

## **National Association of Tenant Organisations (NATO)**

### **Submission in Response to the Green Paper**

#### *Which Way Home? A New Approach to Homelessness*

**June 2008**

#### **About NATO**

The National Association of Tenant Organisations (NATO) is a federation of the peak non-government organisations for tenants across Australia. NATO's membership comprises:

- the Tenants' Union of NSW (TUNSW)
- the Tenants' Union of Queensland (TUQ)
- the Tenants' Union of Tasmania (TUT)
- the Tenants Union of Victoria (TUV)
- the Tenants Advice Service of Western Australia (TASWA)
- the Tenants' Union ACT (TUACT), and
- the Tenants' Advice Service of the Darwin Community Legal Service (DCLS).

NATO is unfunded, but receives in-kind support from its member-organisations and the National Association of Community Legal Centres. NATO is also a member of the board of National Shelter.

Each of NATO's members is a tenants advice service that gives information and advice to tenants about their legal rights and responsibilities. Most NATO members also represent tenants in legal proceedings, and some NATO members resource other tenants advice services operating at a local level. All NATO members work to promote the interests of tenants in their respective jurisdictions through policy and law reform. NATO pursues this work at a national level.

NATO welcomes the opportunity to comment on the Green Paper. We particularly welcome the Green Paper's recognition of the importance of early intervention and prevention of homelessness. This is part of what tenants advice services do; the first part of our submission provides some illustrations of how tenants advice services prevent homelessness, and some indications of what more might be done by governments to help tenants advice services expand this aspect of their work.

In the second part of our submission we identify a number of problems in the residential tenancies laws of Australian States and Territories that contribute or

otherwise relate especially to homelessness. These problems are the exclusion of some renters from residential tenancies legislation; tenant databases; and the termination of tenancies without grounds. NATO submits that all Australian governments should commit to law reform in these problem areas as part of a national approach to the prevention of homelessness.

Finally, in the third part of our submission, NATO makes some brief recommendations as to broader housing policy reform to prevent homelessness.

## 1. Tenants advice services and the prevention of homelessness

Each Australian State or Territory has at least one specialist tenants advice service operated by a non-government organisation. Table 1, below, shows the tenants advice services operating in each State or Territory, and the types of services they make available to tenants.

*Table 1. Tenants advice services and the services they make available to tenants*

<b>State/Territory</b>	<b>Tenants advice services</b>	<b>Services available to tenants</b>
New South Wales	TUNSW 14 local Tenants Advice and Advocacy Services (TAASs) four specialist Aboriginal TAASs one specialist residential parks TAAS one specialist older persons TAAS	Phone information and advice Advocacy and representation Community education
Queensland	TUQ 24 local Tenants Advice and Advocacy Services (TAASs)	Phone information and advice Advocacy and representation Community education
South Australia	Tenants Information and Advice Service, Anglicare SA	Phone information and advice Advocacy and representation for low-income tenants
Tasmania	TUT	Phone information and advice Advocacy and representation Community education
Victoria	TUV	Phone information and advice Advocacy and representation Community education
Western Australia	TASWA 15 Tenant Advocates in local community legal centres	Phone information and advice Advocacy and representation Community education
Australian Capital Territory	TUACT Welfare Rights and Legal Centre ACT (WRLC)	Phone information and advice TUACT is shortly to commence providing representation WRLC provides representation to public housing tenants Community education
Northern Territory	DCLS	Phone information and advice Advocacy and representation Community education

Most of the work done by tenants advice services is information and advice provided to tenants through phone advice lines, and this type of service is available to tenants generally – not just those at risk of homelessness. Tenants advice services prioritise persons who are homeless or at risk of homelessness in their work in community education and, especially, advocacy and representation. It is through these types of services that tenants advice services prevent homelessness, as the following case studies show.

***Case study: advocacy***

A is a tenant of a housing service provider in a remote indigenous community in the Northern Territory. After A notified her landlord that she would be away for a month for medical treatment, the landlord fixed a purported eviction notice to the door of the premises and prepared to install another tenant.

After some unsuccessful negotiations with the landlord, A was referred to DCLS, which convinced the landlord to reinstate A in the premises and pay her compensation for the illegal eviction.

***Case study: representation***

When B's privately rented house in Nollamara, Perth, was vandalised by trespassers, the landlord blamed B and took proceedings to terminate B's tenancy. A single mother of three children, one of whom has an intellectual impairment, B had nowhere else to go.

