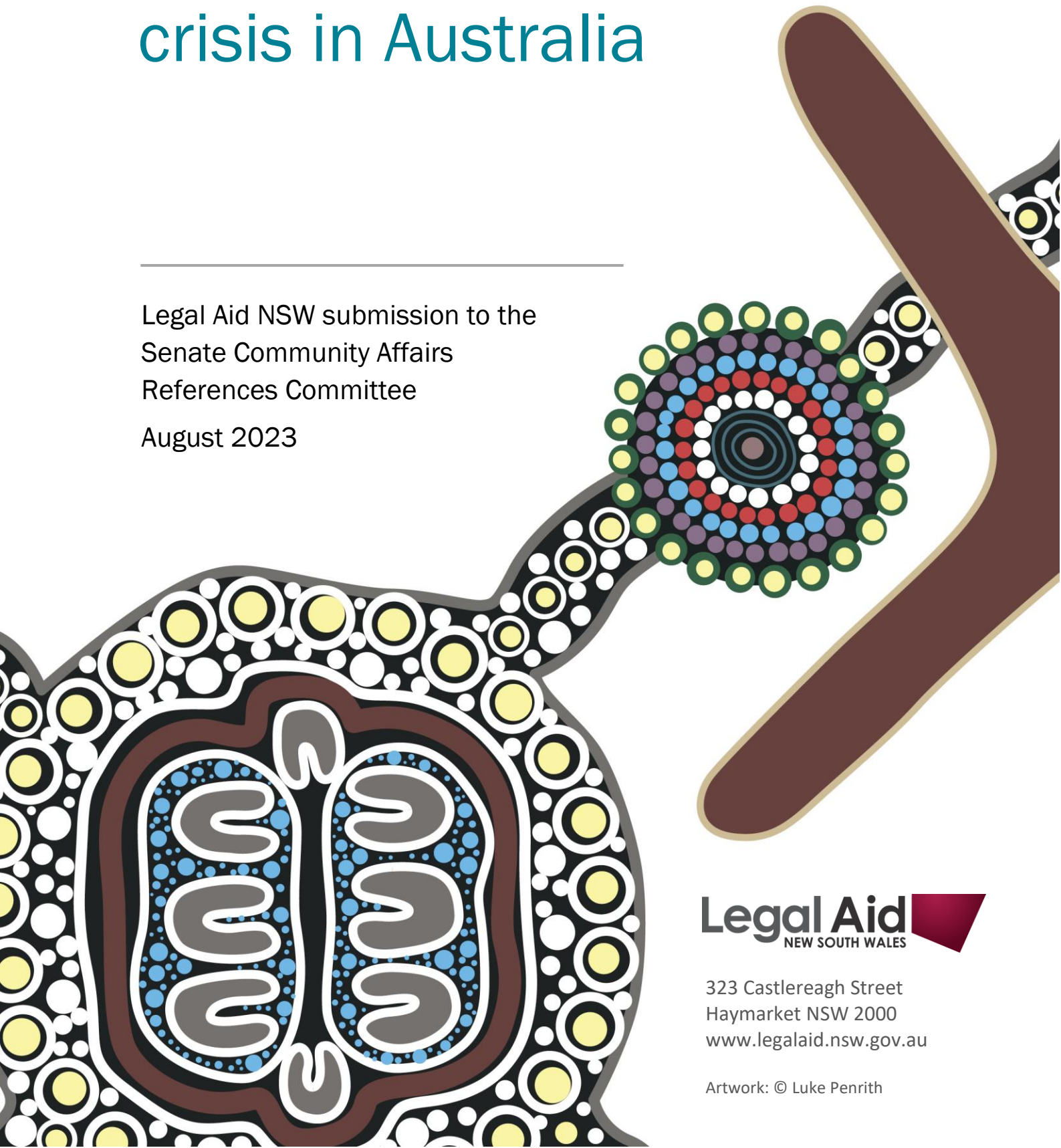


Inquiry into the worsening rental crisis in Australia

Legal Aid NSW submission to the
Senate Community Affairs
References Committee
August 2023



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NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

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2. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Community Affairs References Committee's inquiry into the worsening rental crisis in Australia.

We provide legal services across NSW in criminal, civil and family law, with an emphasis on assisting socially and economically marginalised people.¹ Access to housing is a consistent theme across all areas of our casework, with the overwhelming majority of our clients either renting, privately or in social housing, or experiencing homelessness.

Our Civil Law Division provides advocacy to tenants in social housing and private tenants, as well as owners and tenants in caravan parks, in matters such as rent arrears, repairs and damage, alleged anti-social behaviour and eviction notices. However, a lack of housing affordability and stability is also an issue that regularly intersects with other legal issues that our clients need advice about. In some instances, it exacerbates those other legal problems.

Our submission highlights the following critical issues in relation to the housing crisis:

- The need for residential tenancy legislation to strike a better balance between the interests of landlords and tenants in terms of when, and by how much, rent can be increased.
- The need for residential tenancy legislation to limit “no grounds” evictions and expressly prescribe the limited circumstances in which they are permitted.
- The increasing role being played by non-government social housing providers, and the need to ensure that tenants in non-government housing have equal rights and protections to those who reside in government social housing.
- The barriers for people experiencing a housing crisis to access emergency short-term accommodation provided by government and non-government providers, due to eligibility requirements.
- The impact of the housing crisis on people who are experiencing domestic and family violence, including on their decision to leave a violent relationship, and the need to ensure government housing programs better support victim-survivors.
- The impact of more frequent and intense disasters on people's housing, particularly for marginalised persons who reside in caravan parks and manufactured home estates.

¹ Due to our grant eligibility policies, very few people we provide a grant to are homeowners.

Recommendations

Recommendation 1: Rental price increases

Commonwealth, State and Territory Governments should work together on harmonising residential tenancy legislation to limit the circumstances in which landlords can increase rental prices and the amount by which they can increase.

Recommendation 2: No grounds evictions

Commonwealth, State and Territory Governments should work together on harmonising residential tenancy legislation to limit the circumstances in which landlords can issue “no grounds” evictions, in terms similar to what has occurred in Victoria and the ACT.

Recommendation 3: Non-government social housing providers

Commonwealth, State and Territory Governments should work together to ensure that non-government social housing providers have policies in place that provide for the same rights and protections as tenants in government operated social housing.

Recommendation 4: Short-term accommodation

Commonwealth, State and Territory Governments should work together to urgently review current policies governing eligibility and length of stay in short-term accommodation, to ensure that the requirements placed on applicants are trauma informed and do not place an unnecessary burden, financial or otherwise, on applicants experiencing a housing crisis.

Recommendation 5: Anti-social behaviour and vulnerable tenants

Commonwealth, State and Territory Governments should work together to adopt a “Housing First” approach.

Recommendation 6: Anti-social behaviour and vulnerable tenants

Commonwealth, State and Territory Governments should work together to increase the availability of housing stock and crisis accommodation for victim-survivors fleeing domestic and family violence.

