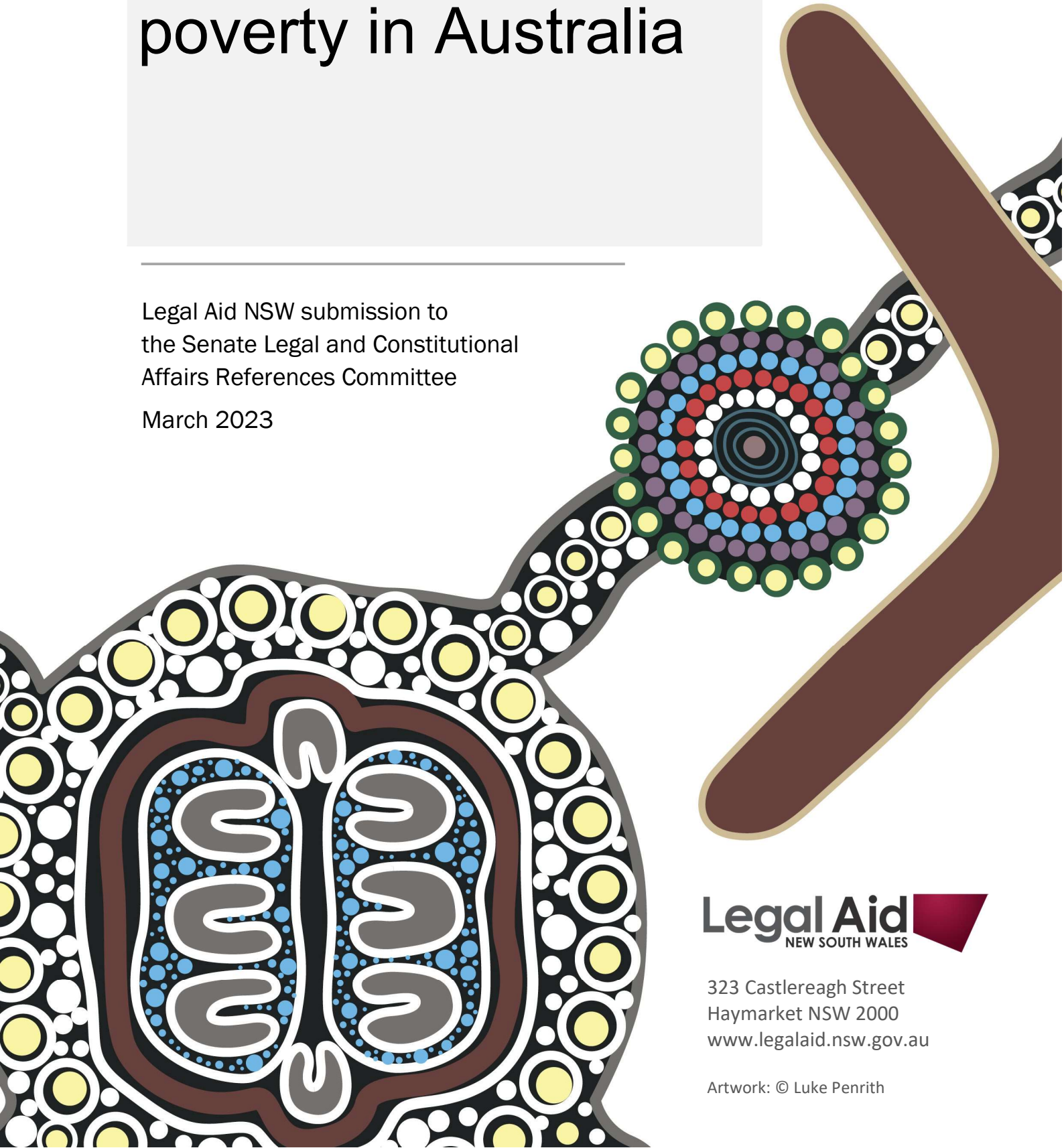
Inquiry into the nature and extent of poverty in Australia

Legal Aid NSW submission to
the Senate Legal and Constitutional
Affairs References Committee

March 2023



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Acknowledgement 4

1. About Legal Aid NSW 5

2. Executive Summary 6

Recommendations 6

3. Housing 9

3.1 "No grounds" evictions for private tenants 11

3.2 Caps on rent increases 13

3.3 Availability and composition of social housing 14

3.4 Short-term Accommodation 16

3.5 Anti-social behaviour and vulnerable tenants 18

3.6 Family and domestic violence 20

3.7 Disasters and housing 22

Recommendation 1 - Housing 26

4. Social Security 27

4.1 Rate of *JobSeeker* 27

4.2 Barriers to accessing the disability support pension 27

4.3 Waiting periods for migrants 29

4.4 Asylum seekers 30

4.5 Victims of family violence 31

Recommendation 2 – Social security 31

5. National Disability Insurance Scheme 33

5.1 Financial assistance to prospective applicants 33

5.2 Psychosocial Disability 34

5.3 NDIS and the Criminal Justice System 35

Recommendation 3 - NDIS 36

6. Child Support 38

6.1 Failing the "Maintenance Action Test" 38

6.2 Unpaid Child Support 39
6.3 Family Tax Benefit pitfalls for Private Collect 42
6.4 Foregoing Child Support due to Family Violence 43
Recommendation 4 – Child support 44

7. Criminal Justice System 46
7.1 Release from custody 46
7.2 Fines 48
Recommendation 5 – Criminal justice 49

8. Buy Now, Pay Later 50
Recommendation 6 – Buy Now, Pay Later 51

Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise their 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 20 regional offices. It focuses 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 extent and nature of poverty in Australia.

We provide legal services across NSW in criminal, civil and family law, with an emphasis on assisting socially and economically disadvantaged people. We also provide non-legal assistance to clients through our allied professional staff which includes caseworkers, social workers, mental health workers, youth workers and financial counsellors. We therefore have extensive case work experience that is relevant to the terms of reference of this inquiry.

In this submission, we highlight the following areas as requiring legislative, policy or funding reform to ensure that people who are experiencing, or at risk of experiencing poverty, are able to escape poverty or be prevented from experiencing poverty in the first instance:

- Housing,
- Social security,
- National Disability Insurance Scheme,
- Child Support,
- Criminal justice system, and
- "Buy Now, Pay Later" loans.

While some of the issues discussed in the submission are State based matters, the cause and effect of poverty are intertwined and cut across Commonwealth and State responsibilities. We therefore believe it is important that the Committee looks at the extent and nature of poverty in Australia in a holistic manner.

Recommendations

Recommendation 1 - Housing

a) Commonwealth, States, and Territories should work together on harmonising residential tenancies legislation to limit the circumstances in which landlords can issue "no grounds" evictions and place caps on rent increases.
b) To ensure that public housing tenants have equal rights and protections, regardless of where they live or who manages their tenancy, government and non-government social housing providers should have consistent policies.
c) Current policies governing eligibility and length of stay in short-term accommodation should be urgently reviewed 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.

d) To improve access to housing of individuals who experience a psychosocial disability, and support those individuals in maintaining housing tenure, current housing policies should adopt a "Housing First" approach.
e) Availability of housing stock for victims fleeing domestic and family violence should be urgently improved, and the policies regarding eligibility reviewed, to remove existing barriers to victims leaving violence, and ensure that by doing so, they are not facing homeless.
f) To ameliorate the effects of disasters on vulnerable individuals and communities residing in caravan parks and manufactured home estates, the legislation governing the operation these communities should be reviewed, and brought into line to afford those residents the same rights and protections as those of tenants covered by residential tenancies legislation.
g) The Committee should also investigate insurance affordability in disaster-prone areas and consider this issue in the context of insufficient housing availability, lack of affordable housing, climate change and poverty.

Recommendation 2 – Social security

a) The rate of *JobSeeker* allowance should be increased to help lift people out of poverty.
b) The Disability Support Pension eligibility criteria and application requirements should be reviewed to ensure that they do not operate in a way that unfairly denies applicants a payment designed to benefit individuals in their situation.
c) The "Newly Arrived Resident Waiting Periods" and "Qualifying Resident Periods" should be reduced.
d) In light of the shortcomings of the Status Resolution Support Services payments, asylum seekers' eligibility for Centrelink payments should be reconsidered.
e) The inability of victims of domestic violence who are present in Australia on temporary visas to access Centrelink or Status Resolution Support Services payments, despite clear evidence of financial need, should be urgently reviewed and addressed.

Recommendation 3 - NDIS

a) National Disability Insurance Agency decision makers should be directed to use the powers available under section 6 of the *National Disability Insurance Scheme Act 2013* to provide financial assistance to prospective applicants, to assist them to obtain expert medical evidence needed to support their application under the Act.
b) The National Disability Insurance Scheme (Support for Participants) Rules 2013 (Cth) should clarify the responsibilities of the health and mental health system and the NDIS, in order to ensure that individuals with psychosocial are not precluded from accessing NDIS supports.
c) Practical and legal barriers to prisoners accessing NDIS in custody should be examined and removed as a matter of priority.

Recommendation 4 – Child support

a) Correspondence sent to individuals who Centrelink has determined have failed the "reasonable maintenance action" test should include information about

services which provide free legal advice and encourage recipients to contact those services.

b) To protect the integrity of the scheme, and achieve greater general deterrence, Services Australia Child Support should implement an expanded, and well-targeted litigation program to enforce unpaid child support.
c) Consideration should be given to reforming superannuation laws so that superannuation funds can be more easily accessed and garnisheed in cases of unpaid child support.
d) The rules for payees to switch from private to agency collect should be amended to permit agency collection of instant arrears.
e) FTB rules about deeming child support to have been received for private collect cases should be modified to avoid the unintended consequences for eligible carers and their children when "instant arrears" are created.
f) The scheme should be reviewed to ensure that it adequately address the needs of victims of domestic violence. Whilst exemptions from "reasonable maintenance action" are a useful starting point, additional measures are necessary to ensure that victims of domestic violence understand their rights and options, are able to make fully informed decisions and are not left in a worse of position financially.

