Submission No 7

RESIDENTIAL TENANCIES AMENDMENT (PROHIBITING NO GROUNDS EVICTIONS) BILL 2024

Organisation: City Futures Research Centre, UNSW Sydney

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Legislative Assembly Select Committee on the Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2024

NSW Parliament

To the Committee

Re: *Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2024*

I am glad to have the opportunity to make this submission on the *Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2024* (the Bill). I strongly support the Bill, subject to some amendments that are consistent with its aim of improving the security of renters and their ability to make a home in rental housing in NSW.

The submission reflects my experience of working in residential tenancies law for almost 25 years, as an academic and before that as an advocate. I am a Scientia Senior Research Fellow in the City Futures Research Centre, UNSW Sydney, where I specialise in research into rental housing law and policy. My recent research publications include the reports 'Regulation of residential tenancies and impacts on investment' (2022) and 'Towards an Australian Housing and Homelessness Strategy: understanding national approaches in contemporary policy' (2023), both published by the Australian Housing and Urban Research Institute (AHURI), and several academic articles on residential tenancies law reform.[1] Prior to my academic appointment in 2015, I worked for 13 years as the Tenants' Union of NSW's policy officer, and before that as an advocate at Southern Sydney Tenants Advice and Advocacy Service. I currently serve on the management committee of the Eastern Area Tenants Service and am a past Chair of Shelter NSW.

[1] Martin, C., Hulse, K., Ghasri, M., Ralston, L., Crommelin, L., Goodall, Z., Parkinson, S. and O'Brien Webb, E. (2022) *Regulation of residential tenancies and impacts on investment*, AHURI Final Report No. 391, Australian Housing and Urban Research Institute, Melbourne, https://www.ahuri.edu.au/research/finalreports/391, doi: 10.18408/ahuri7124801; Martin, C., Lawson, J., Milligan, V., Hartley, C., Pawson, H. and Dodson, J. (2023) Towards an Australian Housing and Homelessness Strategy: understanding national approaches in contemporary policy, AHURI Final Report No. 401, Australian Housing and Urban Research Institute Limited, Melbourne, https://www.ahuri.edu.au/research/final-reports/401, doi: 10.18408/ahuri7127901.

General comments on no-grounds reform

No-grounds reform is the single most important tenancy law reform that the NSW Parliament could make today. It goes to the single most unsatisfactory aspect of the current experience of renting: its insecurity. It is also the reform on which other improvements in the renting experience depend. For renters to have the full benefit of their rights under the *Residential Tenancies Act 2010* (NSW) (RT Act), they must be assured that their tenancies cannot be terminated without good reason.

No-grounds reform will benefit all renters, but will not equally disadvantage all landlords. It is the retaliators, the discriminators and the incompetent landlords who will suffer a detriment from losing their ability to take termination proceedings without specifying the grounds and justifying their case. No-grounds reform is not zero-sum.

No-grounds reform is the first of the nine-point 'Better Deal for Renters' agenda announced by the National Cabinet in August 2023. The ACT has removed provision for no-grounds evictions from its residential tenancies legislation; similar amendments have been enacted, but are yet to commence, in South Australia. Victoria and Queensland have recently legislated to limit, but not entirely remove, provisions for no-grounds evictions in their respective Acts. In both jurisdictions, the failure to eliminate no-grounds evictions is being exploited by bad actors and presenting new regulatory problems, especially in Queensland. Genuine no-grounds reform – that removes all provision for termination proceedings by landlords without grounds, and replaces them with new reasonable grounds – would place NSW among the leading jurisdictions in Australia.

No-grounds reform would also bring NSW law into closer alignment with the human right to housing recognised at international law. Over the past 30 years, the right to housing has been the subject of comments and decisions by the United Nations Committee on Economic, Social and Cultural Rights ('UN CESCR') that have elaborated on state obligations to ensure that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction', and that evictions occur only after accessible legal proceedings to 'ascertain that the measure in question is duly justified', only as a 'last resort', and not to 'render individuals homeless'. [2]

In these terms, replacing provisions for no-grounds termination with reasonable grounds is necessary to ensure eviction is always 'duly justified'. It is necessary, but not sufficient for bringing the law regarding tenancy termination into line with the right to housing: justification, whether termination is a last resort, and whether homelessness will result also require that the tribunal has scope to consider the circumstances of each case and to decline termination where that's necessary for justice.

