

**Submission
No 10**

RESIDENTIAL TENANCIES AMENDMENT (RENTAL FAIRNESS) BILL 2023

Organisation: Public Interest Advocacy Centre (PIAC)

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PIAC submission to the Residential Tenancies Amendment (Rental Fairness) Bill 2023 inquiry

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Introduction

PIAC welcomes the opportunity to make a submission to the Legislative Assembly Select Committee on the *Residential Tenancies Amendment (Rental Fairness) Bill 2023* (the Bill).

The Public Interest Advocacy Centre (PIAC) provides free legal advice and assistance to people experiencing or at risk of homelessness through the Homeless Persons Legal Service (HPLS) and the Women's Homelessness Prevention Service (WHPS). We see daily the consequences of inadequate regulation of rental housing and how it contributes to risk and incidence of homelessness.

Reform of regulation of rental housing in New South Wales is urgently needed. PIAC commends the NSW Labor Government for considering it a priority and initiating reform to the legislation early in its term. PIAC supports extending the existing ban on solicited rent bidding to landlords and third parties and the creation of a portable bond scheme.

PIAC is concerned, however, that clause 22B of the Bill will negatively impact people living on low incomes or who are otherwise vulnerable to homelessness or housing stress. Clause 22B is highly likely to contribute to increasing rents in current market conditions, which are already severely impacting people who rent their home, placing them at risk of homelessness and/or in financial hardship.

PIAC joins with other organisations to urge the NSW Government to remove rent bidding altogether. Housing is a basic need and an essential service that must be regulated as such. We support an end to rent bidding by introducing regulation that would prohibit landlords, real estate agents and/or third parties from offering, soliciting or accepting a higher rent than the advertised price.

However, if the NSW Government is committed to formalising rental auctions, they must conduct further consultation, including a detailed consideration of how auctions would be regulated and of the potential impacts on rents and on people living on low incomes. In the interim, provisions must be put in place to prevent rent bidding.

We understand the intention of this clause is to deliver greater transparency so that those who might be in a financial position to make a higher offer to secure a property will be given a fair opportunity to do so. But this will benefit a very small number of renters. And entrenching rental auctions will have unintended consequences by pushing up rental prices, putting more people at risk of homelessness and housing stress.

We urge the NSW Government to consult with people who rent their home, and have experiences of housing insecurity and homelessness, before developing potential policy changes further.

This submission follows the structure of the terms of reference of inquiry.

1.1 Whether clause 22B of the Bill will provide sufficient transparency for applicants to enable them to make informed decisions if bids higher than the advertised rental price are received during the application process to secure a residential tenancy.

While clause 22B (2) (a) states that a landlord must give all applicants written notice of a higher offer, clause 22B does not provide sufficient transparency or clear regulation of the rental auction process to allow applicants to make informed decisions.

This is because:

- Applicants have no clear view of the intentions of the landlord and of other applicants intentions
- There are no clear rules stipulating how long a rental auction will last, how applicants will be informed that they are being considered an 'acceptable applicant', or how many times applicants might make a higher/counter offer or withdraw an offer

The definition of 'acceptable applicant' is also broad, with no test to determine the intention of the landlord at the time they receive the higher bid (whether they would be 'willing to enter into a residential tenancy agreement' with the applicant).

We note that other type of auctions in NSW are much more highly regulated, for example, by prescribing record keeping, conditions of sale and notifications of such conditions, and rules for sellers and bidders.¹ More detailed regulation of rental auctions under clause 22B (if desirable at all) would be needed to provide sufficient transparency for applicants to make informed decisions. There is also nothing in the Bill to ensure that landlords and real estate agents do not engage in dummy bidding, directly or indirectly, or otherwise encourage dummy bidding.

1.2 The impact of clause 22B on improving disclosure and transparency requirements compared to the current rental application process.

We note the important, related impact of clause 22A compared to the current rental application process. Clause 22A ensures that landlords and third parties are covered by the legislation. This is an improvement compared to the current rental application process, which only covers licensed real estate agents who undertake leasing functions in relation to residential premises under the *Property and Stock Agents Regulation 2022*. We support this change.

Clause 22B does slightly improve disclosure and transparency compared to the current rental application process, but this is outweighed by the potential for negative consequences for people who rent their home by entrenching rental auctions and pushing up rental prices.

There are other mechanisms and law reform options that can increase transparency and protect people who rent their home without pushing up rent prices and risk creating 'bidding wars'. We propose to introduce regulation to end rent bidding altogether by prohibiting both solicited and unsolicited offers, and clearer, stronger regulation of applications processes (see section 1.4).

¹ *Property and Stock Agents Regulation 2022* (NSW) Part 3, Part 5.

1.3 How clause 22B might be expected to influence applicants' transactional behaviour.

The lack of detail about how rental auctions under clause 22B makes it difficult to predict more precisely how the introduction of this clause might influence applicants transactional behaviour.