Recommendation 7: Caravan parks and manufactured home estates

Commonwealth, State and Territory Governments should work together to reduce the effects of disasters on vulnerable people and communities residing in caravan parks and manufactured home estates. This should include reviewing the legislation governing the operation of these communities and ensuring residents are afforded the same rights and protections as tenants covered by residential tenancies legislation.

3. The current housing landscape

The worsening rental crisis, and the rights of tenants more broadly, is an issue of increasing significance given the declining rates of homeownership, and renters being the fastest growing tenure in Australia.² In NSW, the number of renting households increased by 17.5 per cent between the 2016 and 2021 censuses.³ The financial pressures being felt by tenants in recent times are therefore impacting on an ever-increasing segment of the population.

Recent reports indicate that vacancy rates have been at record low levels,⁴ and average rents at record highs. For example, rents are reported to have increased by 19.6 per cent in Sydney in the 12 months up until 20 July 2023.⁵ These financial pressures are occurring at a time when there was already an increase in “low income” households renting privately. Data from 2018 revealed that over a million “low income” households in Australia were renting privately, which was double the number who were in the private rental market two decades earlier.⁶ Of these households, two-thirds spent more than 30 per cent of their income on rent, which is the measure for identifying “rental stress”.⁷

These financial pressures are occurring at a time when social housing has declined as a percentage of total housing stock from 5.1 per cent in 2000 to 4.2 per cent in 2016.⁸ There are many who are unable to, or struggling to, access stable and affordable private rental properties in NSW. This includes the 51,031 people on the social housing waitlist and the additional 6,519 people on the priority waitlist, as at 30 June 2022.⁹ For many areas of Sydney, the wait time for any type of social housing property is over 10 years.¹⁰

² Census 2021 – Jemima Mowbroy, ‘Renters are the fastest growing tenure in Australia’, This Renting Life- The Tenants’ Union Blog (Blog Post, 4 July 2022).

³ Ibid. This figure is based on an analysis of 2016 and 2021 Census data by Tenants’ Union of NSW.

⁴ In February 2023 the vacancy rate across Australia was reported to be 0.8%, the lowest on record- ‘Vacancy rates: February 2023’, *Domain* (Web page, 2 March 2023) <<https://www.domain.com.au/research/vacancy-rates-february-2023-1198404/>>. Since then, it has increased to 0.9% in May 2023- ‘Vacancy rates: May 2023’, *Domain* (Web page, 2 June 2023) <<https://www.domain.com.au/research/vacancy-rates-may-2023-1216380/>>.

⁵ ‘Weekly Rent- City: Sydney’ *SQM Research* (Web page, 20 July 2023) < <https://sqmresearch.com.au/weekly-rents.php?region=nsw%3A%3ASydney&type=c&t=1>>.

⁶ Productivity Commission, *Vulnerable Private Renters: Evidence and options* (Research Paper, September 2019) 2.

⁷ Ibid.

⁸ Abigail Payne and Miguel Ruiz, *Social Housing and Poverty in Australia* (Breaking Down Barriers Report Series, 2022) 5.

⁹ ‘Expected Waiting Times’, NSW Government Department of Communities and Justice (Web page, 17 December 2020) <<https://www.facs.nsw.gov.au/housing/help/applying-assistance/expected-waiting-times>>. We use the term “social housing” to refer to housing provided by government and community housing providers.

¹⁰ Ibid.

At the most acute end of the housing crisis are those who are “rough sleepers”.¹¹ On any given night in Australia there are approximately 8,000 “rough sleepers”. However, this has been referred to as “the visible tip of the much larger crisis of homelessness in Australia”.¹² In reality, only around 5 per cent of people experiencing homelessness are “rough sleepers” with others residing in temporary accommodation or severely crowded dwellings.¹³

The current situation may be regarded as a crisis due to the barriers to entering the rental market, the financial strain on those who are currently renting and the impact of housing instability in relation to a person’s overall health and wellbeing, which is well documented.¹⁴ Housing is identified by the World Health Organisation as a key social determinant of a person’s health.¹⁵ Experts have highlighted that “stable housing is a critical component in addressing financial and social stresses that can lead to poverty or prevent exit from poverty”.¹⁶ There is a relationship between housing stability and educational attainment, job security, food security and childhood development.¹⁷

The importance of housing is reflected in Australia’s international human rights law obligations, which provide for “the right of everyone to an adequate standard of living for himself and his family, including adequate... housing”.¹⁸ However, despite the clear importance of housing to a person’s health and wellbeing, and Australia’s international commitment to uphold the right to adequate housing, there are many in Australia who do not have access to stable and affordable housing.

We consider that there are a range of steps that could be taken by the Commonwealth, State and Territory Governments to address the current rental crisis.

¹¹ The term “rough sleepers” is used to refer to people who are sleeping in their cars or on the street.

¹² Angela Spinney, ‘Eliminating most homelessness is achievable. It starts with preventing and ‘housing first’, The Conversation (online, 3 December 2020) <<https://theconversation.com/eliminating-most-homelessness-is-achievable-it-starts-with-prevention-and-housing-first-151182>>.

¹³ Angela Spinney et al, Ending Homelessness in Australia: a redesigned homelessness service system (AHURI Final Report No. 347, December 2020) 23.

¹⁴ For a comprehensive Australian analysis of the relationship between housing and wellbeing, see – Rachel Ong Viforj et al, Precarious Housing and Wellbeing: a multi-dimensional investigation (AHURI Final Report No.373, February 2022).

¹⁵ Social Determinants of Health’ World Health Organisation (Web page) <https://www.who.int/health-topics/socialdeterminants-of-health#tab=tab_1>.

¹⁶ Abigail Payne and Miguel Ruiz, Social Housing and Poverty in Australia (Breaking Down Barriers Report Series, 2022).

¹⁷ Rachel Ong Viforj et al, Precarious Housing and Wellbeing: a multi-dimensional investigation (AHURI Final Report No.373, February 2022) 11.

¹⁸ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1).

4. Rental caps and limits

Data from the NSW Civil and Administrative Tribunal (**NCAT**) reveals that the overwhelming majority of termination applications for private tenants and social housing tenants are in relation to rent arrears.¹⁹ While there is a lack of data to indicate the reasons for the non-payment of rent, research indicates that there is strong circumstantial evidence to indicate that it is a result of “systemic housing affordability problems”.²⁰

This is supported by our casework experience, where we observed a significant reduction in social housing tenants seeking assistance in relation to rent arrears, during the period when *Jobseeker* was increased due to the economic impact of COVID-19. We did however observe an increase in private tenants accessing our services during this time in relation to rent arrears, particularly households that had experienced a decline in income because of the pandemic, but who may not have been eligible for any of the additional government assistance available.

The fact the evidence indicates that rental arrears is a consequence of “systemic housing affordability problems” is important in determining appropriate policy responses to the rental crisis.