Shortly before the proceedings were to be heard, B contacted a Tenant Advocate who referred B to TASWA. After attempting unsuccessfully to negotiate with the landlord's agent, TASWA prepared B's case, including police evidence about the vandalism. The Court dismissed the landlord's proceedings and B kept her tenancy.

***Case study: representation 2 – duty advocates***

B rents privately with his young family in Gosford, New South Wales, and works on a permanent-casual basis at a car wash. When the weather is bad, B does not get work. Earlier this year, after several weeks of bad weather, B fell into arrears of \$1 600 and his landlord took proceedings in the Consumer, Trader and Tenancy Tribunal to terminate B's tenancy.

At the Tribunal, a duty advocate from Central Coast Tenants Advice and Advocacy Service (CCTAAS) was available to assist B prepare his case. On the duty advocate's advice, B gave evidence as to his circumstances and made undertakings to the Tribunal to contact a financial counsellor. The Tribunal decided not to terminate the tenancy and ordered B to pay the arrears.

***Case study: community education***

The Hunter Tenants Advice and Advocacy Service (HTAAS) conducts a number of community education programs that are directed at preventing homelessness. In partnership with the Job Placement, Employment and Training Programme (JPET) and the WEA in Newcastle and Maitland, HTAAS conducts 'Rent Ready', a course for young persons who are homeless or at risk of homelessness. Rent Ready teaches young persons about how to get and keep a tenancy in the private rental market, while the JPET and WEA courses teach budgeting and other living skills. HTAAS also conducts community education sessions with young persons in Maitland who are coming out of care arranged by the NSW Department of Community Services and commencing public housing tenancies.

***Case study: community education 2 – training support workers***

The TUACTION conducts 'There's No Place Like Home', a regular course of training for workers in domestic violence and rape crisis services, SAAP services, and other women's services. The course trains these workers in residential tenancies law, particularly as it relates to situations of domestic violence: for example, how to remove perpetrators of domestic violence from women's homes, the legal requirements for leaving rental housing, liability for arrears and damage, and access to social housing. The focus of the training is on the right of women to remain free from violence in their homes and strategies for maintaining their tenancies.

Many of the cases in which tenants advice services work to prevent homelessness involve tenants who are threatened without eviction from social housing. Social housing tenants are at special risk of homelessness, in large part because of the various forms of disadvantage that so many social housing tenants face. A very low income, a disability or a mental illness can place a social housing tenant at special risk of breaching a term of their tenancy agreement, and can make it very difficult or impossible to find alternative accommodation in the private rental market.

Another part of the reason why so much of the work of tenants advice services is done with social housing tenants, however, relates to the social housing providers themselves. It appears to NATO that social housing providers become involved in disputes between neighbours and take proceedings against tenants on the basis of their social conduct more than other landlords – including where this conduct is related to the factors that made the tenant eligible for social housing in the first place. In some jurisdictions, residential tenancies legislation provides that social housing tenants bear additional responsibilities, and social housing providers enjoy additional powers, in relation to tenants' conduct. Social housing rent rebate systems also give social housing providers a unique knowledge of tenants' personal affairs, and additional scope for proceeding against tenants.

***Case study: mental illness and representation***

C is a tenant of the Queensland Department of Housing (DoH) from inner-city Brisbane. After serving C, who has a mental illness, with a notice to vacate on the ground of objectionable behaviour, the DoH took termination proceedings in the Small Claims Tribunal. C went unrepresented, and the Tribunal terminated his tenancy.

The DoH was about to enforce a warrant of possession and evict B when a disability support agency referred him to the TUQ. The TUQ sought an injunction against the eviction and a rehearing of C's case; on the steps of the court, the DoH agreed to reinstate C's tenancy.

***Case study: rent rebates and arrears***

In the first six months of 2008, the Inner Sydney Tenants Advice and Advocacy Service (ISTAAS) represented 34 tenants of Housing NSW in termination proceedings. Many of these proceedings were taken after Housing NSW cancelled the tenants' rent rebates and backdated the cancellation, which has the effect of immediately plunging tenants into rent arrears. In each of these cases, Housing NSW sought termination of the tenancy; in each case, ISTAAS convinced the Consumer, Trader and Tenancy Tribunal not to terminate and instead make orders for the payment of the arrears.