Recommendation 5 – Criminal justice

a) Better planning and greater investment are urgently needed to adequately support individuals leaving custody to obtain stable accommodation, and access services, including drug and alcohol treatment/rehabilitation, mental health and NDIS, and to break the cycle of reoffending and incarceration.
b) To ensure greater fairness, the fines system should be reformed to make infringements proportionate to a person's income.

Recommendation 6 – Buy Now, Pay Later

a) Buy now, pay later products should be subject to the National Consumer Credit Protection Act 2009.

3. Housing

The issue of housing affordability and stability is a consistent theme in the case work of our Criminal, Civil and Family Law Divisions. Our Civil Law Division provides advocacy to tenants in social housing and to private tenants, as well as to owners and tenants in caravan parks, in relation to matters such as rent arrears, repairs and damage, alleged anti-social behaviour and eviction notices. However, a lack of housing affordability and stability is an issue that regularly inter-relates with other legal issues that our clients seek advice about, and in some instances, it exacerbates those other legal problems.

The central role of housing stability in relation to a person's overall health and wellbeing is well documented.[1] Housing is identified by the World Health Organisation as a key social determinant of a person's health.[2] Experts have highlighted that "[s]table housing is a critical component in addressing financial and social stresses that can lead to poverty or prevent exit from poverty".[3] There is a relationship between housing stability and educational attainment, job security, food security and childhood development.[4] 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 and the continuous improvement of living conditions".[5] However, because Australia has not implemented the *International Covenant on Economic, Social and Cultural Rights* into our domestic legislation, these rights remain essentially unenforceable in legal proceedings.

While there are approximately 8,000 "rough sleepers" on any given night in Australia, this has been referred to as "the visible tip of the much larger crisis of homelessness in Australia".[6] In reality, only around 5 per cent of people experiencing homelessness are "rough sleepers" with others residing in temporary accommodation or severely crowded dwellings.[7] Meanwhile, there are many tenants, particularly private tenants, who also

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[1] For 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).

[2] Social Determinants of Health' *World Health Organisation* (Web page) <https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1>.

[3] A Abigail Payne and Miguel Ruiz, *Social Housing and Poverty in Australia* (Breaking Down Barriers Report Series, 2022)

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

[5] *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).

[6] 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)>.

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

experience financial stress that places them in poverty or at risk of experiencing poverty. For example, in 2018 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.[8] Of these households, two-thirds spent more than 30 per cent of their income on rent, which is the measure for identifying "rental stress".[9]

The intersection of housing and poverty is of increasing importance in Australia given the declining rates of homeownership, an increase in the proportion of tenants, and growing public housing waiting lists. In NSW between 2016 and 2021, the number of renting households increased by 17.5 per cent.[10] While as at 30 June 2022 there were 51,031 applicants on the social housing waitlist in NSW and an additional 6,519 people on the priority waitlist.[11] For many areas of Sydney, the wait time for any type of property is in excess of 10 years.[12] It is therefore vital that our laws and policies recognise the importance of housing security, particularly for certain demographics of people, such as those who experience a psychosocial disability, who often face additional challenges in accessing a rental property and maintaining a tenancy.

As a result of our case work experience, we wish to highlight a number of specific issues that are deserving of attention. These are:

- "No grounds" evictions,
- Rent increases,
- Availability and composition of social housing,
- Short-term accommodation,
- Anti-social behaviour and vulnerable tenants,
- Domestic and family violence and tenancy laws, and
- Disasters and housing.

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

[9] Ibid.

[10] This figure is based on an analysis of 2016 and 2021 Census data by Tenants' Union of NSW- 'Census 2021 – Jemima Mowbroy, 'Renters are the fastest growing tenure in Australia', *This Renting Life- The Tenants' Union Blog* (Blog Post, 4 July 2022) <https://www.tenants.org.au/blog/census-2021-renters-are-fastest-growing-tenure-australia#:~:text=The%202021%20Census%20data%20tells,2016%20to%20335%2C404%20in%202021>.

[11] '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

[12] Ibid.

3.1 "No grounds" evictions for private tenants

Compared to most comparable countries, Australian tenancy laws provide less security of tenure.[13] 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".[14] "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.[15] A tenant has no right, and the NSW Civil and Administrative Tribunal (**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".[16]

While the *Residential Tenancies Act 2010* (NSW) (**Residential Tenancies Act**) 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 any of the following reasons:

- an application, or proposed application, by the tenant to NCAT seeking orders,
- the tenant having taken, or having proposed to take, any other action to enforce a right, or
- an order being in force between the parties.[17]

In our view, the protections are inadequate for the following reasons. Firstly, the grounds to substantiate a retaliatory eviction are drafted very narrowly as they require either proceedings to have occurred or to be on foot, or for the tenant to have taken, or propose 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 the above reasons, this only engages NCAT's discretion to declare that the termination notice has no effect or refuse to make the termination

[13] 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.

[14] Ibid 5.

[15] *Residential Tenancies Act 2010* (NSW) ss 84(2), 85(2)

[16] Ibid s 115.

[17] Ibid s 115(2).

order.[18] In our experience, NCAT often declines to exercise their discretion. Thirdly, even if NCAT did invalidate the termination notice or refuse to make a termination order, a landlord may issue another termination notice 6 months after NCAT's finding and it is very difficult for the tenant to substantiate that the newer termination notice was issued for retaliatory reasons.

We submit that an important step to improving housing stability and in turn reducing and preventing poverty, is by limiting the circumstances in which landlords can issue "no grounds" evictions. The Tenants' Union of NSW estimates that the basic cost of moving houses is $2,520 and that generally the cost is more likely to be around $4,075.[19] Therefore, a reduction in the number of times a tenant is required to move, will reduce the financial burden of renting, not to mention the other benefits that flow from a person remaining in the same residence.

A number of Australian jurisdictions have already taken steps to limit the use of "no grounds" evictions. Victoria has done so in the most comprehensive manner by prescribing the circumstances in which evictions can occur. Broadly, these relate to the follow 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, and
- If the premises are the property of a public statutory authority and the premises are required for public purposes.[20]

However, Victoria does continue to permit "no grounds" evictions at the end of an initial tenancy, but not at the end of subsequent fixed term tenancies.[21] Legal Aid NSW

[18] Ibid s 115(1).

[19] 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-cost-eviction#:~: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.>.

[20] *Residential Tenancies Act 1997* (Vic) ss 91ZW-91ZZC.

[21] Ibid ss 91ZZD-91ZZDA.

supports limiting “no grounds” evictions in a similar manner to what has been done in Victoria, however we also support extending the limitations on “no grounds” evictions to all fixed term tenancies, including initial fixed term leases.

3.2 Caps on rent increases

A further issue we believe requires legislative attention is the issue of rental increases. Rents in NSW have recently reached record highs and are the highest in the country. Rental prices in Sydney increased by an average of 11 per cent between January 2022 and January 2023.[22]

Data from NCAT reveals that the overwhelming majority of termination applications for private tenants and social housing tenants is in relation to rent arrears.[23] 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…” as opposed to the wilful non-payment of rent.[24] This is supported by Legal Aid NSW’s experience where we observed a significant reduction in social housing tenants seeking assistance in relation to rent arrears, during the period of time when *JobSeeker* and a number of other social security payments were increased due to the economic impact of COVID-19. We did, however, observe an increase in private tenants accessing our services during this time for rent arrears, particularly households who had experienced a decline in income, but who may not have benefited from the additional government assistance.

In NSW a private landlord can increase the rent during a fixed term tenancy of less than 2 years, but only where the agreement states the amount of the increase, or provides the method for calculating any increase in rent.[25] On the other hand, fixed term leases of longer than 2 years and periodic leases, rental increases can only occur once in any 12 month period.[26] For a fixed term lease that is being renewed, the landlord must still provide the tenant with 60 days notice of the proposed increase.[27]

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

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[22] ‘Pressure on Australia’s Rental Market Shows Tenative Signs of Easing Despite New 10.2% record for Annual Rent Growth’, *CoreLogic* (Web page, 10 January 2023) <https://www.corelogic.com.au/news-research/news/2023/pressure-on-australias-rental-market-shows-tentative-signs-of-easing-despite-new-10.2-record-for-annual-rent-growth>.

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

[24] Ibid.

[25] *Residential Tenancies Act 2010* (NSW) s 42(1).

[26] Ibid ss 41(1B), 42(2).

[27] Ibid s 41(2).

- an application must be filed within 30 days of receiving notice of the rent increase,[28]
- the onus is on the tenant to substantiate that the proposed rent increase is excessive,[29]
- there is a filing fee of $54 for any application, which a tenant can apply to reduce, 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 is excessive.[30]

There is often a power imbalance, particularly between unrepresented tenants who may experience vulnerabilities such as a psychosocial disability versus a landlord, who is often represented by an 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 that 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. In the event 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 around caps on rental increases are considered alongside reforms to "no grounds" evictions. 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 so that any rental increases are not subject to statutory or contractual conditions.

3.3 Availability and composition of social housing

As was highlighted above, there is currently a significant waitlist for social housing in NSW. Australia-wide there has been a decline in the percentage of housing stock that is social housing from 5.1 per cent of housing stock in 2000 to 4.2 per cent of housing stock in 2016.[31] 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

[28] *Residential Tenancies Act 2010* (NSW) s 44(2); *Residential Tenancies Regulation 2019* (NSW) reg 39(1).

[29] *Residential Tenancies Act 2010* (NSW) s 44(1).

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

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

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".[32] It is therefore important that the level of social housing is constantly reviewed and keeps pace with population growth.