In NSW, a private landlord can increase the rent during a fixed term tenancy of less than two years, but only where the agreement states the amount of the increase or provides the method for calculating any increase in rent.²¹ For fixed term leases of longer than two years and for periodic leases, rental increases can only occur once in any 12-month period.²² For a fixed term lease that is being renewed, the landlord must still provide the tenant with 60 days’ notice of the proposed increase.²³

While a tenant may challenge a proposed rent increase in NCAT, this is not a straightforward process for unrepresented tenants given:

- an application must be filed within 30 days of receiving notice of the rent increase²⁴
- the onus is on the tenant to substantiate that the proposed rent increase is excessive²⁵

¹⁹ Chris Martin, ‘Australian’s Incipient Eviction Crisis: No going back’ (2021) 46(2) *Alternative Law Journal* 134, 137.

²⁰ *Ibid.*

²¹ *Residential Tenancies Act 2010* (NSW) s 42(1).

²² *Ibid* ss 41(1B), 42(2).

²³ *Ibid* s 41(2).

²⁴ *Ibid* s 44(2); *Residential Tenancies Regulation 2019* (NSW) reg 39(1).

²⁵ *Residential Tenancies Act 2010* (NSW) s 44(1).

- there is a filing fee of \$54 for any application,²⁶ and
- the tenant will need to lead evidence that speaks to any of the matters the Tribunal may have regard to in considering whether the proposed rent increase is excessive.²⁷

There is often a power imbalance, particularly between unrepresented tenants, who may experience vulnerabilities such as a psychosocial disability and limited education or literacy, and a landlord, who is often represented by their agent. In our view, the current provisions not only fail to account for this power imbalance, but also do not strike an appropriate balance between competing interests. We suggest this could be achieved by:

- prohibiting any form of rent increase, including by agreement, during a fixed term lease of 12 months or less, and
- capping rent increases in line with the Consumer Price Index (**CPI**) for fixed term leases of longer than 12 months, subsequent leases and periodic tenancies. If the landlord wishes to seek an increase in rent more than the CPI, the onus should be on the landlord to seek orders from NCAT to this effect.

It is important that any reforms by State and Territory Governments around rental caps or rental limits are considered alongside reforms to “no grounds” evictions due to the interrelationship between these two issues. Otherwise, there is a risk that legislated restrictions on rental increases will result in worsening security of tenure for tenants, as landlords may look to turn over tenants more frequently so that any rental increases are not subject to statutory or contractual restrictions.

Recommendation 1: Rental price increases

Commonwealth, State and Territory Governments should work together on harmonising residential tenancy legislation to limit the circumstances in which landlords can increase rental prices and the amount by which they can increase.

²⁶ We note that the fee may be waived in circumstances where a tenant can show extreme financial hardship. A tenant simply being in receipt of Centrelink will not be sufficient, and in our experience, it is very unlikely a private tenant would be granted a fee waiver.

²⁷ The matters the Tribunal may have regard to are prescribed- *Residential Tenancies Act 2010* (NSW) s 44(5).

5. “No grounds” evictions

Compared to most comparable countries, Australian tenancy laws provide less security of tenure.²⁸ Research by the Australian Housing and Urban Research Institute (**AHURI**) identifies that the “foremost approach to assuring tenants security is to allow landlords to terminate on prescribed grounds only”.²⁹

“No grounds” evictions refer to circumstances where a landlord evicts a tenant when it is not alleged the tenant has breached the tenancy agreement. “No grounds” evictions remain lawful in NSW. In NSW, a landlord can evict a private tenant without any grounds provided they give the tenant 30 days’ notice at the end of a fixed term lease, or 90 days’ notice during an ongoing lease.³⁰ A tenant has no right, and NCAT has no discretion, to refuse a “no grounds” termination notice, unless the tenant can substantiate that the issuing of the termination notice was “retaliatory”.³¹

While the *Residential Tenancies Act 2010* (NSW) addresses “retaliatory” evictions, we submit that the current provisions provide inadequate protections for tenants. Under the current retaliatory eviction provisions, NCAT may find that a termination notice is retaliatory if satisfied that the landlord gave the termination notice due to being wholly, or partially, motivated by:

- an application, or proposed application, by the tenant to NCAT seeking orders
- the tenant having taken, or proposed to take, any other action to enforce a right, or
- an order being in force between the parties.³²

In our view, the protections are inadequate for a number of reasons. Firstly, the grounds to substantiate a retaliatory eviction are drafted very narrowly as they require either proceedings to have occurred or be on foot, or for the tenant to have taken, or proposed to take, other action to “enforce a right”. For example, a landlord terminating a tenancy in response to a tenant negotiating a proposed rent increase or requesting a rent decrease in response to a change in the rental market, would not be considered retaliatory.

Secondly, even when NCAT is satisfied that the termination notice is retaliatory on the basis of any of the above reasons, this only engages NCAT’s discretion to declare that

²⁸ Chris Martin, Kath Hulse and Hal Pawson, *The Changing Institutions of Private Rental Housing: an international review* (AHURI Final Report No. 292, January 2018) 52.

²⁹ *Ibid* 5.

³⁰ *Residential Tenancies Act 2010* (NSW) ss 84(2), 85(2).

³¹ *Ibid* s 115.

³² *Ibid* s 115(2).

the termination notice has no effect or refuse to make the termination order.³³ In our experience, NCAT often declines to exercise its discretion.

Thirdly, even if NCAT did invalidate the termination notice or refuse to make a termination order, a landlord may issue a subsequent termination notice at a later date, and it is very difficult for the tenant to substantiate that the newer termination notice was issued for retaliatory reasons. We have seen instances where landlords have issued a new termination notice almost immediately after NCAT's decision to invalidate the earlier termination notice or refusal to make a termination order.

We submit that an important step to improving housing stability is to limit the circumstances in which landlords can issue "no grounds" evictions. The Tenants Union of NSW estimates that the basic cost of moving houses is \$2,250 and that generally the cost is more likely to be around \$4,075.³⁴ Therefore, a reduction in the number of times a tenant is required to move will reduce the financial burden on renting, not to mention the other benefits that may flow from a person remaining in the same residence and community.

A number of Australian jurisdictions have already taken steps to limit the use of "no grounds" evictions. Victoria, the ACT, Queensland and Tasmania have all limited their use to some extent. However, Victoria and the ACT have legislated in the most comprehensive manner by prescribing the discrete circumstances in which a "no grounds" eviction can occur. In Victoria, broadly these relate to the following circumstances:

- Where the premises was the landlord's primary place of residence immediately prior to the tenancy and the landlord intends on resuming occupancy.
- The landlord intends on repairing, renovating or reconstructing the premises and the work cannot be carried out unless the renter vacates.
- The landlord intends on demolishing the property.
- The property will be used for a purpose, other than residential use, upon termination of the tenancy agreement.
- Immediately after termination, the property will be occupied by the landlord, a family member of the landlord or someone who normally lives with the landlord and is wholly or substantially reliant on the landlord.
- Immediately after termination the property is to be sold.

³³ Ibid s 115(1).