ISTAAS's clients included a 78 year-old man; a woman from a non-English-speaking background with three children, two of whom are autistic; and a single Aboriginal woman with five children. Had their tenancies been terminated, all would have been homeless.

***Case study: representation for a tenant in gaol***

D is an Aboriginal man who has a public housing tenancy in Dubbo, New South Wales. D was convicted of a minor offence and received a custodial sentence of three months. Shortly before his release, D learnt from a friend that his tenancy had been terminated; Housing NSW, which was aware that D was in gaol, had sent the notice of termination to the house, and had directed the Consumer, Trader and Tenancy Tribunal's notice of hearing there too.

D contacted the Northern England and Western Tenants Advice and Advocacy Service (NEWTAAS), which worked with the TUNSW's Aboriginal Legal Officer to get a rehearing of the termination proceedings. At the rehearing, D's arrears were found to be less than \$50, and his tenancy was allowed to continue.

Not every case, of course, is a success. Sometimes, despite the best efforts of a tenants advice service, a client becomes homeless. The following case studies illustrate some of the reasons for this, such as the limits on the ability of tenants advice services to provide a service to all who need it; a lack of other types of support services for tenants; and what we can only describe as plain, callous injustice in some parts of the housing system.

***Case study: no resources for representation***

E was due to attend termination proceedings brought by her landlord in Launceston, Tasmania. She received advice from the TUT but, because it is based in Hobart and has very limited resources for work elsewhere, it could not represent her (the TUT's outreach budget pays for a worker 3.5 hours per week at a legal centre in Devonport).

E's landlord was represented by a lawyer, and E was very confused by the conduct of the proceedings. The Magistrate terminated E's tenancy with immediate effect.

***Case study: lack of support***

F and her husband and their seven children moved to Darwin from a remote indigenous community to get away from violence and seek better opportunities for their children's education. They arrived homeless; with the help of an Aboriginal support service, they found short-term accommodation and applied for public housing. F and her family were quite unprepared for life in the suburbs, or for life with Territory Housing.

Within a week of F's family moving into their public housing premises, owner-occupiers in the neighbourhood had complained to their local MP and to Territory Housing about the family's 'anti-social behaviour.' Territory Housing has an Aboriginal Liaison Officer, but she does not speak F's language; the extent of Territory Housing's 'support' is to stipulate that alcohol must not be consumed on the premises. F contacted DCLS only after Territory Housing had gotten orders terminating her tenancy; DCLS could not get the tenancy reinstated and F and her family returned to the remote community from which they had wanted to get away.

***Case study: a callous injustice***

G was single Aboriginal woman who lived with her teenaged son in a public housing tenancy in a suburb of Wollongong, New South Wales. G was diagnosed with terminal cancer, and suffered from depression; her son had a brain injury and was employed in a CDEP land regeneration scheme on a local reserve. G's boyfriend also stayed at the premises from time to time, but G had not informed Housing NSW that he was an additional occupant of the premises.

Housing NSW found out about G's boyfriend, accused G of rental rebate fraud, and retrospectively cancelled G's rent rebate. Suddenly \$36 000 in arrears, G was also served with a termination notice. G's local Aboriginal Tenants Advice and Advocacy Service, Murra Mia, and the TUNSW's Aboriginal Legal Officer attempted to negotiate with Housing NSW, without success. When Housing NSW applied to the Consumer, Trader and Tenancy Tribunal for termination orders, G agreed to a settlement in which she would consent to the termination of her tenancy and Housing NSW would provide a subsidy and other assistance to rent in the private market.

G moved out of the premises in accordance with the settlement and went to stay with friends. Housing NSW's promised assistance was not forthcoming. G was homeless when she died.

NATO submits that as part of a national approach to homelessness, Australian governments should make available to tenants advice services additional funds to expand the work they do to prevent homelessness. NATO members would welcome discussions with the Commonwealth Government and their respective State or Territory Government about how best to expand tenants advice services' homelessness prevention work. We suggest the following may be the most useful lines along which to expand:

- *Representation and duty advocates.* As the case studies above show, it is often the advocacy and representation provided by tenants advice services that directly prevents a person from becoming homeless. The ability of tenants advice services to provide representation needs to be improved particularly in Tasmania, as indicated in the case study above; in the Northern Territory, where DCLS struggles to provide representation to tenants in urban centres other than Darwin; and in the regional areas of the other jurisdictions. The ability to provide representation through a duty advocate is especially important to homelessness prevention: tenants advice services that provide a duty advocate at their local Tribunal or Court report that many of the clients they assist are unaware of the services that may be available to them and often do not know how to deal with the prospect of losing their tenancy. These persons could easily fall through the cracks into homelessness were it not for the last-minute intervention of a duty advocate.
- *Specialist caseworkers.* Tenants advice services employ skilled workers from a variety of professional backgrounds, notably the law, social work and community development, but the focus of their work is mostly on their clients' legal problems. NATO submits that clients at risk of homelessness would benefit from the assistance of specialist caseworkers in tenants advice services, who would have the time, knowledge and skills to address a wider range of support needs and to organise and follow-up referrals to other support services.
- *Specialist Indigenous tenants advice services or Indigenous advocates.* More than 60 per cent of Indigenous households rent, and about 30 per cent rent in social housing;<sup>1</sup> many also rent from Indigenous corporations, Lands Councils and other housing providers that house Indigenous households only. Indigenous persons have a quite a specific experience of renting, as well as a special risk of homelessness. NATO submits that all of these factors justify the provision of specialist Indigenous tenants advice services or Indigenous advocates. New South Wales' Aboriginal Tenants Advice and Advocacy Services report that they work differently from other tenants advice services, with a heavy emphasis on community education both with tenants and with housing providers. Aboriginal tenants can choose to use the Aboriginal TAAS or the generalist TAAS for their local area. At present, these are the only specialist Indigenous tenants advice services in Australia; NATO submits that Indigenous persons in other jurisdictions would benefit from similar specialist services.

NATO emphasises that any expansion of tenants advice services' homelessness prevention work should be funded additionally, and not through a reallocation of

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<sup>1</sup> ABS, Census 2006, cat no 2068.0.

existing funds. It is not appropriate that tenants advice services should have to reallocate existing resources from the provision of phone information and advice for tenants generally, because the number and proportion of persons renting is growing and demands on this type of service will also grow.

## 2. Tenancy law reform to prevent homelessness

From the casework of NATO members and other tenants advice services, three problem areas in residential tenancies legislation stand out as being particularly related to homelessness:

- the problem of *exclusions from residential tenancies legislation*;
- the problem of *residential tenancy databases*; and
- the problem of landlords' *termination of tenancies without grounds*.

These are problem areas across Australian jurisdictions. NATO submits that law reform in these areas should be part of the new national approach to homelessness.

### ***Persons excluded from residential tenancies legislation***

Not all persons who rent their housing are covered by their State or Territory's residential tenancies legislation. This is a problem in two ways: first, there is considerable inconsistency between the States and Territories as to who is covered and who is excluded. Secondly, those excluded are left to the common law, which does not deal appropriately with all questions relating to housing. This is especially so because those excluded tend to be amongst the most economically and socially disadvantaged persons in the community.

At common law, the housing agreements of these persons are invariably mere licences, the terms of which are left to the parties; in practice, this means that the terms are set by the landlord and the agreements are offered on a take-it-or-leave-it basis. At common law, rents can be increased, and agreements terminated, with little notice: the period of notice being whatever is specified in the agreement or, failing that, the period for which rent is paid. Upon termination of their agreements, these persons become trespassers and can be evicted by their landlords. Dispute resolution is, at least theoretically, through the courts – and to prevent an eviction a person would have to apply for an injunction in the relevant jurisdiction's superior court. This is, of course, entirely impractical, and such legal rights as these persons do have are unenforceable.

### ***Case study: excluded from residential tenancies legislation***

H lived in a boarding house in inner Sydney. He did not have a written agreement with the landlord, nor did he receive rent receipts. Following a disagreement between H and the landlord as to whether H was up to date with the rent, the landlord removed the door to H's room from its hinges and made a demand: pay the disputed amount and H can have the door back. Without a door to his room, H had no way of keeping his belongings secure and had to stay put in order to keep a watch over them; in fact, removing the door had the perverse effect of trapping H inside.

Eventually H phoned Inner Sydney Tenants Advice and Advocacy Service (ISTAAS), which advised that H, as a lodger, was excluded from the *Residential Tenancies Act 1987* (NSW). The dispute between H and the landlord worsened, and the landlord called the police to summarily evict H.

***Case study: excluded from residential tenancies legislation 2***

J is a student in Hobart who entered into a 12-month agreement for a room in premises that were also occupied by the landlord. J and her landlord had a disagreement about the payment of rent; the landlord stated that the agreement was terminated, that she would be keeping the bond, and that J should leave immediately.