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2 Committee on Economic, Social and Cultural Rights, Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with Regard to Communication No 5/2015, 61st sess, UN Doc E/C.12/61/D/5/2015 (21 July 2017) 11 [15.1]–[15.2] ('Djazia and Bellili v Spain'). See also the discussion in Kenna, P. (2018) 'Introduction' in Kenna, P. et al (eds), *Loss of Homes and Evictions across Europe: A Comparative Legal and Policy Examination*. Edward Elgar, Cheltenham: 1-65.

The Bill deals with both these aspects of no-grounds reform: the grounds, and the tribunal's scope to decline termination. Some refinements should be considered in both respects but generally the Bill would make a crucial and long-overdue improvement to NSW residential tenancies law.

Abolishing no-grounds

The Bill would end the ability of landlords to give termination notices without grounds towards the end of the fixed term of a tenancy (s 84), and during a periodic tenancy (s 85). To be clear, 'the end of the fixed term' is not a ground for termination, and termination notices given under s 84 are a type of no-grounds notice that should be abolished.

The Bill does not deal with s 94, which also provides for no-grounds terminations in the rare circumstances of a tenancy that has continued for more 20 years or more. This section should also be repealed.

New grounds for termination

The Bill provides for three new grounds for termination, and for additional new grounds to be prescribed by regulation. The three new grounds are:

1) the landlord or an associate intends to occupy the premises for at least 12 months;
2) the landlord intends to carry out repairs or renovations that would render the premises uninhabitable for at 4 weeks; and
3) the premises will be used in a way, or kept in a state, such that they cannot be used as a residence for at least six months.

In general terms these grounds are appropriate, although I suggest that the wording of each should be tightened. In particular:

- In the first two grounds, reference to mere intention may encourage landlords to represent that they intend a use and subsequently not actually use the premises in the relevant way. Such a course would be unlawful: new s 85A(2) states that the landlord 'must ensure the premises are used in accordance with the ground' and provides penalties and remedies where the landlord does not do so. For consistency, the grounds should use 'will', not 'intends to'.
- The third ground would encompass justifiable reasons for seeking termination, such as that the premises will be changed to a non-residential use, but it is worded in a broad way that may admit other less justifiable uses and 'states'. For example, would keeping the premises disconnected from electricity and water (such that they are uninhabitable) satisfy the requirement of the ground? I suggest the ground should instead be that the landlord will change the use of the premises to a non-residential use, subject to the change of use being permitted by relevant planning instruments and, where required, that development consent has been given by the relevant consent authority.

The new grounds do not include 'prepare for sale'. The omission is appropriate. Rental properties are frequently sold to other landlords. In a recent research project, colleagues and I conducted a

survey of rental investors in western Sydney, and found 43% of properties acquired by investors had been used as rental housing immediately prior to purchase. Furthermore, in 75% of those acquisitions the renter signed a new agreement with the incoming landlord.[3] The proportion of landlord-to-landlord sales would vary geographically, but such sales should be regarded as a reasonable prospect across the market generally. Allowing termination in preparation for sale is therefore unnecessarily disruptive, with renters bearing the costs of the disruption. The expectation should be that premises may be marketed for sale with the tenancy remaining on foot (provided that the tenant does not give a termination notice themselves).

Where a landlord sells a rented dwelling to a purchaser who requires vacant possession, the provision at s 86 should be used – although it may be useful to amend that provision in light of the new grounds. It should provide that a landlord may give a termination notice on the ground that they have entered into a contract for the sale of the premises under which the landlord is required to give vacant possession for a reason corresponding to the three grounds at new ss 84 and 85: i.e. use as a home by the purchaser or their associate (1)(a); reconstruction, repair or renovation (1)(b); or change of use (1)(c).