³⁴ Jemima Mowbroy, 'The True Cost of Eviction', This Renting Life- The Tenants' Union Blog (Blog Post, 22 February 2022) <<https://www.tenants.org.au/blog/true-costeviction#:~:text=Renting%20households%20in%20NSW%20face,of%20around%20%244%2C075%20to%20move.&text=Landlords%20also%20face%20a%20number,landlord%20at%20between%20%241%2C100%20%2D%201%2C400.>>>

- If the premises are the property of a public statutory authority and premises are required for public purposes.³⁵

Recommendation 2: “No grounds” evictions

Commonwealth, State and Territory Governments should work together on harmonising residential tenancy legislation to limit the circumstances in which landlords can issue “no grounds” evictions, in terms similar to what has occurred in Victoria and the ACT.

³⁵ *Residential Tenancies Act 1997* (Vic) ss 91ZW-91ZZC.

6. Availability and composition of social housing

As highlighted above, there is currently a significant waitlist for social housing in NSW. The NSW Department of Communities and Justice (**DCJ**) has:

found that about 57 per cent of people aged 16 and over in public housing were unlikely to ever be able to improve their economic status by working (typically because of age and/or physical or psychosocial disability status) and would require social housing for an extended period.³⁶

It is therefore important that the level of social housing is constantly reviewed and keeps pace with population growth and socio-demographic change.

In recent times, there has also been a trend towards increased reliance on non-government housing providers providing social housing. In 2006, 84 per cent of social housing stock in Australia was provided by government, but by June 2021 this had fallen to just 68 per cent.³⁷ While in NSW, government housing makes up approximately 64.5 per cent of social housing, as at June 2021,³⁸ in some regional parts of NSW, only non-government social housing is available.

We have a number of concerns in relation to the increased share of social housing being provided by non-government organisations. These concerns relate to the transparency and accountability of non-government housing providers compared to DCJ Housing. For example, non-government housing providers are not subject to the *Government Information (Public Access) Act 2009* (NSW). There is also less transparency around their policies and decision-making processes. This includes the fact that recommendations of the Housing Appeals Committee (**HAC**)³⁹ that are favourable to a social housing applicant or tenant, can be disregarded by non-government housing providers and there is no real recourse available to the tenant. This is in contrast to an applicant for, or tenant in, DCJ Housing who may seek judicial review in the Supreme Court of NSW of a decision of DCJ Housing in addition to seeking review at HAC.

Furthermore, most non-government housing providers have policies that are less favourable to tenants, particularly vulnerable tenants, such as people who are in custody

³⁶ NSW Government, Submission No 69 to Productivity Commission, *Housing and Homelessness Agreement Review* (18 March 2022) 29.

³⁷ Social housing dwellings, *Housing assistance in Australia* (Web report, 29 June 2022) <<https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia/contents/social-housing-dwellings>>.

³⁸ *Ibid.*

³⁹ The Housing Appeals Committee is an independent NSW government agency which hears appeals from social housing applicants and tenants who are dissatisfied with decisions made by DCJ Housing or a non-government social housing provider.

and those experiencing family violence, compared to DCJ Housing. This is particularly concerning given research shows that vulnerability to housing precariousness is greatest for people when they are victims of physical violence and for those who are facing imprisonment.⁴⁰ The difference in policies can lead to adverse decisions being made by non-government housing providers regarding vulnerable tenants that would not have been made by DCJ Housing.

An example that we regularly encounter is the difference in approach towards tenants being absent from their residence due to being in prison or a drug or alcohol rehabilitation facility. DCJ Housing permits tenants to be absent from their residence for a period of up to six months for a range of reasons, including if the person is in prison or in drug or alcohol rehabilitation.⁴¹ In contrast, non-government housing providers only permit tenants to be absent from their residence for such purposes for a period of up to three months. This is a very short timeframe, particularly in the current circumstances when courts are continuing to deal with a backlog of cases due to COVID-19, and there are longer than usual delays in criminal matters progressing through NSW courts. Tom's story below demonstrates the potential impact of the differences in policy between non-government housing providers and DCJ Housing.

There is also inconsistency between DCJ Housing and non-government providers in terms of the rent that is charged while a person is absent from their property. While DCJ will only charge \$5 per week in rent provided certain conditions are met,⁴² some non-government housing providers will continue to charge full rent, which is particularly problematic for people in custody as their Centrelink payments are suspended during this time. This can result in a person leaving prison without a property and having a debt for unpaid rent. It is similarly problematic for people who are in residential drug and alcohol treatment because they will generally be required to pay an upfront fee and a portion of their Centrelink payment for their treatment.

A further example is that some non-government housing providers require former tenants to repay any former tenancy debts in full before they will receive a further offer of social housing. This is in contrast to DCJ Housing policy, which only requires regular repayments of a debt for a period of six months before a person will again be eligible for an offer of social housing.

⁴⁰ Rachel Ong Vitorj et al, *Precarious Housing and Wellbeing: a multi-dimensional investigation* (AHURI Final Report No.373, February 2022) 5. The third group of people who are most vulnerable to housing precariousness are those "in earlier stages of the life course".

⁴¹ "During a Tenancy Policy", *NSW Department of Communities and Justice* (Web page, 29 April 2021) <<https://www.facs.nsw.gov.au/housing/policies/during-tenancy-policy>>.

⁴² "Tenancy Policy Supplement", *NSW Department of Communities and Justice* (Web page, 30 June 2022) <<https://www.facs.nsw.gov.au/housing/policies/tenancy-policy-supplement>>.

These are just a few examples of how inconsistent policies between government and non-government housing providers results in differential treatment of social housing tenants solely on the basis of provider.

Tom's story⁴³

Tom had been homeless for a long time before being housed with a Community Housing Provider (**CHP**) through the NSW Government's *Together Home* program during COVID-19. Around this time, Tom was arrested, refused bail and he entered a plea of not guilty.

His CHP only permitted absences from a residence for up to three months. The CHP's policy also provided that a tenant could only be given a rent abatement of \$5 on one occasion during their tenancy.

The CHP asked Tom to relinquish his tenancy within one month of being in custody on the basis that earlier in his tenancy he had had a short absence for one month and he did not yet have a known release date. The CHP cancelled his \$5 rent abatement and refused a request for a further extension until the next hearing date. At this stage, Tom hadn't even seen the brief of evidence against him in his criminal matter. He eventually changed his plea to guilty.

Fortunately, Tom was being supported by a specialist homelessness service who used brokerage to pay his subsidised rent in order to sustain his tenancy.

Eventually, the CHP issued a termination notice on the basis that Tom had abandoned the property and they applied to the tribunal for an order that they be permitted to take immediate possession of the property.

Legal Aid NSW assisted Tom in obtaining a NCAT hearing date for his tenancy matter after he was due to be sentenced for his criminal matters. He ended up receiving a non-custodial sentence.

Tom was released a week before his NCAT hearing for the termination of his social housing tenancy and was able to move back into his unit. His absence ended up being six months.

If he had been a DCJ Housing tenant, he would not have had to rely on brokerage from a specialist homelessness service or try to defend his tenancy from termination in NCAT.

⁴³ This case study has been de-identified.

Recommendation 3: Non-government social housing providers

Commonwealth, State and Territory Governments should work together to ensure that non-government social housing providers have policies in place that provide for the same rights and protections as tenants in government operated social housing.

