

**Submission to the Office of Fair Trading – Policy Division**

**Residential Tenancy Law Reform: A New Direction**



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## **Introduction**

NCOSS is the peak body of the social and community services sector in NSW. We work with our members on behalf of disadvantaged people and communities towards achieving social justice in NSW. As such we have a long-standing interest residential tenancy laws and policy particularly in terms of their impact on low to moderate income private tenants, social housing tenants, those living in residential (caravan) parks, and boarders and lodgers.

NCOSS welcomes this opportunity to respond to the recently Discussion Paper *Residential Tenancy Law Reform: A New Direction*, which follows from the July 2005 Options Paper *Residential Tenancy Law Reform*, to which we also responded.

## **Background**

NCOSS notes that a growing proportion of the NSW population live in rented properties. According to the 2006 Census<sup>1</sup>, there were 687,430 NSW households living in rented dwelling, compared to 742,157 home purchaser households and 810,706 households who fully owned their home. Tenant households represent 29.5% of all households, with the largest numbers renting from real estate agents (389,725 households), from a parent or other relative (129,517) or a State or Territory Housing Authority (108,794). Fully 59.0% of NSW households containing an indigenous person were renting at the time of the Census.

While many commentators still view renting as a transitional tenure, the reality is that around 40% of all tenants have been renting for more than 10 years, although not necessarily in the same premises. This is acknowledged in the discussion paper.

We also note that there have been few substantive amendments to the *Residential Tenancies Act 1987* in recent years. Those changes that have occurred have largely been targeted at social housing tenants, and these have generally been adverse in their impact. The current Government did, however, introduce a number of changes to the *Residential Parks Act 1998* in late 2005, which we warmly welcomed at the time.

## **The Discussion Paper**

NCOSS notes that the Discussion Paper contains some 102 separate proposals for reform. It is unrealistic to expect community organisations and individuals to respond to such a large and diverse range of proposals. The challenge of doing so is not helped by the use of generic chapter headings such as 'Reducing Red Tape', 'Streamlined procedures', 'Bringing the law into the 21<sup>st</sup> century', 'Greater clarity and certainty' and 'Minimising disputes'.

NCOSS will therefore confine its comments to five sets of proposals – rental arrears, abandoned/uncollected goods, mortgagee taking possession, co-tenant disputes, and tenant databases. Where we refer to 'the Tribunal', this should be taken as a reference to the Consumer Trader and Tenancy Tribunal (CTTT) and 'the Act' as a reference the *Residential Tenancies Act 1987*.

## **Rental arrears (proposals 12-18)**

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<sup>1</sup> All figures taken from 2006 Census table *Tenure Type and Landlord Type by Dwelling Structure by Indigenous Status of Household*, Catalogue No. 2068.0

Presently a tenant must be at least 14 days in rental arrears before a landlord can issue them a 14 day notice to vacate. If the tenant fails to comply with the notice an application can then be lodged with the Tribunal for a possession order. At the Tribunal hearing a date to end the tenancy is then set if another outcome cannot be conciliated.

During the 2005 Review this process was raised as the most significant area of concern for landlords and agents. They argued that it could take up to 2 to 3 months from the time a tenant stops paying until an eviction order can be made and enforced and that tenants frequently fail to appear before the Tribunal to contest eviction applications.

The Discussion Paper contains seven recommendations to change this aspect of the Act. Recommendation 15 effectively places the onus on a tenant who has been given a termination notice to apply to the Tribunal *before the notice expires* if they wish to have a hearing and contest the matter. Recommendation 16 provides that where a contested hearing request has not been lodged by the tenant, the Tribunal would administratively issue a termination order to the tenant who would have a second opportunity to apply for a hearing in the limited time before the order comes into effect.

NCOSS has a number of objections to these recommendations. The first is that they would lead to the termination of many tenancies that are currently able to be sustained by conciliation or determination by the Tribunal. The second is that they would place the onus on making a formal application to the Tribunal on the tenant, thus placing at particular disadvantage those who have low literary skills or who lack the confidence and experience necessary to comply with the necessary procedures.

We note that the evidence does not appear to support the claimed 2-3 month timeframe for evictions put forward by landlords and agents. According to data from the Tribunal's 66% of tenancy matters (not including relisted matters) are finalised within 3 weeks of lodgement, and 80% within 4 weeks<sup>2</sup>. Taking into account the original 14 day notice requirement and the time to prepare an application to the Tribunal, this means that the vast majority of matters are finalised within 51 to 58 days<sup>3</sup>.

The second criticism of the current situation is that tenants do not attend the Tribunal hearing in about 60% of cases involving rental arrears. This is naturally seen as an inefficient use of resources. However NCOSS does not believe that the solution to this problem is to make tenants liable for eviction if they do not make a timely application to the Tribunal. It would be preferable if greater efforts were made to encourage tenants to attend or to otherwise take action to resolve the matter with the landlord or agent.

### Abandoned/uncollected goods (proposals 19-24)

Currently the Act imposes a number of obligations on landlords regarding goods that are abandoned or left behind when a tenancy ends. This can include removal of the items, storage for at least 30 days, sale by public auction and attempting to contact the former tenant via a public notice in a statewide newspaper.

