

Review of rent models for social and affordable housing: Issues Paper

Legal Aid NSW submission to IPART

December 2016

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Legal Aid 
NEW SOUTH WALES

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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) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW provides state-wide civil law services through the in-house Civil Law Practice and private practitioners. Advice and assistance in housing issues is part of the core services of the civil law practice. In 2015-2016, the in-house practice provided 5,675 sessions of assistance in housing matters across New South Wales, including advice, assistance and representation. Our solicitors have specialist legal expertise in social housing from eligibility to ongoing rent subsidy calculation and eviction.

Legal Aid NSW also has a number of relevant specialist services:

The Legal Aid NSW Civil Law Division operates 31 **specialist homeless legal outreach services** in strategic locations across NSW. Outreach clinics are established in agencies that provide support to people who are homeless or at risk of homelessness.

The Legal Aid NSW **Tenants' Appeal Advice Line** provides advice and representation to tenants who wish to

appeal a decision of NCAT. 40% of callers are social housing tenants and 57% of calls relate to eviction.

The Legal Aid NSW **Prisoners Legal Service** provides advice, minor assistance and representation to prisoners, including in relation to housing and other civil law issues.

The Legal Aid NSW **Aboriginal Women Leaving Custody Service** assists Aboriginal women exiting custody who are at risk of homelessness.

The **Children's Civil Law Service** provides a targeted and holistic legal service to young people identified as having complex needs. This includes legal assistance with the housing needs of young people exiting care.

The **Domestic Violence Unit** provides integrated social and legal services to victims of domestic violence, including those experiencing or at risk of homelessness.

Legal Aid NSW welcomes the opportunity to respond to this review and to contribute to the ongoing success of the social housing system. Should you require any further information in relation to this submission, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to respond to the issues raised in the Consultation Paper *Review of rent models for social and affordable housing (Consultation Paper)* released by the Independent Pricing and Regulatory Tribunal (IPART) (November 2016).

Legal Aid NSW's response to the issues raised in the Consultation Paper has been primarily informed by the extensive experience of lawyers from our Civil Law Division and the Aboriginal Women Leaving Custody Legal Service.

There is no doubt that the social housing system is under pressure and that change is needed. In 2013, social housing could only meet forty-four percent (44%) of the need in NSW.¹ Increased demand for social housing has been caused by:

- lack of affordable housing in the private rental market
- lack of employment in some areas of social housing (making it more difficult for tenants to find employment and leave the system)
- high rates of disability and severe mental illness in the social housing tenant population, and
- the difficulty of re-entering the social housing system, which causes disincentives for social housing tenants to find employment and leave the system.

The IPART review is limited to reviewing the rent setting framework and eligibility criteria for social and affordable housing. The complex issues underpinning social and affordable housing supply and demand cannot be resolved through this approach alone. Meaningful reform requires a whole of government response, including:

- an increase in funding for social and affordable housing
- changes to tenancy laws, including removing no grounds evictions, and
- regulating rent increases in the private sector.

We have elaborated on many of these and other related issues in our response to the Family and Community Services (**FACS**) Social Housing Discussion Paper in 2015, and the Foundations for Change Discussion Paper on Homelessness earlier this year.²

We deal with the issues of eligibility and rent setting below.

¹ *The Cost of Increasing Social and Affordable Housing Supply in NSW*, Shelter NSW, December 2014, p 3.

² Legal Aid NSW, *Submission to FACS Social Housing in NSW Discussion Paper* February 2015, pp 2–9; Legal Aid NSW, *Submission to the Foundations for Change Discussion Paper: Homelessness in NSW* November 2016, pp 14–19.

Eligibility criteria

Q 5 Is it appropriate to more narrowly define the eligibility criteria for social housing to target people with the greatest need for this form of housing assistance?