7. Short-term accommodation

To fully appreciate the challenges for people who are unable to access the private rental market due to financial constraints, a lack of available housing, and/or other crises, it is also necessary to discuss the short-term accommodation options that are funded by the NSW Government.

The NSW Government provides a pathway to three types of short-term accommodation options for persons who are experiencing a housing crisis: temporary accommodation, emergency temporary accommodation and crisis accommodation.⁴⁴ These types of accommodation are of fundamental importance because they are what stand between a person and rough sleeping. However, they are all subject to strict eligibility criteria and other conditions.

7.1 Temporary accommodation

Temporary accommodation refers to the provision of “short term accommodation in low cost motels, caravan parks or similar” by DCJ and some community housing providers.⁴⁵ It is designed as a short-term and temporary measure, to provide a person with an opportunity to find crisis accommodation or a private rental.⁴⁶

Previously, temporary accommodation was only available for a maximum period of 28 days in a 12-month period, other than in exceptional circumstances. However, in July 2023 this was changed to provide that the length of temporary accommodation assistance will be offered “on an assessment of a client’s immediate housing needs”.⁴⁷ We support this change.

Another recent change to temporary accommodation in NSW has seen the initial period that a person can be provided with temporary accommodation increase from two days to seven days.⁴⁸ While we are yet to see the effect of this new policy in practice, it is an improvement and is consistent with what was implemented during the height of the COVID-19 pandemic. Ordinarily, temporary accommodation is only granted for a few days at a time, which forces a person to check out of their accommodation and re-apply to DCJ for further funds for temporary accommodation if they have not found alternative

⁴⁴ “Housing Assistance Options Policy”, *NSW Government Communities & Justice* (Web Page, 10 September 2021) <<https://www.facs.nsw.gov.au/housing/policies/housing-assistance-options-policy>>.

⁴⁵ Ibid.

⁴⁶ “Rentstart Assistance Policy”, *NSW Government Communities & Justice* (Web page, 14 July 2023) <<https://www.facs.nsw.gov.au/housing/policies/rentstart-assistance-policy#temp>>.

⁴⁷ Ibid.

⁴⁸ Ibid.

accommodation within that timeframe. This can be especially challenging for people who have children with them and/or who have a large number of belongings with them. While the new policy will ease some pressure, such challenges are likely to remain.

An additional challenge for people who are accessing, or seeking to access, temporary accommodation is that to be eligible, a person must demonstrate that they are “facing a short wait for a more permanent housing solution”, which in practice can involve a person having to demonstrate that they have the capacity to afford a private rental and that they are making attempts at finding a rental property.⁴⁹ The strictness of the policies and the manner in which they are implemented adds additional stress on people who are already experiencing significant hardship as a result of their housing situation, and who may also be experiencing other stressors such as family violence.

An earlier change in policy also requires people accessing temporary accommodation to pay a contribution towards the cost of the accommodation.⁵⁰ We have seen some examples where the contribution is more than what a tenant would be paying in a private rental. While it is possible for the contribution to be waived, the person needs to be aware of this option and be able to persuade DCJ that they should not be required to pay the contribution.⁵¹

Given that a person must satisfy a strict income eligibility test and have no more than \$5,000 in cash assets to be eligible for temporary accommodation, expecting the person to pay a contribution seems unnecessary, and risks further compounding the stress on individuals and families.⁵² This is particularly true for those who may be paying for accommodation elsewhere, but are unable to reside at the premises following a separation or family breakdown. In addition, people accessing temporary accommodation are likely to be facing challenges in saving money to pay the bond for a private rental. Expecting them to pay a contribution can delay entry to the private rental market and exit temporary accommodation.

Lastly, there are very few temporary accommodation providers in most regional and remote areas of NSW, which means that people are often turned away. They are forced to find accommodation long distances away from their supports and community connections, such as their children’s school and doctors.

⁴⁹ Ibid.

⁵⁰ Ibid. We note that in July 2023 the cash asset test increased from \$1,000 to \$5,000. We also note that the cash asset test does not apply to persons who are experiencing family and domestic violence. They are not required to pay a contribution.

⁵¹ Ibid. We note that the cash asset limit does not apply to a person who is experiencing family and domestic violence.

⁵² Ibid.

7.2 Emergency temporary accommodation

Emergency temporary accommodation is available for people who are not eligible for social housing, but who have an urgent need for accommodation which may exist as a result of a range of factors, including family violence or a child being at risk of abuse.⁵³ The accommodation that is provided is in social housing premises, but it is only available in “extreme situations” for a maximum period of up to three months.⁵⁴ It is not subject to any income test, and it is not provided where temporary accommodation is considered a more appropriate option.

7.3 Crisis and transitional accommodation

Crisis and transitional accommodation options are available through some community housing organisations who provide what are commonly referred to as “specialist homelessness services”. These services provide specialist short and medium-term housing for people who are homeless, or at risk of homelessness, and are in crisis.⁵⁵ These include services that specialise in family violence, young people and people experiencing substance abuse issues.

Recommendation 4: Short-term accommodation

Commonwealth, State and Territory Governments should work together to urgently review current policies governing eligibility and length of stay in short-term accommodation, to ensure that the requirements placed on applicants are trauma informed and do not place an unnecessary burden, financial or otherwise, on applicants experiencing a housing crisis.

⁵³ “Social Housing Eligibility and Allocations Policy Supplement- Eligibility for emergency temporary accommodation other than because of a natural disaster”, *NSW Government Communities & Justice* (Web page, 3 May 2022) <<https://www.facs.nsw.gov.au/housing/policies/social-housing-eligibility-allocations-policy-supplement/chapters/emergency-temporary-accommodation>>.

⁵⁴ “Eligibility for Social Housing Policy”, *NSW Government Communities & Justice* (Web page, 25 May 2021) <<https://www.facs.nsw.gov.au/housing/policies/eligibility-social-housing-policy>>.

⁵⁵ “Housing Assistance Options Policy”, *NSW Government Communities & Justice* (Web Page, 10 September 2021) <<https://www.facs.nsw.gov.au/housing/policies/housing-assistance-options-policy>>.

8. Anti-social behaviour and vulnerable tenants

There is a need to improve access to housing and support to maintain housing tenure for vulnerable members of the community, such as those who experience a psychosocial disability.

Legal Aid NSW regularly assists clients in proceedings before the Housing Appeals Committee and NCAT regarding attempts by social housing providers to evict our clients on the basis that their alleged anti-social behaviour is a breach of their tenancy agreement. These are significant proceedings given social housing is generally the only thing standing between people and homelessness. The clients we represent in these proceedings tend to experience multiple layers of disadvantage, such as mental illness, trauma, substance abuse issues, family violence and/or have been in prison.