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.[33] While in NSW, government housing makes up approximately 64.5 per cent of social housing as at June 2021[34] in some regional parts of NSW, only non-government social housing 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. Furthermore, most non-government housing providers have policies that are less favourable to tenants, particularly to vulnerable tenants such as people who are in custody 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.[35] 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 in relation to 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 6 months for a range of reasons, including if the person is in prison or in drug or alcohol rehabilitation.[36] In contrast, non-government housing providers only permit tenants to be absent from their residence for such purposes for a period of up to

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

[33] 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>.

[34] Ibid.

[35] Rachel Ong Viforj 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".

[36] '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>.

3 months. This is a very short time frame, particularly at the moment when courts are continuing to deal with a backlog of cases as a result of COVID-19 and there are longer than usual delays in criminal matters progressing through NSW courts. 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,[37] 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 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 6 months before a person will again be eligible for an offer of social housing.

These are just a couple of examples of how the difference in policies between government and non-government housing providers risks treating social housing tenants differently depending on who their housing provider is.

3.4 Short-term Accommodation

To fully appreciate the challenges for people who are homeless, or at risk of homelessness, in finding appropriate housing 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.[38] 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.

Temporary accommodation

[37] '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>.

[38] '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>.

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.[39] 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.[40] Temporary accommodation is only available for a maximum period of 28 days in a 12 month period, other than in exceptional circumstances.[41] In most instances, 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 in the event they have not found alternative accommodation within that time frame. This can be especially challenging for people who have children with them and / or who have a large amount of belongings with them.

Furthermore, to be eligible for temporary accommodation, a person needs to be able to 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".[42] The strictness of the policies and the manner they are implemented adds additional stress to people who are already experiencing significant stress as a result of their housing situation and may also be experiencing other stressors such as family violence.

During the initial response to COVID-19, the requirement of needing to reapply every few days for continued access to temporary accommodation was removed. Instead, people were only required to reapply approximately every week which reduced some of the stress on individuals and families. Unfortunately, this arrangement has now ended. We submit that a return to such a policy is a simple measure that can ease the pressure on vulnerable individuals and families who are going through an exceptionally difficult time.

Lastly, we also highlight a recent change in policy which now requires people accessing temporary accommodation to pay a contribution towards the cost of the accommodation. 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.[43] Given that a person must satisfy a strict income eligibility test and have no more than $1000 in cash assets to be eligible for Temporary Accommodation,

[39] Ibid.

[40] 'Rentstart Assistance Policy" *NSW Government Communities & Justice* (Web page, 4 November 2021) < https://www.facs.nsw.gov.au/housing/policies/rentstart-assistance-policy#temp>.

[41] Ibid.

[42] Ibid.

[43] Ibid.

expecting the person to pay a contribution seems unnecessary, and risks further compounding the stress on individuals and families.[44] This is particularly true for those who may be paying for accommodation elsewhere, but are unable to reside at the premises due to it being unsafe.

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.[45] 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 3 months.[46] It is not subject to any income test, and it is not to be provided where temporary accommodation is considered a more appropriate option.

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.[47] This includes services that specialise in family violence, young people and people experiencing substance abuse issues.

3.5 Anti-social behaviour and vulnerable tenants

There is a need to improve access to housing and support in maintaining 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

[44] Ibid.

[45] '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>.

[46] '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>.

[47] 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>.

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 6 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.[48]

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.[49] 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*".[50]

Legal Aid NSW supports a "Housing First" approach as we regularly observe the barriers that many of our clients face to being able to access housing. The reality is that the vulnerabilities and disadvantages 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, who made a finding 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…".[51] The Productivity Commission went on to recommend that under the next National Housing and Homelessness agreement, "..the Australian, State and Territory Governments should

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

[49] 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)>.

[50] "Housing First", *Homelessness Australia* (Webpage) < https://homelessnessaustralia.org.au/what-you-can-do/housing-first/>.

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

commit to expanding Housing First programs to improve housing outcomes for people experiencing homelessness.[52]

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

3.6 Family and domestic violence

Domestic and family violence is one of the leading causes of homelessness for women and children.[53] It is therefore vital that tenancy laws and policies reflect this significant driver of homelessness.

Residential Tenancy

Positively, since February 2019, the Residential Tenancies Act contains provisions that specifically address family and domestic 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.[54] 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.[55] 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. We are supportive of 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 relevant parties, such as landlords, real estate agents, potential competent persons[56] 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. Such an issue could be remedied through greater education amongst relevant parties and/or by creating a positive duty on agents to make

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[52] Ibid 43.

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

[54] *Residential Tenancies Act 2010* (NSW) s 105B.

[55] Ibid s 105D(1).

[56] 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.

tenants aware of the provisions in the Act when they know that a tenant has left a property due to family violence.

Short-term accommodation

For people who are experiencing family and domestic violence and need to leave their usual residence, it is essential that, where required, they are provided with support to find appropriate accommodation.

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

- Specialist accommodation providers for women experiencing family violence are not evenly distributed across greater Sydney or the entire State and therefore they will often be a long way from where the victim ordinarily lives. This can be problematic in terms of social connection, the time and cost of commuting to their workplace and to their children's school, for those who have children in their care.

- People who are on temporary visas are not ordinarily eligible for temporary accommodation or emergency temporary accommodation.[57] However, in "exceptional circumstances" temporary residents may be provided a few days of temporary accommodation if they are escaping family and domestic violence and have no other accommodation options.[58] 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, who 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.[59]

- 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

[57] 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>.

[58] 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>.

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

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 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.

Other observations

The challenges for women and children escaping family violence in finding safe and affordable accommodation is acute, but particularly so in regional areas. In family law proceedings, we regularly observe the other party to the proceedings criticising the victim for certain decisions they make post-separation while in the midst of trying to escape the violence. This is because a mother with limited financial means will restrict her options which may present as a child being neglected, when in fact, the mother simply does not have the resources needed to provide the best for their child. It is a situation imposed on them as a result of limited financial means and a lack of government supports, as opposed to an unwillingness to provide for their child.

3.7 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. For those who already experience vulnerability, including Aboriginal people, people at risk of homelessness and people with disability, they 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 case work experience shows that those who experience existing vulnerabilities bare the greatest impact of disasters.

Caravan Parks and Manufactured Home Estates

As part of our disaster relief work, we have observed emerging issues for vulnerable clients who reside in a caravan park 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.[60] 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.[61] While the average wage for those who were employed full-time or part-time was 37 per cent below the national average at the time.[62]

Through our case work, 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. 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.[63]

- 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.[64] 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 case work during a number of disasters in recent years, we have observed entire parks become uninhabitable and if there is no requirement on operators to have a capital works

[60] 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>.

[61] 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.

[62] Ibid 20.

[63] *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

[64] *Strata Schemes Management Act 2015* (NSW) s 74(1).

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.

- 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.[65]

- Abatement of site fees: The Act also provides for an abatement of site fees, but only where the site is wholly uninhabitable.[66] 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".[67] 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,[68] but not a rent abatement despite the fact they may not be able to live at their site until the toilet facility is repaired.

Case Study – Ronan's story

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. 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.

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

[66] Ibid s 62(a).

[67] *Residential Tenancies Act 2010* (NSW) s 43(2)(a).

[68] *Residential (Land Lease) Communities Act 2013* (NSW) s 64(1)(a).

Residential tenancy agreements

Our staff 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 as a result of many properties becoming uninhabitable. Due to the shortage in rental properties, rental prices increased substantially. The increase in rental prices created an incentive for landlords to terminate existing tenancy agreements, including fixed term tenancies prematurely, on the basis the property had become "wholly or partially uninhabitable".[69] 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.[70]

Insurance

Lastly, we note that due to the risk of floods in certain parts of NSW, insurance premiums for home and contents insurance are prohibitively high for many households. As a result, many households were uninsured at the time of recent flood events and they lost everything. While the NSW Government established a number of cash grants in response to support owner occupiers, landlords and tenants,[71] the issue of insurance premiums being prohibitively expensive is not going away and government grants are rarely going to be adequate to cover the true costs of a disaster to a household.

These are just some of the challenges posed by disasters for people living permanent residents in caravan parks or manufactured home estates, as well as tenants in residential properties. We encourage the Committee to explore the issues at the intersection of housing, climate change and poverty further.

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[69] *Residential Tenancies Act 2010* (NSW) s 109.

[70] Ibid s 43(2).

[71] 'Disaster Relief Grants for Individuals, NSW Government (Web page) <https://www.nsw.gov.au/emergencies/nsw-reconstruction-authority/disaster-relief-grant-for-individuals>; 'New Back Home Grants for Flood-Damaged Properties', NSW Government (Web page) <https://www.nsw.gov.au/media-releases/back-home-grants-floods#:~:text=Under%20the%20Back%20Home%20grant%20scheme%20households%20that,be%20eligible%20for%20up%20to%20%2420%2C000%20cash%20grants.>.

Recommendation 1 - Housing

a) Commonwealth, States, and Territories should work together on harmonising residential tenancies legislation to limit the circumstances in which landlords can issue "no grounds" evictions and place caps on rent increases.
b) To ensure that public housing tenants have equal rights and protections, regardless of where they live or who manages their tenancy, government and non-government social housing providers should have consistent policies.
c) Current policies governing eligibility and length of stay in short-term accommodation should be urgently reviewed 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.
d) To improve access to housing of individuals who experience a psychosocial disability, and support those individuals in maintaining housing tenure, current housing policies should adopt a "Housing First" approach.
e) Availability of housing stock for victims fleeing domestic and family violence should be urgently improved, and the policies regarding eligibility reviewed, to remove existing barriers to victims leaving violence, and ensure that by doing so, they are not facing homeless.
f) To ameliorate the effects of disasters on vulnerable individuals and communities residing in caravan parks and manufactured home estates, the legislation governing the operation these communities should be reviewed, and brought into line to afford those residents the same rights and protections as those of tenants covered by residential tenancies legislation.
g) The Committee should also investigate insurance affordability in disaster-prone areas and consider this issue in the context of insufficient housing availability, lack of affordable housing, climate change and poverty.

