

**Submission
No 229**

**INQUIRY INTO SOCIAL, PUBLIC AND AFFORDABLE
HOUSING**

Organisation: Legal Aid NSW

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The Director
Select Committee on Social, Public and Affordable Housing
Parliament House
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Dear Sir/Madam

Inquiry into social, public and affordable housing

Legal Aid NSW welcomes the opportunity to respond to the terms of reference to the Legislative Council Inquiry into social, public and affordable housing currently being conducted by the Social, public and affordable housing Committee.

Legal Aid NSW is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners.

Our civil law solicitors advise clients living in social and public housing, with a particular focus on clients experiencing, or at risk of, eviction or homelessness. Where appropriate, we litigate on behalf of our clients. This practical experience provides a strong base from which to provide comment to the inquiry.

In this submission we will focus on two issues relevant to the inquiry;

1. the role of residential tenancy legislation in the provision of affordable housing and
2. improving the internal decision-making processes of Housing NSW and review of Housing NSW decisions.

Role of residential tenancy legislation in the provision of affordable housing

Residential tenancy legislation can place stresses and demands on the social housing system. In our experience, many tenants renting in the private market in NSW are anxious about the security and affordability of their housing. The *Residential Tenancies Act 2010* does not provide adequate protection from arbitrary or unfair eviction, or from excessive rent increases. This lack of protection often results in tenants forgoing other rights, such as requesting repairs.

There are two changes that could be implemented to make private tenancy more secure and less open to exploitation. They are:

- (a) remove the ability of a private landlord to seek termination for no grounds, and
- (b) improve the determination process for excessive rent increases.

Remove the ability of a private landlord to seek termination without stating a ground

Under the current Act, a landlord may serve on a tenant a 'no grounds' notice of termination, giving 30 days' notice to end the tenancy at the expiration of the term of the agreement, or 90 days' notice for a periodic agreement. If the landlord then applies to the NSW Civil and Administrative Tribunal to obtain possession of the property, the Tribunal has no discretion to refuse the order unless the tenant can establish that the eviction was retaliatory.

A landlord will always have a reason to seek to end a tenancy, and should not be able to shelter behind a 'no grounds' notice if that reason is discriminatory, retaliatory or otherwise unfair. This is the reason that notices of this type are not used in social housing, and neither should they be available in the private market.

The Act already contains a number of grounds on which a landlord may terminate a tenancy, including for breach, or to require the property to live in or sell. However, in our experience, private landlords rarely use termination notices other than 'no grounds' notices, except in the case of rent arrears. The ability to serve a 'no grounds' notice should be removed from the legislation and replaced with the ground of 'other reason not listed'. Final authority would then rest with the Tribunal to decline to end a tenancy if appropriate.

Improve the determination process for excessive rent increases

The current legislation places the burden of proof on the tenant to establish that a rent increase is 'excessive'. This places a significant burden on tenants and can leave them vulnerable if they are not able to obtain sufficient information to challenge a rent increase. Landlords are best placed to access and outline this information.

Legal Aid NSW recommends that the onus of proof in excessive rent increase determinations should be placed on the party with the greater access to the relevant information, namely, the landlord.

Housing NSW – internal decision-making and review

Housing NSW is charged with the management of the state's public housing stock. As a government agency, there is an expectation that it will not only be efficient and effective in its administration, but also fair, equitable, accountable and transparent. These characteristics are the embodiment of good governance. It is therefore important for Housing NSW to ensure that:

- Policies and legislation are correctly applied
- It is clear what factors are taken into account in a decision
- Decisions are made in a timely manner
- Adequate reasons are given for decisions
- Decisions are consistent across the Department
- Discretion is exercised in appropriate cases

We have found that where these practices are not followed, problems can be exacerbated by a confusing arrangement of policies and the absence of a proper system of review. Presently, a person aggrieved by a decision of Housing NSW may apply to the Housing Appeals Committee (HAC). The HAC has no basis in legislation and is only able to make a recommendation that may or may not be implemented by Housing NSW. Housing NSW's own policies provide no guidance about the circumstances in which a HAC recommendation might be implemented.

Further, after the HAC stage there is no further mechanism for merit review of decisions nor any easily accessible forum for judicial review. The sole recourse available is to seek judicial review in the Supreme Court. Legal Aid NSW currently has conducted a number of these cases, and they are prohibitively expensive for both the applicant and Housing NSW. It is recourse that would be beyond the means of most, and especially the economically and socially disadvantaged that are the people that typically interact with Housing NSW.

Legal Aid NSW recently had carriage in the Supreme Court of the judicial review matter of *Twaddell v New South Wales Land and Housing Corporation* [2014] NSWSC 7, and a copy of the judgment is **attached** to this submission. That case concerned the decision to cancel a tenant's rent subsidy following an allegation that her former partner resided in the property. The subsidy was cancelled by the tenant's local Housing NSW office despite internal advice from the Tenant Fraud Unit to not do so (see paragraph 26). Our client sought review at the Housing Appeals Committee, which recommended that the subsidy should be reinstated. This recommendation was not implemented by Housing NSW, which then took steps to terminate our client's tenancy. With the assistance of Legal Aid NSW, the tenant was able to have the decision of Housing NSW set aside. The NSW Land and Housing Corporation has since filed a Notice of Intention to Appeal in the Court of Appeal in respect of this decision.

This case illustrates the action and resources currently required to correct decisions of Housing NSW. But for the intervention of Legal Aid NSW, the tenant and her children would have lost their public housing tenancy.

Instead of having to take action of this magnitude, review of Housing NSW decisions should be available in the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal (NCAT). This is the forum of review for many other government decisions and the Division has the expertise to efficiently deal with these matters. Representation at the NCAT is not required and its processes are geared towards accessibility for non-represented parties.

Having recourse to accessible review encourages a culture of good decision-making within an agency and can lead to substantial improvements to processes and practice. It would also promote good governance by enhancing public perceptions of the fairness of Housing NSW decision-making.

Further, greater accountability can be achieved by having Housing NSW policies drafted in a more consistent, accessible and integrated manner. Guidelines should also be issued to provide guidance to the decision-makers, the public and their advisers.

Legal Aid NSW appreciates the opportunity to provide these submissions. For further information, please contact Damien Hennessy on (02) 4629 2753 or by email at damien.hennessy@legalaid.nsw.gov.au.

Yours sincerely

Bill Grant
Chief Executive Officer