A 2019 survey by End Street Sleeping of people sleeping rough in the City of Sydney highlighted the layers of disadvantage that many people who are sleeping rough have experienced. For example, 48 per cent reported past trauma or abuse, 23 per cent reported being in out-of-home care as a child, 28 per cent reported being in prison or a watchhouse in the past six months, 63 per cent reported problematic substance use, 75 per cent reported a mental health diagnosis, and 22 per cent reported a learning or intellectual disability.⁵⁶

The prevalence of such layers of disadvantage amongst those who are homeless or at risk of homelessness has led to an international trend focused on ensuring that social services move away from crisis responses and instead focus their responses on preventing housing instability and finding long-term solutions to ensure a person has a stable place to live.⁵⁷ This is the aim of the “Housing First” approach:

Housing First is an international model for housing and supporting people who have experienced long term and recurring homelessness and who face a range of complex challenges. It supports strategies to end homelessness and is a methodology for effectively assisting some of the most vulnerable people in our community.⁵⁸

Legal Aid NSW supports a “Housing First” approach as we regularly observe the barriers that many of our clients face to access housing. The reality is that the vulnerabilities and

⁵⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Homelessness in Australia* (Final Report, July 2021) 141.

⁵⁷ Angela Spinney, ‘Eliminating most homelessness is achievable. It starts with preventing and ‘housing first’, *The Conversation* (online, 3 December 2020) < [Eliminating most homelessness is achievable. It starts with prevention and ‘housing first’ \(theconversation.com\)](#)>.

⁵⁸ “Housing First”, *Homelessness Australia* (Webpage) < <https://homelessnessaustralia.org.au/what-you-can-do/housing-first/>>.

disadvantage that many of our clients experience are very difficult to address unless they have stable accommodation, which in turn allows them to receive wrap around supports to address their underlying needs.

A Housing First approach has also been supported by the Productivity Commission, which found that:

[n]ew social housing investment decisions should prioritise meeting the housing needs of people experiencing, or at risk of, long-term homelessness and people who are unable to access or sustain housing in the private rental market...⁵⁹

The Productivity Commission went on to recommend that under the next National Housing and Homelessness agreement, “the Australian, State and Territory Governments should commit to expanding Housing First programs to improve housing outcomes for people experiencing homelessness”.⁶⁰

We encourage the Committee to review the discussion of Housing First at Chapter 4 of the report on the inquiry into homelessness in Australia by the House of Representatives Standing Committee on Social Policy and Legal Affairs.⁶¹

Recommendation 5: Anti-social behaviour and vulnerable tenants

Commonwealth, State and Territory Governments should work together to adopt a “Housing First” approach.

⁵⁹ Productivity Commission, *In Need of Repair: The National Housing and Homelessness Agreement* (Study Report, August 2022) 44.

⁶⁰ *Ibid* 43.

⁶¹ Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into homelessness* (Final Report, July 2021) Ch 4.

9. Family and domestic violence

Domestic and family violence is one of the leading causes of homelessness for women and children.⁶² The worsening rental crisis in Australia is exacerbating the difficulties that people experiencing family and domestic violence have to access stable and affordable housing. As private rentals become increasingly unattainable, there is a flow-on effect to other types of housing, in particular temporary housing. It is therefore vital that tenancy laws and policies reflect this significant driver of homelessness.

9.1 Not leaving or returning to violence

The rental crisis adds a further and significant barrier to people trying to leave family and domestic violence. The availability of stable and affordable accommodation is the biggest practical factor in the decision made by our clients as to whether to stay or leave a violent relationship, whether to report the violence and/or whether to return to violent relationships. It is not just the cost of housing which is a concern, but also the cost of setting up a new home, as they often leave the relationship without any household goods. Some clients we assist choose to stay in violent relationships or in homes with perpetrators because they cannot afford to rent privately. For victim-survivors with children, the availability of safe, secure and affordable housing, in the area that their child goes to school or is in care, is also a significant consideration.

Our clients report that insecure or inadequate housing can also be used by perpetrators as a further tool to intimidate or control them. This can be through threats to not allow them access to their children, due to what they consider to be inadequate housing. It can also involve reporting the victim-survivor to DCJ with supposed concerns for their children or raising such concerns in family court proceedings.

The story of Melanie, one of our clients, highlights the importance of the availability of stable and affordable housing for women who are leaving a relationship where there is domestic and family violence.

Melanie's story⁶³

Melanie is the protected person in a final Apprehended Domestic Violence Order (**ADVO**). The defendant is her ex-partner, Dennis, and there are three children of the relationship. Melanie called the Police after an incident of

⁶² Kathleen Flanagan et al, *Housing Outcomes after Domestic and Family Violence* (AHURI Final Report No. 311, April 2019) 7.

⁶³ This case study has been de-identified.

domestic violence. Police attended the home and took out an ADVO to protect Melanie from Dennis. Police thought it necessary to have a “no contact” condition on the ADVO to avoid further violence.

Dennis was the sole lessee of their rental accommodation in a regional city in NSW. Once the ADVO was taken out, Dennis evicted Melanie from the property. He retained the children and Melanie was made homeless. This resulted in Melanie living in a caravan for 12 months.

Melanie searched for private rentals for months without securing anything. She then worked with a women’s housing non-government organisation to secure housing but was still unable to secure anything because she simply could not afford the rent as she was in receipt of the disability support pension. Her housing situation impacted on her physical and mental health as well as her ability to spend time with the children.

Melanie lodged an application to the Local Court to remove the non-contact condition on the ADVO, despite Dennis having been violent towards her in the past, so that she could return to the family home.

9.2 Residential tenancy

Positively, since February 2019, the *Residential Tenancies Act 2010* (NSW) contains provisions that specifically address domestic and family violence. Most significantly, the legislation permits a tenant to give a termination notice to the landlord and each co-tenant, if the tenant or dependent child of the tenant is experiencing family violence.⁶⁴ A tenant is not liable to pay any compensation or other additional amount as a result of the early termination of the fixed term lease or periodic agreement.⁶⁵ Such a provision is vital for ensuring that victims of family violence are able to prioritise their safety by leaving a property and not having to worry about continuing to pay rent, or having an adverse listing on a tenancy database.

Legal Aid NSW recently made a submission to the statutory review of the domestic violence provisions in the *Residential Tenancies Act 2010* (NSW). We support the existing domestic violence provisions in the Act and believe they largely operate well, although we consider that there is a strong need for increased education amongst

⁶⁴ *Residential Tenancies Act 2010* (NSW) s 105B.

⁶⁵ *Ibid* s 105D(1).

relevant parties, such as landlords, real estate agents, potential competent persons,⁶⁶ police and the general public.

For example, we have assisted clients who have reported incidents where a real estate agent was aware of the existence of domestic violence in the home prior to our client leaving the premises, but did not assist the client by referring them to the domestic violence provisions of the Act. This could be remedied through greater education for relevant parties and/or by creating a positive duty on agents to make tenants aware of the provisions in the Act when they know that a tenant has left a property due to family violence.

Despite these positive legislative developments, the story of Jessica below highlights that family and domestic violence can still leave tenants financially worse off, and this can be compounded by third parties, such as police, not being familiar with residential tenancy legislation.

Jessica's story⁶⁷

Jessica moved into a private rental on her own. Her boyfriend later came to stay with her and then refused to leave. His name was not on the lease, nor was he a "sub-tenant" within the meaning under the *Residential Tenancies Act 2010* (NSW).