4. Social Security

4.1 Rate of *JobSeeker*

Many Legal Aid NSW clients are in receipt of *JobSeeker*. The feedback from our staff is that the most significant issue at the interface between social security and poverty is the current rate of *JobSeeker.*

Since 20 September 2022, *JobSeeker* has been set at $334.20 per week for a single person with no dependents, which is just $47 per day. This is an especially meagre sum for people who reside in private rentals, even in the event they have access to the maximum Rental Assistance payment of $73 per week. Anglicare in its 2022 Rental Affordability Snapshot, identified just five rental listings nationally that were "affordable" to a single person on Jobseeker.[72] All of these rooms were in share houses.

It is important to highlight the positive impact that the Coronavirus supplement had on the lives of many of our clients. The supplement added $550 per fortnight to the base rate of *JobSeeker* and it has been estimated that it lifted 470,000 people out of poverty.[73] We heard from many of our clients about the positive impact the supplement had on their life, including being able to put healthy food on the table and being able to afford their medication. The supplement highlighted the ease with which government could move people above the poverty line.

4.2 Barriers to accessing the disability support pension

Legal Aid NSW has observed that the disability support pension (**DSP**) has become increasingly difficult for people with a disability to access. The effect of this is that people with a disability are forced onto lower forms of social security payment, such as *Jobseeker.* The current maximum DSP rate for a single person is $468.40 per week, compared to $334.20 per week for a single person on *JobSeeker*. In addition, mutual obligations apply to those in receipt of *JobSeeke*r, which can be particularly onerous for persons who experience a disability. Furthermore, they are more likely to have medical and disability related expenses which places them at greater risk of experiencing financial hardship.

Over a number of years, the eligibility requirements for DSP have been tightened and as a result there has been a fall in the number of people successfully applying for the DSP.

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[72] Eddy Bourke and Melissa Foo, 'Rental Affordability Snapshot' (National Report, Anglicare Australia, April 2022) 4.

[73] Matt Grudnoff, 'Opportunity Lost- Half a million Australians in poverty without the coronavirus supplement' (Discussion Papers, Australia Institute, March 2021) 1.

Consistent with the concerns we have observed, the Parliamentary Budget Office has found that the drop is the result of "….new compliance and assessment measures, which applied from 1 January 2012..".[74] From 2001/02 to 2010/11 approximately 63 per cent of DSP applicants were successful.[75] In 2016-17 just over 25 per cent of applications were successful.[76]

The key changes were:

- Inability to work: From 1 July 2006, an applicant had to be able to establish that they were unable to work 15 hours a week within the next 2 years.[77] Previously they were required to establish that they could not work 30 hours per week.

- Program of support: From 3 September 2011, a new claimant for the DSP must have actively participated in a "program of support" in order to be eligible, unless they experience a "severe impairment".[78] In practice, this requires a person to participate in a program of support through participation in employment or disability employment services while in receipt of an activity tested income support payment such as *JobSeeke*r or Youth Allowance. The program usually includes activities such as job search, job preparation, or education and training. Ordinarily, 18 months total participation time is required.

- Impairment tables: From 1 January 2012 impairment tables were introduced as part of the DSP eligibility criteria. A person must establish that they have an impairment that is caused by a permanent condition and the tables are then used to determine whether a person is sufficiently impaired to qualify for the DSP.[79]

It is Legal Aid NSW's experience that there are significant difficulties for people with serious medical conditions and limited or no capacity to work in meeting the eligibility criteria for DSP, or in being able to prove they meet the eligibility criteria for DSP. The complexity of the criteria and the assessment and review process create barriers for applicants, particularly for those from culturally and linguistically diverse backgrounds,

[74] Parliamentary Budget Office, Parliament of Australia, *Disability Support Pension- Historical and projected trends* (Report no 01/2018, 20 February 2018) vi.

[75] Ibid.

[76] Luke Michael, 'Sharp Decline in People Accessing Disability Support Pension', *Probono Australia* (online, 21 February 2018) < https://probonoaustralia.com.au/news/2018/02/sharp-decline-people-accessing-disability-support-pension/>.

[77] *Social Security Act 1991* (Cth) s 94(5).

[78] Ibid ss 94(2)(aa), 94(3B).

[79] Ibid ss 94(1)(b), 94(3B).

with mental health conditions and those that experience other compounding disadvantage.

Based on our experience, we recommend that changes are made to the requirements to promote fairer and more transparent decisions, including changes to processes, the evidence that can be considered in decision making and the legal requirements to be eligible for the DSP.

In May 2021, the Senate referred an inquiry into the purpose, intent and adequacy of the DSP to the Senate Community Affairs References Committee. Legal Aid NSW made a submission that inquiry and we encourage you to refer to that submission for a comprehensive explanation of the flaws in the current assessment process.[80] Also, the Committee released their report in February 2022.[81] We strongly support the recommendations made by the inquiry and encourage the Committee to review them. We believe that the implementation of those recommendations have a critical role to play in reducing the number of people who are experiencing poverty, or at risk of experiencing poverty, as a direct result of their disability.

4.3 Waiting periods for migrants

An area that we believe requires particular attention is that of "newly arrived resident waiting periods" (**NARWP**) under the *Social Security Act 1991* (Cth) which can operate to cause or exacerbate the financial hardship that new migrants experience. Generally, for a person to be eligible for a pension, allowance or benefit they must be an "Australian Resident". To be an Australian Resident a person must reside in Australia and be either an Australian citizen, the holder of a permanent visa or a Special Category Visa (**SCV**) holder who is a protected SCV holder.[82] However, for certain payments "Australian Residents" will also be subject to a NAWRP or a Qualifying Resident Period, or both.

Whether a particular waiting period applies depends on the type of payment. For example, the NAWRP does not apply to the DSP or Age Pensions, but the Qualifying Resident Period does. Newly arrived residents are subject to waiting periods of up to 4 years before qualifying for most social security payments, including *JobSeeker*, Youth Allowance, Parenting Payment and Austudy.[83]

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[80] Legal Aid NSW, Submission No 11 to Senate Community Affairs References Committee, Parliament of Australia, *Purpose, Intent and Adequacy of the Disability Support Pension* (6 July 2021).

[81] Senate Community Affairs References Committee, Parliament of Australia, *Purpose, Intent and Adequacy of the Disability Support Pension* (Report, February 2022).

[82] *Social Security Act 1991* (Cth) s 7(2).

[83] We note that there are a number of exemptions to the application of NARWPs based on the type of visa the person holds or based on a person's particular circumstances. For example, NARWPs do not apply to refugees or their family members in relation to any payment type. While "Special Benefit" may be accessible if a newly arrived resident can satisfy Centrelink

The waiting periods for newly arrived residents have become much longer over the years. In January 1993 the Government introduced a 26-week waiting period for migrants before they would be eligible to receive select payments. This was extended to 104 weeks in March 1997 and applied to a wider range of payments than it did previously. Most recently, from 1 January 2019 the NARWP was further extended to 208 weeks for key payments such as *JobSeeker*, Youth Allowance, Parenting Payment and AusStudy. Waiting periods of 208 weeks, 104 weeks and 52 weeks were introduced for a range of payments that did not previously have a NARWP. In light of the significant increase in waiting periods for new migrants who arrived after 1 January 2019,there is a need to urgently review the impact of these changes on this cohort.

Similarly, in our experience, social security residency requirements that apply to New Zealand citizens who reside in Australia can lead to harsh outcomes. Prior to 26 February 2001 New Zealand citizens residing in Australia had access to a greater number of social security payments and allowances than they do today. Since 26 February 2001 only 'protected' special category visa holders meet the definition of "Australian Resident", which grants them access to a range of social security payments. Whether a person is considered to be a "protected" special category visa holder depends on a number of factors, but at a minimum it requires that they held a special category visa as at 26 February 2001.[84]

4.4 Asylum seekers

We also note that asylum seekers who are on bridging visas while their protection visa application is being determined, are not eligible to receive Centrelink payments or allowances. For most, determination of a protection visa application takes a very long period of time. The average waiting time for an interview with the Department of Home Affair, for the purpose of assessing the asylum claim, is 4 years. It is approximately a further 3 years in the event the applicant wishes to seek review of the Department's decision before the Administrative Appeals Tribunal.

Instead of being eligible for Centrelink, this cohort are eligible for Status Resolution Support Services (**SRSS**) payments, which are regular payments to assist with basic living costs while a person is waiting for their immigration status to be determined. The payments are less than *JobSeeker*. In NSW, SRSS payments are administered by two non-governmental organisations, Settlement Services International and Life Without

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that there has been a "substantial change in circumstances beyond their control" and they are in financial hardship - [83] *Social Security Act 1991* (Cth) s 739A(7).

[84] Ibid s7(2A)-(2G). For a summary of who is deemed to be a "protected" special category visa holder, see- 'New Zealand Citizens', *Guides to Social Policy- Social Security Guide* (Web page, 4 January 2022) <https://guides.dss.gov.au/social-security-guide/9/1/3>.

Barriers. However, eligibility for the payment is not automatic and are assessed by the organisations who administer the payments. We estimate that only around one-third of our clients who are eligible to apply for a SRSS payment, are actually in receipt of the payment and yet all of them experience financial hardship. Support workers who attend appointments with Legal Aid NSW report great difficulty in obtaining SRSS payments for their clients. Unfortunately, the scheme is opaque and there is no merits review.