Legal Aid NSW acknowledges that in practical terms, the housing system already limits supply to those approved as in priority need. However, Legal Aid NSW does not support a narrowing of the eligibility criteria for social housing. Legal Aid NSW submits that issues around unmet demand should be addressed through increased funding for social housing, and other policy measures to increase the supply and security of social and affordable housing.

Any review of eligibility must also take into account how the *Eligibility for Social Housing Policy* is applied. We have encountered inconsistencies in the way that the criteria for priority is applied, including who is eligible, and what evidentiary requirements must be met. We submit that the application of eligibility policies must be transparent, consistent and reviewable in order to ensure that this public resource is allocated appropriately.

We also note that the current system contains a number of barriers to accessing social housing by those who are most in need. In particular:

- the Housing NSW negative classification policy disproportionately excludes those with complex needs
- the document burden to prove priority excludes the most vulnerable applicants, and
- homeless clients find it difficult to remain on the list because of the requirement for applicants to regularly confirm their ongoing need for housing assistance.

These issues are discussed in full in our previous submissions.³ In our view these issues should also be addressed as part of the review of eligibility, as they directly affect who receives social housing in NSW.

Q 7 Should people receiving housing assistance have their eligibility for assistance reviewed as their circumstances change? What criteria should be used?

Social housing tenants' circumstances are already reviewed regularly to ensure that the rent they pay corresponds to their income. If tenants do not declare a change of income they are at risk of eviction and debt recovery. Working tenants pay either an increased percentage of income as rent or pay market rent.⁴ Tenants on fixed term leases may be evicted if their income is too high.

³ See Legal Aid NSW *Submission to FACS Social Housing in NSW Discussion Paper* February 2015, pp 2–9; Legal Aid NSW *Submission to the Foundations for Change Discussion Paper: Homelessness in NSW* November 2016, pp 14–19.

⁴ Family and Community Services, *Tenancy Charges and Account Management Policy Supplement*, Fact Sheet, 11 August 2016, Table 1.

Further, current transfer and tenancy management policies provide ongoing adjustments where the property becomes unsuitable. For example, tenants with changing medical needs can be transferred to more suitable premises. The limitations within the system come from the lack of housing, not the policies themselves. This is illustrated by the limited effectiveness of the vacant bedroom charge, mentioned in the Consultation Paper, which has occurred because of the lack of suitable properties to move people to.⁵

Q 9 Is the current income threshold for eligibility for public housing lease renewal set at the appropriate level? What are the pros and cons of reducing this threshold?

We are opposed to the reduction of income thresholds for eligibility for social housing, as reduced thresholds would be a disincentive to many tenants to work. If tenants were forced to exit social housing on obtaining employment it would be a serious deterrent. Unlike the private market, social housing rent is adjusted for loss of employment and illness. This is a significant factor for those with recurring illnesses or those in casual employment, as the risk of losing their income and therefore their private rental accommodation is very real. Transition from social housing can only be effective if there are pathways back into housing when former tenants become too unwell to work or are unable to find employment to pay for their rent.

Q 10 Is the order in which clients are currently housed appropriate?

Priority should be according to need, so people who cannot access housing but are in urgent need due to violence, illness, overcrowding or their personal circumstances (tenants with children, with disabilities, or aged over 65) should be given preference over relocations for portfolio management or tenancy management reasons such as underoccupancy.

The criteria for attaining various levels of priority and the evidence requirements to substantiate them should also be publicly available. Further, tenants should be given clearer information about their status when their applications are determined to ensure that their need for housing has been properly assessed.

Other eligibility issues

At 5.2, the Consultation Paper notes that there has been an increase in the number of social housing tenants with complex needs. Legal Aid NSW agrees and notes that the most critical need in social housing is for supported accommodation for people with serious mental illnesses.