Jessica's boyfriend started to become threatening and overly domineering towards her, including controlling her use of the space in the unit and threatening her with a knife. She called the police and an ADVO was taken out for her protection. It prevented her boyfriend from harassing or intimidating her, but it did not exclude him from the property.

With the assistance of her support worker, Jessica found a new private rental to move into and issued a Domestic Violence Termination Notice (**DVNOT**). However, for a DVNOT to legally terminate the tenancy, the tenant needs to provide vacant possession of the premises to the landlord. Jessica was not able to do this because her boyfriend refused to move out even after she had moved into her new property. This meant she was liable for two properties.

With Legal Aid NSW assistance, Jessica wrote to her boyfriend and told him she withdrew permission for him to remain in the premises and that if he didn't

⁶⁶ A "competent person" is a person who is permitted under the legislation to declare that a person has been the victim of domestic violence by a particular person: *Residential Tenancies Act 2010* (NSW) s 105A.

⁶⁷ This case study has been de-identified.

leave, he was trespassing. When he still didn't leave, Jessica asked the police to help remove him, but they said they didn't want to get involved. The real estate agent also initially refused to assist Jessica by initiating termination proceedings in NCAT to formally end the tenancy, which would allow the sheriff to evict her boyfriend. The only other option for Jessica was to take action herself by initiating proceedings in the Supreme Court for an order of possession which would be a complicated, lengthy and expensive process.

After a month of sustained advocacy by Legal Aid NSW, the real estate agent finally agreed to seek an order for termination in the Tribunal which Jessica immediately consented to.

9.3 Short-term accommodation

For people who are experiencing domestic and family violence who need to leave their usual residence, it is essential that, where required, they are provided with support to find appropriate accommodation. Our allied professional staff report that it is now taking longer to secure crisis and transitional accommodation, as there are fewer vacancies.

While NSW provides temporary accommodation, emergency temporary accommodation, and "specialist homelessness services" (as referred to above), there are still a number of barriers for such people to find appropriate accommodation when they are fleeing family violence. These include the following:

- Specialist accommodation providers for women experiencing family violence are not evenly distributed across greater Sydney or the state, and therefore they will often be a long way from where the victim usually lives. This can be problematic for social connection, and the time and cost of commuting to their workplace or their children's school (where they have children in their care).
- The Rent Choice Start Safely (**Start Safely**) program provides short to medium-term financial support for people escaping domestic or family violence. The financial subsidy helps people secure private rental accommodation, so they do not have to return to the violent situation. Of our clients who are eligible and suitable for Start Safely, many are finding it increasingly difficult to meet the requirement that they will be able to afford the private market rental after the subsidy period ends, with the increasing cost of rent.

- People who are on temporary visas are not ordinarily eligible for temporary accommodation or emergency temporary accommodation.⁶⁸ However, in “exceptional circumstances”, temporary residents may be provided a few days of temporary accommodation if they are escaping domestic and family violence and have no other accommodation options.⁶⁹ This vulnerability is further compounded by the fact that people on temporary visas are ineligible for most Centrelink payments and allowances. As a result, we are aware of women on temporary visas who have escaped violence and are sleeping in cars with their children. While the Red Cross can provide funds of up to \$3,000 for women on temporary visas who are experiencing family violence and financial hardship, this does not go very far.⁷⁰

The story of one of our clients, Josia, who was on a temporary visa, is highlighted below.

- The requirement that a person needs to be “facing a short wait for a more permanent housing solution” to be eligible for temporary accommodation is particularly challenging for people who are fleeing family violence. Often one or more of the following circumstances will be applicable: they do not have access to a phone, they do not have access to any finances or their financial information, they are trying to recover their belongings from their former residence, they have children in their care, they are dealing with legal matters, and/or they are dealing with their employer. This leaves little opportunity for someone to demonstrate that they are taking steps towards finding a more permanent housing solution.

Josia’s story⁷¹

Josia arrived in Australia on a temporary visa in 2023 after getting married to Kua in her home country overseas. Josia moved into Kua’s private rental

⁶⁸ “Rentstart Assistance Policy”, *NSW Government Communities & Justice* (Web page, 4 November 2021) <<https://www.facs.nsw.gov.au/housing/policies/rentstart-assistance-policy#temp>>; “Eligibility for Social Housing Policy”, *NSW Government Communities & Justice* (Web page, 25 May 2021) <<https://www.facs.nsw.gov.au/housing/policies/eligibility-social-housing-policy>>.

⁶⁹ Social Housing Eligibility and Allocations Policy Supplement- Eligibility for social housing- residency’, *NSW Government Communities & Justice* (Web page, 30 June 2022) <<https://www.facs.nsw.gov.au/housing/policies/social-housing-eligibility-allocations-policy-supplement/chapters/emergency-temporary-accommodation>>.

⁷⁰ ‘Family and Domestic Violence Financial Assistance’ *Australian Red Cross* (Web page) <<https://www.redcross.org.au/migration/family-and-domestic-violence-financial-assistance-program/>>.

⁷¹ This case study has been de-identified.

when she arrived in Australia. She spoke limited English and had no family or friends in Australia. Josia was not allowed to go anywhere alone in Australia and was only given an allowance for basic personal items on request. Kua made threats to kill Josia and her family overseas if she told anyone what was going on.

One evening the neighbours called Police after hearing a domestic dispute at the property. Police applied for an ADVO to protect Josia and charged Kua with domestic violence offences. The ADVO excluded Kua from the property, despite him being the sole lease holder and having a set of keys.

With nowhere to go and no understanding of services available, Josia remained in the property for several days. Josia was terrified of further violence from Kua should he return to the property as he had always said that he would kill her if she reported to Police. Josia attended court on the first mention of the ADVO and linked with a Legal Aid NSW Domestic Violence Unit solicitor and a family violence caseworker.

A private rental was not an option for Josia as she had no income. As a temporary visa holder experiencing domestic and family violence, Josia would only be eligible to access a maximum of two days' temporary accommodation. She was ineligible for DCJ social housing and community housing options as a temporary visa holder.

Despite being at significant risk of further violence should Kua return to the home, Josia chose to stay in his private rental until she secured a place at a refuge.

Josia was assisted by a family violence caseworker to contact the NSW Domestic Violence Line for help to access a refuge. It took five weeks of Josia contacting the Domestic Violence Line almost every day before a refuge vacancy was offered to her.

Recommendation 6: Family and domestic violence

Commonwealth, State and Territory Governments should work together to increase the availability of housing stock and crisis accommodation for victim-survivors fleeing domestic and family violence.

10. Disasters and housing

For over 10 years Legal Aid NSW has provided legal assistance to communities across NSW impacted by disasters as part of the government response to disasters. Legal Aid NSW is the lead agency in coordinating the legal response. This involves providing legal assistance across a range of areas, including housing matters. Those who already experience vulnerability, including Aboriginal people, people at risk of homelessness and people with disability, receive more intensive socio-legal services from legal and allied professional staff, such as social workers and financial counsellors.

While it is commonly said that “disasters do not discriminate”, our casework experience shows that those who experience existing vulnerabilities bear the greatest impact of disasters.