Some examples of the strictness with which SRSS payments are administered, include:

- If a recipient transfers money overseas to family members, they will have their payment cancelled and will not be able to get back onto the payment,
- If an asylum seeker is on a visa that has not yet expired, such as a visitor's visa, they will not be eligible for an SRSS payment until their existing visa expires and they are placed on a bridging visa that is associated with their protection visa application.

4.5 Victims of family violence

A second group of people on temporary visas unable to access either Centrelink or SRSS payments easily are victims of family violence who have made an application for a partner visa (family violence exemption) which is being processed by the Department of Home Affairs. Unless the person holds either an 820 or a 309 temporary partner visa, they are unable to access social security payments. While awaiting processing of their application for the family violence exemption, this group is usually present in Australia on Bridging Visas. They have usually left their violent Australian partner and have no family or other support in Australia. Often, they are too ashamed about the breakdown of the relationship to call upon family support from overseas. These individuals are currently living in severe poverty in Australia. While they are eligible for a one-off payment of $3,000 from the Red Cross, depending on how long the Department of Home Affairs takes to process their application, these funds can be exhausted very quickly. There is no period of time within which the Department must make a decision and in some cases it can take years.

Recommendation 2 – Social security

a) The rate of *JobSeeker* allowance should be increased to help lift people out of poverty.
b) The Disability Support Pension eligibility criteria and application requirements should be reviewed to ensure that they do not operate in a way that unfairly denies applicants a payment designed to benefit individuals in their situation.
c) The "Newly Arrived Resident Waiting Periods" and "Qualifying Resident Periods" should be reduced.
d) In light of the shortcomings of the Status Resolution Support Services payments, asylum seekers' eligibility for Centrelink payments should be reconsidered.

e) The inability of victims of domestic violence who are present in Australia on temporary visas to access Centrelink or Status Resolution Support Services payments, despite clear evidence of financial need, should be urgently reviewed and addressed.

5. National Disability Insurance Scheme

While eligibility for the NDIS is not means tested, there are a number of barriers that exist within the scheme that make it difficult for people who are of limited financial means to access the scheme and to obtain all of the supports they are potentially entitled to. In turn this is potentially depriving people who are of limited means of obtaining "reasonable and necessary" supports, which may in turn increase their social and economic participation.

5.1 Financial assistance to prospective applicants

To obtain funding through the NDIS, an applicant needs to be able to establish that they have a disability that is caused by a permanent impairment,[85] and that as a result of the impairment they need disability-specific supports to complete daily life activities.[86] It is therefore essential that applications are accompanied by expert medical evidence to substantiate eligibility. However, depending on the expert report required, the cost for obtaining a report can be substantial and therefore cost prohibitive for some individuals and their families.

A solution to the issue lies in the *National Disability Insurance Scheme Act 2013* (Cth), which provides that "[t]o support people with disability to exercise choice and control in the pursuit of their goals, the Agency may provide support and assistance (including financial assistance) to prospective participants in relation to doing things or meeting obligations under, or for the purposes of, this Act".[87] However, in our work in the AAT, we often see the NDIA unwilling to fund medical reports for people who are unable to pay for reports themselves, notwithstanding the legislative power to do so. In our view, applications for access should not be refused because a decision maker determines there is insufficient evidence about a person's impairments. Instead, decision makers should be directed to use the power in section 6 of the Act to help prospective participants to supply the information needed so that an informed decision is made.

There is a real risk that a refusal to use this power in such a manner will not only mean that people of limited financial means are not getting the level of support through the NDIS they are entitled to, but that their social and economic participation will be unfairly limited.

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[85] Which may be intellectual, cognitive, neurological, sensory, physical or psychological – *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(a) and 25(1)(a).

[86] The disability may be intellectual, cognitive, neurological, sensory, physical or psychological – *National Disability Insurance Scheme Act 2013* (Cth) s 24(1)(a) and 25(1)(a).

[87] *National Disability Insurance Scheme Act 2013* (Cth) s 6.

5.2 Psychosocial Disability

There have been, and continued to be, barriers to people who experience a psychosocial disability accessing the NDIS.[88] Previous reviews of the NDIS, particularly the Tune Review, have highlighted the difficulties for people seeking access for psychosocial disabilities.

There is a strong correlation between people who experience a psychosocial disability and their economic circumstances. ABS data from 2018 reveals some key statistics in relation to the financial circumstances of the 4.6 per cent of Australian's who experience a psychosocial disability:

- Of those who are of working age and were not a resident in some form of care facility, 59.2 per cent received a government pension or allowance as their main source of income, and
- While 17.7 per cent reported a wage or salary as their main source of income, the median gross income of those who do work, is less than half that of a person who does not experience a disability.[89]

It is therefore vital that people with psychosocial disability are receiving the support they need to be able to increase their social and economic participation. One reason for people with a psychosocial disability accessing the NDIS is that it is best practice in psychosocial care to emphasise a person's strengths and abilities, and focus on recovery and improved wellbeing[90], which does not always square well with the NDIS requirement that supports not be funded unless there are "no known, available and appropriate evidence-based clinical, medical or other treatments that would be likely to remedy the impairment".[91]

In July 2022, some positive changes to the access requirements were introduced, including the replacement of the term "psychiatric condition" with "psychosocial disability" and the express recognition that some permanent impairments can fluctuate in severity, but still meet the access requirements.[92]

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[88] The term psychosocial disability is used to "describe living with a disability that is associated with a severe mental health condition" and "….it differs from the term psychiatric disability in that it places an emphasis on the social consequences of disability whereas psychiatric disability focuses on the medically defined illness or impairment"- National Mental Health Consumer and Carer Forum, Submission No. 960 to Productivity Commission, *Disability Care and Support* (2011) 9, 18.

[89] 'Psychosocial disability' *Australian Bureau of Statistics* (Web page, 25 September 2020) <https://www.abs.gov.au/articles/psychosocial-disability>.

[90] David Tune, *Review of the National Disability Insurance Scheme Act- Red Tape and Implementing the Participant Service Guarantee* (Report, December 2019) 74.

[91] *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) r 5.4.

[92] *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Act 2022 (Cth)* Sch 2 cls16-23.

Unfortunately, we continue to see prospective participants with psychosocial disabilities having their access applications refused despite having long-standing, debilitating psychosocial impairments. This is often because decision makers do not differentiate between ongoing consultation with a psychologist or psychiatrist, which can be essential to mental health recovery, and the requirement that there be no treatment that is likely to remedy the impairment.

The NDIA has developed a number of resources to assist prospective participants with psychosocial disabilities and their doctors to present information about the impact of their disabilities. We consider that further support and training is needed to ensure that people with psychosocial disabilities can access the NDIS while pursuing mental health recovery. The NDIA decision makers should not refuse access to prospective participants on the basis that they continue to consult a psychologist or psychiatrist, but should appropriately and thoroughly consider the prospective participant's treatment history, and whether the prospective participant's impairment is enduring.[93] There is a need for greater clarity in the *National Disability Insurance Scheme (Support for Participants) Rules 2013* (Cth) around the responsibilities of the health and mental health system and the NDIS.

5.3 NDIS and the Criminal Justice System

Almost one in three (29 per cent) adults who enter prison in Australia identify as having a chronic condition or disability.[94] In our experience, there is a high level of unmet need for disability supports in prisons and our clients experience significant practical and legal barriers to access the NDIS while in prison.

Practical barriers include the fact that advocacy and legal services are difficult to access in prison, assessments can be hard to facilitate, and it can be challenging to assess a person's functional capacity while they are detained in prison, all of which make it difficult to obtain the evidence which needs to be submitted to the NDIA. In turn, these barriers can impede a person's transition planning and may result in them spending longer than necessary in custody, on account of not getting bail or parole without adequate disability supports in place.

In addition, the *National Disability Insurance Scheme (Support for Participants) Rules 2013* (Cth) contains legal barriers. For example, the NDIA is not responsible for funding day-to-day supports while a person is in prison, and is only responsible for other supports "to the extent appropriate in the circumstances of the person's custody".[95] Practically, it

[93] See *National Disability Insurance Agency v Davis* [2022] FCA 1002 [76]-[100].

[94] Australian Institute of Health and Welfare, *The health of Australia's prisoners* (Report, 2018).

[95] *National Disability Insurance Scheme (Supports for Participants) Rules* 2013 (Cth) r 7.24.

is very difficult for prisoners to get these supports in prison and this potentially leads to greater challenges in them being granted bail and parole, or receiving a more favourable sentencing outcome.

In the community context, the NDIA is not responsible for programs "to prevent offending and minimise risks of offending and re-offending", or for the "management of community corrections, including corrections-related supervision for offenders on community-based orders".[96] Given many people who are subject to orders in the community have complex needs, it can be artificial to try to differentiate between their disability and criminogenic needs. The NDIS rules do not reflect this complex reality. There is an increased risk, that if a person with a disability is subject to an order, and they are not receiving necessary supports to comply with the order, they will breach the order, and this could lead to them returning to custody and the cycle continuing.

This issue is currently under consideration by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.[97] In a submission to the Royal Commission, the Victorian State Government stated that:

> [w]hile the Principles to determine the responsibilities of the NDIS and other service systems was updated in November 2015, consensus is yet to be reached between state and territories and the Commonwealth regarding the distinction between criminogenic behaviour and disability behaviour supports, and corresponding responsibilities across the service system.[98]

Legal Aid NSW supports there being greater clarity around the demarcation of responsibility between the NDIS and the justice system as we believe that it can play a crucial role in preventing the cycle of incarceration, and in turn, poverty.

Recommendation 3 - NDIS

a) National Disability Insurance Agency decision makers should be directed to use the powers available under section 6 of the *National Disability Insurance Scheme Act 2013* to provide financial assistance to prospective applicants, to assist them to obtain expert medical evidence needed to support their application under the Act.
b) The National Disability Insurance Scheme (Support for Participants) Rules 2013 (Cth) should clarify the responsibilities of the health and mental health system

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[96] National Disability Insurance Scheme (Supports for Participants) Rules 2013 (Cth) r 7.25(c)-(d)

97 For example, see Transcript of Proceedings, Public Hearing 15: People with Cognitive Disability and the Criminal Justice System: NDIS Interface (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Sackville J, 13 August 2021) 182 (Dr Mellifont).