The following parameters could all affect applicants behaviour:

- how long a landlord might continue to review offers and inform applicants that a higher offer has been made ('the duration of the auction')
- the number of times an applicant might make a higher/counter offer
- the definition of an 'acceptable applicant'

More broadly, it will be difficult to identify the specific impact of clause 22B on applicants' transactional behaviour. This is because there are so many other variables at play, such as the vacancy rate in local rental housing markets, the length of time the applicant is able to wait to secure a home, accessibility barriers (e.g. discrimination, specific dwelling needs).

This being noted, we can reasonably expect the following:

- Some applicants, will make a 'higher offer' to ensure their application is on the 'top of the pile'. This is likely to be done by people who have a strong preference for one specific property, either for trivial reasons, or more concerningly, because they have specific dwelling needs due to disability. This would also be a way for applicants who know they might be discriminated against, for example because of their race, age or sexual orientation, to 'compensate' against potential prejudice.
- Applicants who did not secure a property on their previous applications will become increasingly likely to make a 'higher offer' as they become worried and frustrated they have not yet secured a new property. As their need to relocate becomes more urgent, either because they are being evicted, or relocating for work or other reasons with a clear deadline to secure a new home, their willingness to pay a higher price for a rental property will increase. People at risk of homelessness and more broadly all renters will become more likely to lock themselves into housing they cannot afford by putting in a higher bid to avoid homelessness or meet this deadline.

We also note we can reasonably expect clause 22B to change the other parties transactional behaviour by incentivising landlords and real estate agents to solicit higher bids, either directly or indirectly, in contravention of clause 22A (3). This is because landlords directly benefit from a higher rent, and real estate agents benefit indirectly through higher commissions, as they are usually set as a percentage of rent for the property.

Given that enforcement of clause 22A (3) might be difficult, and that current regulation through the *Property and Stock Agents Regulation 2022* did not result in a single fine being issued,² we expect this incentive to lead to increased illegal behaviour by landlords and real estate agents.

² M chae McGowan, No rea estate agents f ned for break ng NSW rent b dd ng ru es, desp te hundreds of warn ngs , *The Guardian* (On ne, 3 March 2023) < <https://www.theguardian.com/australia-news/2023/mar/03/no-rea-estate-agents-f-ned-for-break-ng-nsw-rent-b-dd-ng-ru-es>>

We also note that proposed clause 22B will incur significant administrative costs for real estate agents, landlords, and Government agencies who might be in charge of enforcement. If clause 22B was to be implemented, which PIAC does not support, there should be an option for landlords to opt out by agreeing to lease the property at its advertised price and not accept any higher offer. They would then avoid being subject to the requirements of clause 22B.

While the Government's intention is to increase transparency in the rental market by eliminating secret bidding³, the introduction of rental auctions under clause 22B is all but guaranteed to push up rental prices. This is because rental properties will either end up being rented at their advertised price, or at a higher price. This does not benefit renters.

Landlords and real estate agents have sufficient information available to them (median rent for similar dwellings in the local area, previous rent prices, etc.) to set an appropriate advertised rent. They can also vary rent to reflect market conditions sufficiently often, through pre-leasing agreement for fixed term tenancies, and through an unregulated increase once in every 12 months period for periodic agreements.

Providing housing is an essential service. It must be regulated as such. We propose to introduce regulation to end rent bidding altogether by prohibiting both solicited and unsolicited offers.

Recommendation 1 – End rent bidding by prohibiting solicited and unsolicited offers

Introduce regulation prohibiting landlords, real estate agents and/or third parties to enter a tenancy agreement with rent set at a price above the advertised price.

1.4 Whether there are any additional measures to improve transparency for applicants during the rental application process or better protect applicants without formalising an auction process for rental properties.

Stronger, clearer regulation of application processes for rental properties has potential to better protect applicants without formalising an auction process, delivering better outcomes for people who rent their home. It must be considered as a priority.

Recommendation 2 – Open a consultation on regulation of application processes for rental properties

Mandate the Rental Commissioner to consult and report on better regulation of application processes for rental properties, considering but not limited to a prescribed application process and/or form, criteria to be used when assessing rental applications, provision of reasons for accepting or declining applications, compliance and enforcement, and options for monitoring and evaluation.

³ NSW Government, Reforms to ease the paying fee and deliver relief for renters (Media release, 10 May 2023) <<https://www.nsw.gov.au/media-releases/rental-reforms-choose-ophoes>>

PIAC's position is that rent bidding should be prohibited permanently in order to protect renters, particularly the most vulnerable, and avoid pushing up rents. This is in line with regulation of other essential services.

If the NSW Government continues to consider formalising rental auctions, we recommend that at least rent bidding be expressly forbidden as an interim measure while thorough consultation is conducted with all stakeholders. This will ensure people who rent their home are protected while a clear, highly regulated process is considered.

Recommendation 3 – Open a consultation on rental auctions led by the Rental Commissioner

Mandate the Rental Commissioner to consult and report on a potential framework for rental auctions in NSW, considering but not limited to definitions of applicants/acceptable applicants, duration of the auction, rules around higher offers, counter offers (number of offers and how much they might differ from initial advertised price) and offer withdrawals, regulation of recordkeeping, compliance and enforcement, and options for monitoring and evaluation.