10.1 Caravan parks and manufactured home estates

As part of our disaster relief work, we have observed emerging issues for vulnerable clients who reside in caravan parks or manufactured home estates, specifically in major flood events in the last couple of years in Western Sydney, the Central Coast, the Mid North Coast and the Northern Rivers region.

In NSW, caravan parks and manufactured home estates are regulated under the *Residential (Land Lease) Communities Act 2013* (NSW). There are almost 500 caravan parks and manufactured home estates in NSW with around 36,000 residents, and many of these properties are built on land that is at risk of flooding.⁷² Data from the 2016 census revealed that just 36 per cent of residents in caravan parks and manufactured homes estates were working or were seeking work.⁷³ The average wage for those who were employed full-time or part-time was 37 per cent below the national average at the time.⁷⁴

Through our casework, we have observed a number of gaps in the legislation which place residents in a more vulnerable position than tenants under the *Residential Tenancies Act 2010* (NSW) in a number of areas, many of which are directly relevant to the issue of disasters. In many respects, the power imbalance is greater than between landlord and tenant because most caravan parks and manufactured home estates are operated by companies.

⁷² Luisa Rubbo and Emma Rennie, ‘Fears caravan park residents could be left homeless if NSW Flood Inquiry recommendation is implemented’ *ABC News* (online, 3 September 2022) <<https://www.abc.net.au/news/2022-09-03/caravan-park-residents-ban-nsw-flood-inquiry-recommendation/101347782>>.

⁷³ Caravan Industry Association of Australia and Residential Land Lease Alliance, ‘Long Term Residents Caravan Parks and Manufactured Housing Estates – A Census 2016 Social Trends Report’ (Report, 2018) 18.

⁷⁴ *Ibid* 20.

Some of the gaps that are relevant to the terms of reference of this inquiry are:

- **Maintaining the residential site:** While the *Residential (Land Lease) Communities Act 2013* (NSW) obligates an operator to ensure that a “residential site is in a reasonable condition, and fit for habitation, at the commencement of a site agreement for the site”, the Act does not expressly state that the operator must ensure that the site remains in such a state during the period of the site agreement.⁷⁵
- **Capital works fund:** There is no obligation under the Act for an operator to establish a capital works fund to ensure that they can meet their repair and maintenance obligations. This contrasts with the *Strata Schemes Management Act 2015* (NSW), which obligates owners’ corporations to establish such a fund.⁷⁶

We believe that there should be a statutory obligation on operators to establish a fund, particularly with the increased frequency with which disasters are occurring and the additional barriers that exist both for residents and operators in obtaining insurance in relation to floods and other disasters. Through our casework during a number of disasters in recent years, we have observed entire parks become uninhabitable. If there is no requirement on operators to have a capital works fund available, there is a real risk that some operators may not be able to afford the cost of repair to make the park habitable again.

The story of one of our clients, Ronan (below), highlights the predicament that residents in caravan parks and manufactured home estates face when their site becomes uninhabitable, but the park owner does not have the funds to repair the site.

- **Reduction of site fees:** While a resident can apply to NCAT for a reduction of their site fees in certain circumstances, these circumstances do not extend to NCAT having the power to reduce site fees for a failure by the operator to maintain a residential site, despite the Act making it clear that this is a legal obligation of the operator at the commencement of a site agreement.⁷⁷

⁷⁵ *Residential (Land Lease) Communities Act 2013* (NSW) s 37(1)(k). Such an obligation was express in the former legislation, but it has not been mirrored in the new Act

⁷⁶ *Strata Schemes Management Act 2015* (NSW) s 74(1).

⁷⁷ *Residential (Land Lease) Communities Act 2013* (NSW) ss 37(1)(k), 64(1)

- **Abatement of site fees:** The *Residential (Land Lease) Communities Act 2013* (NSW) also provides for an abatement of site fees, but only where the site is wholly uninhabitable.⁷⁸ This is in contrast to the *Residential Tenancies Act 2010* (NSW), which permits an abatement of fees where a residence is “wholly or partly uninhabitable”.⁷⁹ If, for example, the toilet facilities at a park are damaged and are not useable, but a person’s residential site remains habitable, then the site has become partly and not entirely uninhabitable. This would mean that the resident is entitled to a rent reduction,⁸⁰ but not a rent abatement despite the fact they may not be able to live at their site until the toilet facility is repaired.

Ronan’s story⁸¹

Ronan has lived at a caravan park on the Mid North Coast for over 10 years. He owns his dwelling and rents the site. Ronan is in his 70s and is reliant on a walker. He owns a mobile phone but does not know how to use it.

Ronan’s dwelling was damaged in the floods. All residents were evacuated from the park and placed into emergency accommodation.

Ronan was told he needed to continue to pay site fees so that the park operators could “afford” to fix the park. Upon speaking to Legal Aid NSW, he was advised about his right to seek a site fee abatement under the *Residential (Land Lease) Communities Act 2013* (NSW) as the premises was wholly uninhabitable.

Ronan was very concerned about Legal Aid NSW writing to the operator as he feared it would jeopardise his housing and the relationship with the operator. He refused to instruct Legal Aid NSW to act.

10.2 Residential tenancy agreements

Our staff have also observed troubling behaviour from landlords in disaster affected areas. In areas such as Port Macquarie following the March 2021 flood, there were major shortages in rental accommodation due to many properties becoming uninhabitable. Due to the shortage in rental properties, rental prices increased substantially. The increase

⁷⁸ Ibid s 62(a).

⁷⁹ *Residential Tenancies Act 2010* (NSW) s 43(2)(a).

⁸⁰ *Residential (Land Lease) Communities Act 2013* (NSW) s 64(1)(a).

⁸¹ This case study has been de-identified.

in rental prices created an incentive for landlords to terminate existing tenancy agreements, including fixed term tenancies prematurely, on the basis that the property had become “wholly or partially uninhabitable”.⁸² They would then complete the repair work and rent the property out again at a much higher rate. Meanwhile there was little incentive for a tenant to rely on the same provision to terminate a tenancy agreement because they would then need to find another property in a tight rental market where rents were increasing.

We also encountered instances where landlords would rely on this provision to terminate tenancy agreements in response to a tenant requesting that certain work be carried out on the property to make it more habitable, or seeking a rent reduction or abatement as they are entitled to under the Act.⁸³ Although in these circumstances a tenant may be able to argue that the termination notice is retaliatory, there are significant barriers and limitations in doing this, with no guarantee if a finding is made that the notice is retaliatory that this will mean the termination notice is declared invalid, as outlined earlier in the report.

Recommendation 7: Caravan parks and manufactured home estates

Commonwealth, State and Territory Governments should work together to reduce the effects of disasters on vulnerable people and communities residing in caravan parks and manufactured home estates. This should include reviewing the legislation governing the operation of these communities and ensuring residents are afforded the same rights and protections as tenants covered by residential tenancies legislation.



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⁸² *Residential Tenancies Act 2010* (NSW) s 109.

⁸³ *Ibid* s 43(2).