98 Victorian State Government, Submission No ISS.001.00512 to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (December 2020) 28.

and the NDIS, in order to ensure that individuals with psychosocial are not precluded from accessing NDIS supports.

c) Practical and legal barriers to prisoners accessing NDIS in custody should be examined and removed as a matter of priority.

6. Child Support

Legal Aid NSW has a specialist Child Support Service, with solicitors who provide legal advice to parents who have to pay financial support for children after separation, and parents and carers who are, or should be, receiving financial support for children in their care. This includes providing representation to eligible clients in child support proceedings before court and the Administrative Appeals Tribunal.

The Australian Child Support Scheme plays an important role in addressing the risk of child poverty in families where the children do not live with both parents. Since the commencement of the *Child Support (Assessment) Act 1989* (Cth), the Child Support Agency took over the Court's role of assessing the child support obligations for most children of separated parents. Those assessments are made administratively, by applying a legislated formula to the taxable incomes of both parents. The resulting "child support assessment" is a legally enforceable financial obligation of the liable parent, payable to the eligible carer. The eligible carer can register their assessment for collection by the Child Support Registrar. The work of the Child Support Agency is now conducted by the Child Support program in Services Australia.

In our view, there are some aspects of the administration of the scheme that undermine the achievement of the objectives of the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1988* (Cth). The experiences of the clients who use our service reveal four specific "pain points" in the administration of the child support scheme that commonly affect eligible carers, placing them and their children at risk of financial hardship. These are:

- Failing the "Reasonable Maintenance Action Test",
- Unpaid child support,
- Family Tax Benefit pitfalls for Private Collect customers, and
- Foregoing child support because of family violence.

6.1 Failing the "Maintenance Action Test"

Centrelink requires a parent with care of a child who is not living with that child's other parent to take "reasonable maintenance action" if they wish to receive more that the base rate of family tax benefit (**FTB**) Part A. In most cases, that means getting a child support assessment for the child, which the eligible carer can collect themselves (**Private Collect**) or apply for it to be collected by Child Support (**Agency Collect**).

As at 30 September 2022, 15 per cent of FTB Part A children were only eligible for the base rate of FTB Part A because the parent they live with had failed the "maintenance

action test".[99] The base rate of FTB Part A is currently $63.56 per child per fortnight, whereas the higher rate is $197.96 for a child aged 0 to 12 years old and $257.46 for a teenaged child. A reduction to the rate of FTB is a significant financial penalty for a low-income household.

Some of our clients have not applied for child support, or delayed doing so, due to ignorance or confusion about their rights and obligations, or a misapprehension about the process. These tend to be more vulnerable clients, including people in remote and regional areas, those with literacy or language barriers, recent migrants and young parents with limited family or social support. In many cases, the loss of FTB far exceeds the value of the child support that the parent would have received.

We acknowledge that Centrelink notifies its clients in writing when their FTB payments have been reduced because they have failed to take "reasonable maintenance action". We also understand that at the end of each financial year, Centrelink reminds those customers that they are receiving reduced FTB Part A because they do not have a child support assessment. We therefore believe Centrelink is well-placed to identify and refer these clients for help to overcome any barriers to obtaining child support, if for example they do not have proof of parentage or they do not know how to contact the other parent. In such cases, the client may be eligible for a grant of aid from a legal aid commission to apply to court for a declaration that they are entitled to a child support assessment.

Unfortunately, Centrelink's letters do not seem to be effective in encouraging this cohort of people to seek legal advice. We believe that it would be appropriate for Centrelink's letters to mention legal aid offices and community legal centres as a source of free legal advice. It would also be helpful if Centrelink proactively identified and personally contacted these clients if they fail to take maintenance action over several years.

6.2 Unpaid Child Support

Unpaid child support places carers and children at risk of financial hardship. That hardship can be even greater if the eligible carer has chosen to collect their own child support payments, because the maintenance income test for their FTB Part A[100] is

[99] Services Australia, 'Child Support Program Data - September quarter 2022', *Australian Government data.gov.au* (Web page, 9 December 2022) <https://data.gov.au/data/dataset/6379b974-e547-4303-a361-6edebbb52550/resource/6b8cb72e-3fff-4a23-b1e1-61123518132d/download/child-support-a3-fact-sheet-september-qtr-2022-finalr1-pdf-09.12.22.pdf>.

[100] The Maintenance Income Test consists of a "Maintenance Income Free Area" for the FTB recipient ($1,752pa, or $3,504pa if the FTB recipient is a member of a couple and both members of the couple receive child support, plus $584pa per child for each second and subsequent child support child in the household). Each $1 of child support above the Maintenance Income Free Area will reduce FTB Part A by 50c. Services Australia, 'How Child Support affects FTB Part A' (Web page, 3 March 2022) <https://www.servicesaustralia.gov.au/how-child-support-affects-ftb-part?context=22151>.

calculated as if they had in fact received the correct rate of child support, regardless of what is actually paid. As at 30 June 2022 51.4 per cent of all child support cases were Private Collect, and the deemed transfers of child support in those cases for the 2021-2022 financial year was $2.069 billion, although there is no data collected about the actual child support paid in Private Collect cases.[101]

In contrast, eligible carers with "Agency Collect" cases have their FTB Part A calculated on the actual amount of child support transferred to them via Services Australia Child Support over the financial year. However, if some, or all, of the child support is not collected and paid to them, the extra FTB they receive under the maintenance income test will always be less than the unpaid child support. The child support transferred in Agency Collect cases for the 2021-2022 financial year was $1.824 billion.[102]

We do not know the current amount of unpaid child support in the Child Support Register. The most recent official figure we could locate was $1088.7M as at 30 June 2009, where it was noted that total child support debt "has been steadily rising in the past four years and reached over $1 billion in June 2008".[103] However, a March 2019 media report indicates that this figure has increased substantially, stating that 228,760 parents have built up a child support payment debt of $1,606,217,985.02.[104]

The Child Support Registrar has a range of administrative powers to collect child support from a liable parent: deductions from wages, salary, Centrelink and Veteran's Affairs payments; intercepting tax refunds, garnisheeing money held in a bank account or by a third party and issuing a departure prohibition order to prevent a child support debtor travelling overseas. These powers are sufficient to collect the child support liability in many cases. However, there are other cases where the liable parent has capacity to meet their child support obligation but has structured their finances in a way that places them beyond the reach of the Child Support Registrar's administrative powers. For these cases, the only effective enforcement option is via court proceedings against the liable parent.

We regularly see eligible carers who are frustrated with the lack of enforcement action taken by Services Australia Child Support. Typically, the liable parent is self-employed or working through a corporate structure or is said to be working 'cash in hand'. It is open

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[101] Services Australia, *Annual Report* 2021-2022 (Report, 30 September 2022) 79.

[102] Ibid.

[103] 'Child Support Scheme Facts and Figures' *Services Australia* (Web Page, 17 November 2022) <https://www.servicesaustralia.gov.au/child-support-scheme-facts-and-figures?context=1>.

[104] Luke Cooper, "Hundreds of thousands of parents owe $1.6b in unpaid child support debts", *9 News* (online, 22 March 2019) <https://www.9news.com.au/national/news-australia-child-support-payment-debts-1-6-billion-owed-parents-travel-bans-michael-keenan-human-services-politics/a49428e4-1df1-4819-af99-c9162c0402bc#:~:text=Hundreds%20of%20thousands%20of%20parents%20around%20Australia%20owe,racked%20up%20%241%2C606%2C217%2C985.02%20in%20child%20support%20payment%20debts>.

to Child Support to start court proceedings in these cases, but it is a discretionary matter for Child Support to decide how many and which child support debts it will enforce through court proceedings. There is no way for a payee to force Child Support to start court action. The only right the payee has is to commence his or her own court action, at their own expense and risk. In most cases, this is simply not a viable option.

The total number of enforcement litigation cases reported by Child Support in 2021-2022 was just 33, resulting in the collection of $9.8million.[105] While this was no doubt appreciated by the eligible carers in those cases, it is little consolation for the many other carers and children whose cases remain in the vast pool of uncollected debt.

We consider that court action to enforce unpaid child support plays a critical role in the integrity of the scheme, beyond the individual case. A well-targeted litigation program sends a strong message to deter those who might otherwise consider avoiding their child support obligations. Unfortunately, the number of cases where Child Support collects via court proceedings has been steadily declining since 2015-2016 when litigation in 1,841 cases resulted in the collection of $6.4 million.[106] In our view, the very low chance of an individual case being selected for litigation undermines the integrity of the scheme.

We recommend that Government consider whether it is appropriate to reform the superannuation laws to alleviate the financial hardship arising from unpaid child support. Currently, preserved superannuation accrued to the liable parent is beyond the reach of Child Support's administrative garnishee notices. A court also cannot make orders that would require the release of preserved superannuation to enforce a child support debt. We appreciate that there are sound public policy reasons for this, as superannuation reduces the extent to which taxpayers must support retirees. However, when people fail to pay their child support the taxpayer bears a greater share of the cost of supporting their children. We therefore suggest that consideration be given to:

- allowing a person to access their superannuation early to pay their child support,
- giving Child Support an administrative garnishee power in relation to a preserved superannuation in a child support debtor's name, and
- permitting a court to make orders that some, or all, of the preserved superannuation in a child support debtor's name be released and applied to their child support debt.

It is our understanding that once superannuation ceases to be preserved, it is currently possible for Child Support to issue a notice requiring payment of that sum in satisfaction of the person's child support debt. We believe a "flagging" arrangement should be

[105] Services Australia, *Annual Report* 2021-2022 (Report, 30 September 2022) 91.