J contacted the TUT, which advised that J's agreement was not covered by the *Residential Tenancy Act 1997* (Tas) because of its exclusion of tertiary students and boarding premises where fewer than three persons reside with the landlord. TUT further informed J that if she remained at the premises she was liable to eviction as a trespasser.

In each State or Territory, certain classes of person, premises and agreements are excluded from what might be called the 'mainstream' provisions of the jurisdiction's Residential Tenancies Act. In most jurisdictions, some of those excluded are covered by other provisions in residential tenancies legislation, either in that jurisdiction's Residential Tenancies Act or in separate legislation: for example, in Victoria, residents of caravan parks are covered by specific provisions within the *Residential Tenancies Act 1997* (Vic); in New South Wales, residents of residential parks are excluded from the *Residential Tenancies Act 1987* (NSW), and are covered instead by the *Residential Parks Act 1998* (NSW). Conversely, others of those excluded from the mainstream provisions are not covered by any other provisions in legislation, and are left instead to the common law.

Table 2 below shows who, apart from 'mainstream' tenants, are covered by each State or Territory's residential tenancies legislation (that is, by either the mainstream provisions, or other specific provisions, or separate legislation) and who are not covered. Coverage varies considerably between the various States and Territories: this is discussed further below. The table also shows that within each State and Territory, questions of coverage are often subject to significant qualifications. These qualifications are also discussed.

*Table 2: coverage of residential tenancies legislation, by types of occupants*

Type of occupant	NSW	Qld	SA	Tas	Vic	WA	ACT	NT
Homeless persons in homeless persons accommodation	no*	no*	no*	no	no	no*	yes	no
Boarders, lodgers, rooming house residents	no	yes*	yes*	yes*	yes*	no	yes	yes*
Students	no	no	no	no	no	no	yes	no
Residents of caravans, manufactured homes and residential parks	yes	yes	yes	yes*	yes	yes	yes	no

\* subject to significant qualifications.

*Homeless persons.* In all Australian jurisdictions except the ACT, most homeless persons accommodation is excluded from residential tenancies legislation, and in many jurisdictions it is excluded specifically. In Tasmania, accommodation for homeless persons and persons experiencing family violence, where the accommodation is provided for three months or less, is specifically excluded from the *Residential Tenancy Act 1997* (Tas) (*Residential Tenancy Regulations 2005* (Tas), cl 5(b)(i) and (ii)). In Victoria, the *Residential Tenancies Act 1997* (Vic) specifically excludes ‘temporary crisis accommodation’ (s 22), being accommodation provided on a non-profit basis for less than 14 days (s 3). In the Northern Territory, the *Residential Tenancies Act 1999* (NT) specifically excludes ‘premises provided for the use of homeless, unemployed or disadvantaged persons for charitable purposes or for the purposes of providing emergency shelter or accommodation’ (s 6(f)). In Queensland, the *Residential Tenancies Act 1994* (Qld) specifically excludes ‘temporary refuge accommodation’ where it is not ‘approved supported accommodation’ (s 24). ‘Approved supported accommodation’ includes accommodation under the SAAP and CAP (*Residential Tenancies Act 1994* (Qld), dictionary), so these types of accommodation may be covered, but not if the resident is in occupation for less than 13 weeks (*Residential Tenancies Regulation 2005* (Qld) cl 24). SAAP accommodation is also specifically excluded from the *Residential Services (Accommodation) Act 2002* (Qld) (*Residential Services (Accreditation) Act 2002*, s 5(i)). In each of these jurisdictions, the housing rights of persons so excluded are left to the common law.

In New South Wales and Western Australia there is no specific exclusion of homeless persons accommodation (the New South Wales Government is currently considering legislating for such exclusion), but most services providing this type of accommodation operate on the basis that the occupants are boarders or lodgers, and these categories of person are specifically excluded from residential tenancies legislation in both jurisdictions. The situation is similar in South Australia, but in that jurisdiction there is a question as to whether the rooming house provisions of the *Residential Tenancies Act 1995* (SA) might bring homeless persons accommodation within coverage. NATO considers that they do not, because these provisions apply only where the rooming house operates on a commercial basis (s 3), which arguably does not include homeless persons accommodation.