The Discussion Paper contains six recommendations to cover the issue of abandoned or uncollected goods. In essence it is proposed that the landlord/agents should be able to give to a charitable organisation goods that are uncollected within seven days, or 'otherwise

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<sup>2</sup> Annual Management Report 2005-06, Consumer Trader and Tenancy Tribunal, p. 15.

<sup>3</sup> As calculated by the Tenants' Union of NSW.

dispose of them in a lawful manner'. An exception is made for personal documents, such as photos, passports or birth certificates, which must be stored securely until 30 days has elapsed.

NCOSS believes these recommendations go too far. There is certainly scope to remove the current onerous requirements that landlords must place a public notice in a statewide newspaper and dispose of goods by sale at a public auction. We do not support, however, a blanket provision that would enable a landlord to give a tenant's goods to a charity if they are not collected within seven days. While every effort should be made to require tenants to remove their goods as soon as possible, or face storage costs, we think it reasonable to wait 30 days before empowering an agent to dispose of another peoples' property.

### Mortgagee taking possession (proposals 39-40)

There have been many reports in recent times of home purchasers defaulting on their mortgage resulting in the mortgagee taking possession of the dwelling<sup>4</sup>. Where the dwelling is an investment property being rented out, the tenant can be evicted by the mortgagee with little or no notice, regardless of whether their rental payments are up to date. In many cases court action by the mortgagee to take possession of the property will occur without the tenant's knowledge. This is a totally unsatisfactory situation.

Recommendations 39 and 40 in the Discussion Paper propose that tenants should be entitled to at least 30 days notice if a mortgagee wants to obtain vacant possession of a rented investment property and that where this involves the cessation of a fixed term tenancy the tenant should be entitled to withhold 2 weeks rent to offset relocation expenses. NCOSS strongly supports these proposals, which would undoubtedly be a substantial improvement on the current situation.

### Co-tenant disputes (proposals 85-87)

Despite the reality of shared households, the *Residential Tenancies Act 1987* currently provides no mechanism to deal with disputes between co-tenants. This is a significant deficiency in the law.

The Discussion Paper contains three recommendations to address this situation. Recommendation 85 proposes that, once the fixed term of a lease has expired, a co-tenant should be able to give 21 days notice to both the landlord and their co-tenants of their intention to vacate, after which time they would incur no further legal liabilities. (They would still be liable for damage caused or rent arrears incurred up until that point). Recommendation 87 provides a mechanism for a departing co-tenant to seek an order from the Tribunal ordering the repayment of their share of the bond where this cannot be secured by agreement of the parties. NCOSS strongly supports these recommendations.

Recommendation 86 proposes a mechanism by which a co-tenant could seek to terminate a fixed term or continual tenancy or to seek an order from the Tribunal to remove one or more co-tenants from the premises. This recommendation raises a number of complex issues, including how such a mechanism will overlap with current laws and practices to deal with domestic violence. NCOSS considers that further consultation is required, including with

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<sup>4</sup> See for example '100 battlers lose homes per week', *Daily Telegraph* 17 February 2007; 'Mortgage defaults on the rise', *The Age* 21 May 2007; and 'Dark side to home boom', *Sydney Morning Herald* 25 September 2007.

services dealing with domestic violence, before any legislative change is introduced in this area.

### Tenant databases (proposals 98-101)

The operation of tenant databases has long been of concern to the non government sector<sup>5</sup>. There is ample evidence of the hardship experienced by disadvantaged groups as a result of databases holding information that is often arbitrary, incomplete, out of date, unverifiable, or inaccurate.

While the introduction in September 2004 of a regulation governing agents improved the situation in NSW, NCOSS agrees that its effectiveness is severely hampered in practice. The first problem is that the regulation has limited coverage because it is restricted to agents, not landlords or database operators, and only to listings made from September 2004. The second problem is the lack of an appropriate dispute resolution mechanism from a tenant's viewpoint, as the only remedy available is for the Office of Fair Trading to take disciplinary action against an agent.

A recent newspaper report claimed that one large tenancy database operator has 300,000 tenants listed and that landlords were adding names to its database without valid cause<sup>6</sup>. It quoted an example of a nurse who had been listed by her landlord after a dispute, despite the Tribunal finding that she was not in rent arrears. She stated that she had subsequently been refused access to alternative accommodation because of this listing.

It is clear that effective regulation of tenant databases needs to:

- cover landlords and database operators, as well as agents,
- more clearly outline what is and what is not permissible to include or retain on such databases (including removal of the exemption allowing pre-September 2004 material to be retained),
- provide tenants with free and prompt access to listings and access to the Tribunal to pursue breaches of the rules including the amendment of inaccurate, incomplete or out of date listings.

To address these requirements NCOSS strongly supports recommendations 98-101 in the Discussion Paper.

### Conclusion

NCOSS believes that the Discussion Paper contains a number of positive proposals for reform, as well as others that would adversely impact on disadvantaged households. We would urge the Government to give priority attention to those positive proposals for which there is substantial community support as reflected in the current consultation process. We also request that there is sufficient opportunity for the Parliament to give proper consideration to any resulting amending legislation in 2008.

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<sup>5</sup> See for example our major research report by Craig Johnston: *Cash and Cowboys: barriers for entry to private rental by disadvantaged consumers*, NCOSS, November 1999.

<sup>6</sup> 'Landlords blacklist tenants', *Sunday Telegraph* 24 August 2007.