[106] Department of Human Services, Annual Report 2015-2016 (Report, 22 September 2016) 124-125.

implemented so that superannuation funds are required to notify Child Support before they release an amount to the superannuation account holder. This could operate along the lines of the present tax refund intercept process between Child Support and the Australian Taxation Office.

6.3 Family Tax Benefit pitfalls for Private Collect

If the liable parent in a private collect case falls behind with their payments, the eligible carer can switch to agency collect. The change in collection method applies to future child support payments, and some limited arrears. This provides a 'safety net' for the eligible carer and children. In most cases, Child Support will collect a maximum of three months arrears, with up to nine months in exceptional circumstances.

We consider it is reasonable to expect the eligible carer to act within a three-month period if the liable parent falls behind. However, we sometimes see cases where this safety net fails. This is not due to any delay on the part of the eligible carer but arises from a peculiarity in the way the collection provisions are expressed under the legislation. The three months of arrears is worked out using the child support "payable" in respect of the last three months, rather than the child support that was "due and payable" within the last three months. This can be a problem if Child Support retrospectively increases the assessment. Child Support may retrospectively increase an assessment if, for example, it discovers following the liable parent lodging their tax return that the estimated income used to determine their rate of child support was too low. The consequence of such a finding is that the extra child support for the whole period is due and payable immediately. Centrelink deems the eligible carer to have received all of the increased child support and requires them to repay any resulting FTB overpayment, even if the liable parent refuses to pay the extra child support. While the eligible carer can switch to "Agency Collect", they can only ask Child Support to collect arrears "payable" in respect of the last three months and not "due and payable". Therefore, where an assessment has been increased due to new information coming to light through a tax return, it is likely that some of that increased earning may relate to a period of time more than three months ago.

Unfortunately, Child Support does not consider this "instant arrears" scenario to be an exceptional circumstance that would warrant collection of up to nine months of arrears. And even if it did, there would still be cases where instant arrears are created for periods of more than nine months and the payee would be required to collect those privately while Centrelink would deem those amounts to have already been received.

In such cases, we will assist the eligible carer by writing a letter of demand to the liable parent and provide advice about how to start their own court proceedings to enforce the arrears. It is possible for Centrelink to disregard the "uncollected" arrears for FTB purposes if the eligible carer seeks a review of the FTB overpayment within a short period

of being notified that they have been overpaid. However, we consider that this is an undesirable situation overall and that it is appropriate for it to be addressed via legislative change, to prevent the need for court proceedings and reduce uncertainty and possible hardship for eligible carers and their children. We recommend that the three-month arrears limitation, or nine-month limitation where there are exceptional circumstances, be amended to include any child support that becomes "due and payable" within that time. We also recommend that the FTB rules about deeming child support to have been received for private collect cases be modified to avoid what would seem to be unintended harsh consequences for eligible carers and their children when "instant arrears" are created.

6.4 Foregoing Child Support due to Family Violence

We see a significant number of clients who have fears about their safety if they seek child support payments from their former partners. Child Support and Centrelink staff are trained to respond to these concerns whenever they become aware of a history of family violence, and we are generally confident that they respond appropriately within the relevant policies about what is considered "reasonable maintenance action" for an eligible carer. Broadly speaking, it is possible for Centrelink to grant an eligible carer an "exemption" if that person has a reasonable fear that seeking child support will place them or their child at risk of family violence.

Essentially the options for these clients are:

- to ask for an exemption from having to apply for child support so they can still receive the full rate of FTB part A (a full exemption),
- to apply for an assessment, but do not ask Child Support to collect, and collect a lower amount from the liable parent privately. This is a partial exemption, which means that the eligible carer's FTB Part A is paid according to the actual amount of child support received, or
- apply for an assessment and ask Child Support to collect it, to reduce the need to interact with the liable parent about money.

We support the use of an "exemption" mechanism to reduce the adverse financial consequences of a person choosing not to seek any, or all, of their child support entitlement because of a fear of violence. However, we consider it desirable for people to receive more holistic advice about their circumstances, including additional measures they might take to increase their safety. It is important to note that an exemption does not place the eligible carer and children in the same financial position that they would be in if the liable parent were to pay child support. It simply means that FTB can be paid at the higher rate, even though the eligible carer is not seeking any or all of the child support from the liable parent that would otherwise be paid to them.

We also believe it is important for these clients to understand the nature of the decision that they have made, and what they can do if their circumstances change. We sometimes see eligible carers who have been granted an exemption and years later want to find out how they can collect the child support they missed out on. Unfortunately, if there was no assessment ever made, or if it has been ended, they cannot apply for a retrospective assessment, and can only seek payments from the date they reapply. We therefore consider it may be useful for eligible carers with exemptions to have their case reviewed on a regular basis to ensure that this is still the best option for them. It would be even more helpful if the client could be provided with information about the amount of child support that they could receive if they were to make an application.

As at 30 September 2022, Centrelink had granted "exemptions" in respect of 14 per cent of FTB Part A children.[107] However, there are other reasons for seeking an exemption, including that the identity of the other parent is unknown, so the proportion of domestic violence exemptions will be less than 14 per cent. Nevertheless, given the significant financial impact that can flow from choosing not to apply for child support, we consider that legislative reform may be appropriate to ensure that these decisions are made on a fully informed basis. We consider a suitable model can be found elsewhere in the child support legislation. The *Child Support (Assessment) Act 1989* (Cth) contains provisions relating to binding child support agreements (**BCSA**s) that require a certificate of independent legal advice before a person can make such an agreement. Once a BCSA is accepted by Child Support, the parties receive notional assessments that say what child support would be paid if not for the BCSA. There are also special rules about when a court may set aside an agreement. These features would not directly translate to exemptions, but they are carefully considered and reflect an appropriate concern to competing policy objects. Overall, we consider a similarly nuanced approach is appropriate in cases of family violence. We are not convinced that the existing exemption mechanism is a sufficiently sophisticated policy response to the problem.

Recommendation 4 – Child support

a) Correspondence sent to individuals who Centrelink has determined have failed the "reasonable maintenance action" test should include information about services which provide free legal advice and encourage recipients to contact those services.

[107] Services Australia, 'Child Support Program Data - September quarter 2022', *Australian Government data.gov.au* (Web page, 9 December 2022) <https://data.gov.au/data/dataset/6379b974-e547-4303-a361-6edebbb52550/resource/6b8cb72e-3fff-4a23-b1e1-61123518132d/download/child-support-a3-fact-sheet-september-qtr-2022-finalr1-pdf-09.12.22.pdf>.

b) To protect the integrity of the scheme, and achieve greater general deterrence, Services Australia Child Support should implement an expanded, and well-targeted litigation program to enforce unpaid child support.
c) Consideration should be given to reforming superannuation laws so that superannuation funds can be more easily accessed and garnisheed in cases of unpaid child support.
d) The rules for payees to switch from private to agency collect should be amended to permit agency collection of instant arrears.
e) FTB rules about deeming child support to have been received for private collect cases should be modified to avoid the unintended consequences for eligible carers and their children when “instant arrears” are created.
f) The scheme should be reviewed to ensure that it adequately address the needs of victims of domestic violence. Whilst exemptions from “reasonable maintenance action” are a useful starting point, additional measures are necessary to ensure that victims of domestic violence understand their rights and options, are able to make fully informed decisions and are not left in a worse of position financially.

7. Criminal Justice System

"How is it in this day and age we still have people being arrested and locked up for offences like theft of food? I see it in the cells all the time. It isn't usually the homeless either; it is people trying to get by on government benefits and in government housing; people who are incredibly resourceful in so many ways, but who at some point or other got down on their luck, and then get trapped in the poverty cycle"- Anonymous, Legal Aid NSW lawyer.

At Legal Aid NSW we observe the cyclical relationship between poverty and crime. It has been said that the "criminal justice 'conveyor belt' compounds existing disadvantage, creates new disadvantage and traps people, families and communities in cycles of disadvantage".[108] This is consistent with our experience. The data also highlights that already marginalised groups are grossly overrepresented in prison. For example, 30 per cent identify as Aboriginal or Torres Strait Islander, 40 per cent reported having been told that they had a mental health disorder at some point in their life, 30 per cent reported having one of five chronic health conditions[109] at some point in their life and 29 per cent report having a disability.[110] Despite this relationship between disadvantage and crime being well-known, the prison population in NSW continues to grow. As of September 2022, there were 12,467 prisoners in NSW, of which 4796 or 31 per cent were unsentenced.[111]

Other sections of this submission have highlighted areas we believe require attention in order to assist people in lifting out of poverty, as well as preventing people from entering poverty. These are all matters that have a role to play in reducing crime that is attributable to, or influenced by, someone's financial circumstances. In this section, we highlight where the focus should be for people who come into contact with the criminal justice system at both the imprisonment end of the spectrum and the fine/infringement end of the spectrum.

7.1 Release from custody

There is a real need to better support people who are being released, or are eligible for release, from prison on bail, parole or at the end of their sentence. Without adequate community supports in place, people are less likely to receive bail or parole, and are

[108] Centre for Policy Development, *Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems* (Report, December 2020) 6.

[109] The chronic health conditions being asthma, arthritis, cardiovascular disease, diabetes and cancer.

[110] 'Health of Prisoners', *Australia Institute of Health and Welfare* (Web page, 7 July 2022) <https://www.aihw.gov.au/reports/australias-health/health-of-prisoners>.