In our experience many of the people evicted from social housing are evicted because of the manifestation of their mental illness. In some cases, these evictions are for nuisance or illegal use, but many more are for rental arrears that are a result of the tenant's deteriorating mental condition. Once evicted from social housing, these high needs clients then become unable to access social housing due to the former tenant classification

⁵ IPART *Review of rent models for social and affordable housing* Issues Paper November 2016, p 28.

policy. There is a need for greater support to help tenants sustain their tenancies, as well as supported accommodation for when that tenancy cannot be sustained.

At 5.2.1, the Consultation Paper refers to the assessment of eligibility. Legal Aid NSW notes that eligibility tests and procedures must be appropriately designed so that they do not create administrative barriers to the most vulnerable tenants they are intending to benefit. They should avoid placing heavy evidentiary burdens on those who are unlikely to be able to meet them.

Rent Setting

Part 6 of the Consultation Paper outlines some proposed models for setting rents in social housing.

Legal Aid NSW notes that the significant rental affordability pressures in the private rental market put even affordable housing out of reach for many tenants. Social housing supply issues must be viewed in a holistic way, and imposing higher rental burdens on low-income tenants will not increase opportunities to transition from social housing.

[Q 15 Is a segmented rental framework appropriate for social housing? Could it also be applied to affordable housing?](#)

In our view, the income-based rent model is the most appropriate of the proposed models in the Consultation Paper. Although there are problems with income-based rents, they give the social housing system the flexibility to respond to tenants' changing circumstances while directly linking rents to an assessment of what they can afford.

Legal Aid NSW does not support a segmented rental framework. The *Future Directions* paper refers to two groups of tenants – the opportunity group and the safety net group. Given that more than 90% of social housing tenants have Centrelink as their main income, it is difficult to see how a segmented framework could be equitably implemented. It is likely that a significant proportion of the opportunity group as defined in the *Future Directions* paper would be those in receipt of the Newstart allowance. The policy therefore has the potential to impose higher rents on tenants with lower incomes.

[Q 17 Should social housing properties be able to transition to affordable housing?](#)

As outlined in the Consultation Paper, there can be a significant gap, both in terms of rental affordability and security of tenure, between social housing and other programs such as affordable housing. While affordable housing can be an appropriate solution for middle-income earners to relieve rental stress, it should complement rather than replace social housing.

If any proposal to transition properties or households from social to affordable housing is adopted, there should be no overall decrease in available social housing properties as a result. The decision to move a household from social housing rent to affordable housing rent should only be made after an eligibility review, similar to that conducted at the end of a fixed term social housing lease. This decision should also be open to appeal, and should

be reversible – if a household’s income decreases, it should be able to transition back to social housing.

The *Community Housing Rent Charging Policy* should be strengthened to create more consistency in the ways in which rents are charged and ensure reviews are conducted across the sector. There are significant differences between providers as to how rents are calculated, when rent reviews take place and when and for how long a household will be eligible for the minimum (\$5) rent. In the Housing Pathways system, tenants can be placed in community or public housing and should not be financially disadvantaged as a result of differing rent policies.

Q 19 Do you think any of the rent model options are not worth assessing, and why?

The Consultation Paper proposes a number of ways in which rent could be calculated to take into account the amenity provided with a social housing property.

We do not support a move towards calculating rents based on the level of amenity, location, size or quality of a property. In our view, such models suffer from the same limitations as the bedroom tax policy, in that they can only be effective in a system where tenants have real choice about their housing options and can move if their circumstances change. Where waiting times for transfer and placement in social housing stretch years, and a large number of applicants can show their need for housing or re-housing is urgent, tenants do not have choice about accepting or moving between properties of varying amenity.

Q 22 If an income-based rent model is retained, should currently exempt income supplements be included in assessable household income?

In our view, any supplement or allowance paid by Centrelink to a tenant or occupant to help them meet a specific cost of living, such as educational supplements, pharmaceutical allowances and telephone allowances, should not be included in the calculation of income for rent purposes.

Q 23 If an income-based rent model is retained, should income from work be assessed on an after-tax basis?