Regarding the offence provision at s85A: it is appropriate that abuse of the new grounds be an offence. There is a small defect in the provision, in that it refers to where a 'termination order was made'. Tenancies may terminate by the tenant vacating in response to a termination notice, without termination orders, and the offence should apply in these circumstances too. I suggest replacing 'termination order was made' with 'tenancy was terminated.'

Provision for the tribunal to decline termination

In wider discussions about no-grounds reforms, the issue of what new grounds should be introduced has overshadowed another issue that is scarcely less important: that of if and when the tribunal may decline to make termination orders in proceedings following a termination notice, even where the termination notice is valid and the grounds are established. This issue is sometimes discussed in terms of the tribunal's 'discretion' (which may be indicated in legislation by the use of the permissive 'may order') although strictly speaking it can also be addressed by non-discretionary provisions that direct the tribunal ('must order') to terminate subject to certain conditions. The key thing is that there should be provision for the tribunal to decline to make termination orders.

The RT Act's current treatment of the issue is complex. It affords discretion in some types of termination proceedings and not in others, and where it affords discretion it structures the decision-making in different ways. In proceedings on the ground of the tenant's breach (s 87), the Act provides that the tribunal 'may' make a termination order 'if it is satisfied that… the breach is, in the circumstances of the case, sufficient to justify termination (s 87(4)(b)). In no-grounds

[3] Pawson, H. and Martin C. (2021) 'Rental property investment in disadvantaged areas: the means and motivations of Western Sydney's new landlords', *Housing Studies*, 36:5, 621-643, DOI: 10.1080/02673037.2019.1709806

termination proceedings under ss 84 and 85, the tribunal is afforded no discretion: it must terminate (provided the notice is valid and the proceedings are not retaliatory) and has discretion only as to the date for possession. Under the Act's predecessor, the *Residential Tenancies Act 1987* (NSW) (the 1987 Act), the tribunal was afforded scope to decline termination in most types of termination proceedings, including in no-grounds proceedings, 'considering the circumstances of the case' (s 64; *Swain v Roads and Traffic Authority [1995] NSW Supreme Court* 30034 (unreported, Rofe J, 22 March 1995)). The omission of this provision from the 2010 Act was a retrograde step that made no-grounds termination notices a trump card for landlords, compounding their pernicious effect. Section 94 effectively preserved the 1987 Act's scope to decline termination in no-grounds proceedings only for those rare 20+year tenancies: the tribunal 'may' terminate 'if the Tribunal is satisfied it is appropriate to do so in the circumstances of the case' (s 94(1)(c)).

The Bill provides that in proceedings on any of the three new grounds (and any additional grounds prescribed by regulation) the tribunal 'must terminate', subject to the condition that 'the termination is appropriate in the circumstances' (new ss 84 (3)(iii) and 85 (3)(iii)). So, it affords some scope to decline termination, in terms that are similar, but not identical, with the 1987 Act and s 94.

The formulation is sound but I suggest one of the two following alternative should be considered instead. Each connects with jurisprudence that would usefully guide the tribunal and promote security and justice.

- Require the tribunal to consider whether the termination is justified, taken as a last resort, and whether the renter would be evicted into homelessness. This would expressly align with international jurisprudence on the human right to housing, discussed in the introduction to this submission.
- Require the tribunal to determine whether termination is 'reasonable and proportionate'. This is the formulation used in the recently amended Victorian *Residential Tenancies Act 1997* (Vic) (s 330(1)(f)). In *Hanson v Director of Housing* [2022] VSC 710, the Victorian Supreme Court's first major decision on the new provisions, the Court emphasised the requirement of an 'active intellectual consideration' by the tribunal of the impact of termination on the tenant, which may include, according to the tenant's evidence and submissions, an assessment of the likelihood that the tenant may be made homeless. In that case the tribunal had 'failed to make a finding as to the likelihood of [the tenant] becoming homeless, [so] the Tribunal was not then properly able to weigh that possible impact on him in the analysis of whether the possession order was reasonable and proportionate.'

I would be pleased to discuss the Bill and this submission further with the Committee.

Yours sincerely

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