[111] 'Corrective Services Australia', *Australian Bureau of Statistics* (Web page, 24 November 2022) <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>.

more likely to breach their bail or parole conditions, or reoffend when they are released from custody. The key areas we observe people needing assistance with during their transition to the community are:

- Access to stable and affordable accommodation: As was highlighted above, many people lose their tenancies when they enter custody, whether that was a private or a social housing tenancy. For some, this will also mean being left with a debt associated with their tenancy, losing belongings and / or being "blacklisted" on the tenancy database. In NSW, most prisoners only receive 2 or 3 nights in temporary accommodation on their release. We believe this to be completely inadequate given the stressors associated with a person being released from custody and the fact that many will need to immediately engage with a number of services. This can include, reporting to community corrections, engaging with DCJ Housing and Centrelink, locating their community mental health or methadone provider.

- Access to drug and alcohol rehabilitation and counselling: Unfortunately, there are inadequate places in residential drug and alcohol facilities in NSW, which means that there are often waiting times for a bed. They are also primarily non-government run and have their own set of eligibility criteria, which can include not taking people directly from custody, not taking people who are subject to bail conditions and not accepting people who have committed certain offences, usually certain types of violent or sexual offences.

- Access to comprehensive mental health support: While people who experience a major mental illness such as a psychotic illness, will be eligible for assistance from their local community mental health service, they will generally only be accepted by a community mental health service if they have a fixed address within the service's catchment area, which can be a challenge for those who do not have stable accommodation. Furthermore, community mental health services are not equipped to provide psychological support or trauma counselling, which can only be accessed through a referral to a GP for a mental health care plan, or for those who are eligible, through Victims Services NSW.

- Access to the NDIS: We highlighted above the practical and legal challenges for people getting access to the NDIS while in custody and during their transition to the community.

In NSW in 2020, there was a pilot program administered by the Justice Health and Forensic Mental Health Network called the "Community Transition Team".[112] It is a multi-disciplinary team comprised of health and welfare professionals and they assist inmates with their transition to the community. This includes linking them with their local community mental health service, drug and alcohol treatment providers, accommodation providers and obtaining access to the NDIS. The program has now received ongoing funding, however it is limited in its scope to persons who experience a major mental illness, specific correctional centres and the team are only able to support people for 8 weeks prior to their release and for 4 weeks after their release. While we welcome this great initiative, we believe that there is value in expanding it to inmates in all correctional centres, particularly those with a cognitive impairment and not placing such short time frames around the period they will provide support. In our experience, it can take a substantial amount of time and advocacy to ensure that a person has access to appropriate supports in the community, particularly in relation to the NDIS.

Another positive initiative has been the establishment of the "Inmate Early Assessment Scheme" which is a program run by DCJ Housing in collaboration with Corrective Services NSW and is aimed at addressing the housing needs of people who are leaving custody. It allows people who are due for release on parole to contact a dedicated DCJ Housing phone line up to three months prior to their release from custody. The scheme also permits the exchange of information between DCJ Housing and Corrective Services NSW in relation to an individual's circumstances. However, it does not remove the fundamental problem that there is a lack of stable and affordable housing.

7.2 Fines

We use the term "fines" to refer to monetary penalties imposed by courts as well as infringement notices. Fines have a disproportionate impact on the socially and economically disadvantaged, with research suggesting that they are overrepresented in receiving certain types of fines such as public transport fines and fines for other street offences,[113] while also being less capable of paying the fines due to their limited means. Whilst courts in New South Wales are required to consider a person's means when fixing the amount of a fine,[114] this requirement only applies to court fines, not infringement or penalty notices, unless the person fined elects to challenge those in court. In our experience, socially and economically disadvantaged individuals are less likely to challenge fines in court, commonly lacking the confidence and capacity to advocate on

[112] There is no publicly available information about the Community Transition Team.

[113] Zhigang Wei, Hugh McDonald and Christine Coumarelos, *Fines: are disadvantaged people at a disadvantage?* (Paper No. 27, February 2018) 4.

[114] *Fines Act 1996* (NSW) s6

their own behalf. As a result, these vulnerable individuals are more likely to be stuck with arbitrary amounts issued on penalty notices.

Consequently, people of limited means are less likely to pay their fines which can lead to further consequences such as enforcement action, which can include the suspension of a person's driver's licence and the cancellation of a person's vehicle registration, as well as additional fees for enforcement. The suspension of a person's driver's licence or cancellation of their vehicle registration is a particularly harsh measure for people who live in regional, rural or remote areas and those with caring responsibilities. It places people at increased risk of further offending that may result in further fines and licence disqualification.

Since 2009 in NSW, there has been a "work and development order" scheme which allows people to pay off their fines by doing unpaid work, undertaking a course or receiving treatment. The eligibility criteria captures people who are experiencing social and economic disadvantage, such as people in financial hardship and people who are homeless. [115] Broadly, the scheme works well by offering an alternative method of paying off fines for people who cannot otherwise afford to pay. However, a person needs an approved sponsor organisation or sponsor health practitioner before they are able to undertake a work and development order, but unfortunately there are very few sponsors in certain areas, particularly in areas where there are high levels of unpaid fines, such as Bourke and Moree.

In our view, a critical measure to ensuring greater fairness in the fines system is by ensuring that infringements are in some way proportionate to a person's income, or at least that certain Centrelink recipients are only required to pay a reduced amount.

Recommendation 5 – Criminal justice

a) Better planning and greater investment are urgently needed to adequately support individuals leaving custody to obtain stable accommodation, and access services, including drug and alcohol treatment/rehabilitation, mental health and NDIS, and to break the cycle of reoffending and incarceration.
b) To ensure greater fairness, the fines system should be reformed to make infringements proportionate to a person's income.

[115] 'Request a Work and Development Order' *Service NSW* (Web page, 23 January 2023) <https://www.service.nsw.gov.au/transaction/request-a-work-and-development-order#eligibility>.

8. Buy Now, Pay Later

Legal Aid NSW has a specialist Consumer Law team within our Civil Law Division. The team is comprised of solicitors and a financial counsellor. A core part of their work involves providing advice to consumers who are experiencing financial hardship and determining whether there has been a breach of any law, such as responsible lending laws and regulations concerning small amount credit contracts and consumer leases under the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**).

Financial stress and debt are currently major talking points in Australia given the current economic conditions. The National Debt Helpline has revealed that calls to their helpline rose by around 28 per cent in January 2023 compared to January 2022.[116] The Financial Counsellors Association reported that as a result of higher housing repayments, they are seeing more people rely on credit, including buy now, pay later (**BNPL**).[117] The rise in the use of BNPL is also a major concern to Legal Aid NSW. We have observed the positive effect that regulation has had on other credit products and consumer leases and are supportive of the additional regulations starting in June this year that apply to small amount credit contracts and consumer leases under the Credit Act following passage of the *Financial Sector Reform Bill 2022*. However, we are concerned that BNPL continues to avoid appropriate regulatory oversight, especially given it is being increasingly used for the purchase of essentials and higher cost items than it once was.

Legal Aid NSW recently contributed to the National Legal Aid submission to Treasury regarding the regulation of BNPL.[118] That submission captures our views on the most appropriate method for regulating BNPL, which we believe is by treating BNPL as a credit product under the Credit Act. In summary, the submission identifies three main concerns in relation to the nature of BNPL products:

- Lending practices: BNPL is not defined as "credit" under the Credit Act[119] and as such BNPL providers are not required to comply with responsible lending obligations that apply to other credit providers, such as the requirement to conduct a "suitability assessment". This means that BNPL providers are not obliged to verify whether a consumer has any other credit products or any significant debts or defaults.

[116] Fabian Cotter, 'Australian Debt Helpline Flags 'Call for Help' Surge: FCA' *Mortgage Business* (online, 17 February 2023) < https://www.mortgagebusiness.com.au/property/17679-australian-debt-hotline-flags-call-for-help-surge-fca>.

[117] Ibid.

[118] National Legal Aid, Submission to Treasury, *Regulating Buy Now Pay Later in Australia* (23 December 2022).

[119] *National Consumer Credit Protection Act 2009* (Cth), sch 1 cls 3-6.

- Hardship and complaints handling arrangements: The Credit Act places an obligation on credit providers to respond to a consumer's request for hardship assistance within set time frames and requires them to be members of the Australian Financial Complaints Authority. However, this does not apply to BNPL and instead they have a Buy Now Pay Later Code of Practice, which is voluntary and is not enforceable. Furthermore, the hardship provisions contained in the Code are not as comprehensive as those under the Credit Act.

- Frictionless sign up: the ease with which a consumer can sign-up to a BNPL product increases the likelihood of consumers incurring debts for unwanted or unaffordable products, increases the likelihood of negative outcomes from pressure selling tactics especially towards vulnerable consumers and increases the likelihood of businesses exploiting the product to the detriment of consumers. The frictionless nature of BNPL products also increases the risk that they may be used in financial abuse.[120]

Case Study- Rose's story

Rose is a 42 year old woman who was living alone in public housing. She was facing eviction due to substantial rent arrears of over $10,000. She also had an $18,000 car loan debt and a $3,000 credit card debt.

Rose reached out to a Legal Aid Financial Counsellor who discovered that Rose had four BNPL debts with different providers amounting to almost $1,500.

Rose entered into these BNPL arrangements to pay for household essentials while already in considerable debt to her housing provider and other creditors.

Because BNPL is not regulated under the Credit Act, the BNPL providers were not required to assess whether Rose was able to afford to repay the BNPL debts or was only able to do so with substantial hardship.

Rose was evicted from her home and still has outstanding debts to BNPL providers.

* Source: National Legal Aid submission to Treasury regarding regulating BNPL.[121]

Recommendation 6 – Buy Now, Pay Later

a) Buy now, pay later products should be subject to the National Consumer Credit Protection Act 2009.

[120] Good Shepherd Australia and New Zealand, *Safety Net for Sale: The role of Buy Now Pay Later* (Report, November 2022) 14.

[121] National Legal Aid, Submission to Treasury, *Regulating Buy Now Pay Later in Australia* (23 December 2022) 7-8.