith and Lenny Roth "Residential Tenancy Law in NSW" Briefing Paper No13/07, NSW Parliamentary Library Research Service, p. 45

² Judith Yates, Maryanne Wulff, Margaret Reynolds, *Changes in the supply of an need for low rent dwellings in the private rental market*, Australian Housing and Research Institute, S , Sydney Research Centre, June 2004, p.i

³ Chris Paris, *Housing Australia*, MacMillan, Melbourne, 1993,p.176

⁴ Yates, Wulff &L Reynolds op.cit p.5

⁵ ibid p.i

⁶ Mike Berry, Christine Whitehead, Peter Williams and Judith Yates, *Financing Affordable Housing: A Critical Comparative Review of the United Kingdom and Australia*, Australian Housing and Research and Urban Research Institute, November 2004 p.56

⁷ Churches Community Housing Ltd. See website: www.churcheshousing.org.au

⁸ Chris Martin, Tenants' Union of NSW Briefing Paper ,*"Occupancy Agreements – a new model of law reform for boarders, lodgers and other renters excluded from the Residential Tenancies Act 1987 (NSW)*

⁹ NSW Office of Fair Trading "Residential Tenancy Law Reform – A New Direction, September 2007, p.41

¹⁰ Tenants' Union Briefing Paper on NSW Office of Fair Trading's proposals for law reform