We support calculating income-based rents on net income rather than gross. Such a change is likely to have a positive impact on tenants in employment or seeking to enter employment. We also support the continuation of programs that provide a grace period for tenants entering employment.

Q 24 If an income-based rent model is retained, what other possible improvements to the current rental model should we assess?

There are a number of improvements that could be made to the income-based rent model to achieve the aims identified in the Consultation Paper.

Firstly, tenants should be able to easily access up-to-date information about their rent charges and quickly update their landlords of any change of circumstances that would affect their rent calculation. Currently, tenants with fluctuating incomes can wait weeks and even months to have their subsidies recalculated, which results in increased administrative burden for housing providers and difficulty for tenants to manage their rental payments and any resulting adjustments they owe. An advocates' line or online portal could help achieve this outcome.

Under the current policy, the moderate income category of rent calculation, whereby a tenant pays between 25-30% of their income as rent is not well articulated, making it difficult for tenants to understand the basis of their rent calculations and to seek review. There is no published basis for arriving at the various percentages of income, which are applied in increments as small as 0.00005%. The moderate income or sliding scale category can provide a disincentive to tenants who might otherwise earn small amounts of income or only earn on a sporadic basis.

Case study: Housing and Centrelink

Yana is a social housing tenant who earns casual income as a hospital administrator. She works different hours every week and gets notified on the day if she is to come to work. For long periods of time, her only income is Centrelink. She reports her casual income to both Housing NSW and Centrelink but because of the different ways of reporting income to the two agencies her rent amount has been undercalculated. Housing NSW conducts an investigation and charges Yana \$40,000 in back rent. What she has underpaid is only a small fraction of that amount, stretching over a period of five years. It takes Yana more than a year to get information from Housing NSW about how they have calculated the debt. Suffering from depression, overwhelmed by the reporting and the debt, she ceases working.

Secondly, there should be a more efficient mechanism for reviewing decisions about rent calculations. Because rental subsidy decisions are based in policy, but also have implications for adherence with a residential tenancy agreement, tenants and providers can often find themselves in both an administrative first tier review of the charges, and the NSW Civil and Administrative Tribunal (**NCAT**) concurrently. This can be the case for even very small subsidy recalculations. Concurrent reviews are burdensome and inefficient for the tenant, NCAT and the provider. They often lead to situations where a tenant agrees to pay an amount in the Tribunal that has not yet been reviewed, or where proceedings in NCAT are adjourned multiple times.

Case study: Rent subsidy issues

Anke, who lives in community housing, has a friend come to stay with her to care for her after a spinal operation. Her subsidy is adjusted and she owes the landlord a debt. Her landlord applies to NCAT for termination of her tenancy based on the debt, and Anke lodges a review of the calculation. The Tribunal will not adjourn to allow the review, and orders that she must repay the money or face eviction. On review, the amount she owes is more than halved. She must return to the Tribunal again to seek variation of the order.

A separate review system for rent subsidy decisions would ensure consistency and efficiency of decision making. This will become particularly important if the result of this consultation is to further diversify the ways in which rents are calculated. Social housing providers should refrain from seeking NCAT remedies until the review process has been completed.

Further, as outlined in our previous submissions,⁶ decisions to cancel a tenant's subsidy can have significant impacts including debt, eviction and restriction from further housing assistance. In our view, these decisions should be reviewable in the Administrative and Equal Opportunity Division of NCAT.

Q 25 What are your views on automatic deduction of rent? Are there other options to make rent collection more efficient?

Presently tenants in social housing can use the Rent Deduction Scheme through Centrelink to pay their rent. Many tenants choose this option, but some prefer to make payments by other methods. We do not support making this form of rent deduction compulsory, because tenants should be able to choose the method that works best for their financial circumstances.

⁶ See Legal Aid NSW, *Submission to the Inquiry into Tenancy Management in Social Housing* by the Public Accounts Committee, August 2014 at p5.