In these three jurisdictions, however, it is possible for homeless persons accommodation to be covered by the mainstream provisions of their respective residential tenancies legislation where the occupant is not, in law, a boarder or a lodger. For example, in *Ellis v City Women's Hostel* [1997] NSWRT 258 a resident of a SAAP service was held to be a tenant, not a boarder or a lodger, because of the way in which that particular service operated. In a postscript to the decision in that case, the Tribunal expressed its dissatisfaction with drastic consequences of the distinction between tenants and lodgers in the present law, noting that the proceedings – and the award of damages against the SAAP service – could have been avoided had residential tenancies legislation provided a degree of clarity and certainty for persons in supported accommodation, rather than leaving most of these persons to the common law.

Only in the ACT is homeless persons accommodation clearly covered by residential tenancies legislation. This is because the occupancy provisions of the *Residential*

*Tenancies Act 1997* (ACT) apply generally to agreements that allow, for value, a person to occupy premises as a home, and that are not residential tenancy agreements (s 71C).

NATO submits that all persons who rent their housing, including persons residing in homeless persons accommodation, should be covered by residential tenancies legislation. We acknowledge that the mainstream provisions of residential tenancies legislation are not well-suited to the operational needs of providers of homeless persons accommodation, and that it is appropriate that there should be a different balance of rights and responsibilities in relation to homeless persons accommodation. This balance should be achieved in legislation, because an appropriate balance not achieved by the operation of common law principles alone. As well as being accountable to governments through reporting and other measures, SAAP services and other providers of homeless persons accommodation should be accountable to their individual clients through the effective agreements and dispute resolution provided by residential tenancies legislation.

*Boarders, lodgers and rooming house residents.* Most boarders, lodgers and rooming house residents – the terminology varies between jurisdictions – are, on accepted definitions, homeless persons.

In most Australian jurisdictions, boarders, lodgers and rooming house residents are covered by specific provisions in the relevant residential tenancies legislation. Even in these jurisdictions, however, coverage is not complete; this is because the application of these provisions is subject to thresholds as to the number of persons housed. So, in Queensland, the *Residential Services (Accommodation) Act 2002* does not apply where the premises accommodate fewer than four occupants; in Victoria, the rooming house provisions of the *Residential Tenancies Act 1997* (Vic) are subject to an equivalent threshold. In South Australia, the threshold for the application of the rooming house provisions of the *Residential Tenancies Act 1995* is three or more; similarly, in Tasmania the boarding premises provisions of the *Residential Tenancy Act 1997* (Tas) do not apply where the building comprises fewer than three boarding premises and the landlord lives at the building. In the Northern Territory, where there are three or more boarders or lodgers residing the mainstream provisions of the *Residential Tenancies Act 1999* (NT) apply; otherwise, boarders and lodgers are not covered.

In two jurisdictions – New South Wales and Western Australia, as indicated above – boarders and lodgers are not covered by residential tenancies legislation at all.

In the ACT, boarders and lodgers are covered by that jurisdiction's occupancy provisions, which apply without regard to any thresholds.

NATO submits that all boarders, lodgers rooming house residents should effective legal rights and dispute resolution under residential tenancies legislation.

*Students.* In all but one Australian jurisdiction, persons whose accommodation is part of an educational institution are excluded from residential tenancies legislation without qualification. In Tasmania, the exclusion goes further: TAFE and tertiary students are expressly excluded from the boarding premises provisions of the *Residential Tenancy Act 1997* (Tas) even where the premises are not part of an

educational institution. The only jurisdiction in which student accommodation is covered by residential tenancies legislation is the ACT, because of the general application of its occupancy provisions.

NATO accepts that relatively few persons are made homeless as a result of the legal insecurity of student accommodation. It is, however, a problem area and it may be a growing one, as universities enter into joint ventures with other partners to create student ‘villages’ that are excluded from residential tenancies legislation (see, for example, *Jericho v Carillon Ave Pty Ltd* [2005] NSWCTTT 514).

*Residents of caravans, manufactured homes and residential parks.* In most Australian jurisdictions park residents are covered by residential tenancies legislation. In several jurisdictions – New South Wales, Queensland, South Australia and Western Australia – residential tenancies legislation makes particular provision for residents who own their homes and rent the sites on which they sit (these residents are sometimes called ‘owner-renters’, as distinct from ‘renter-renters’). Under the *Residential Parks (Long-Stay Tenants) Act 2006* (WA), Western Australian ‘owner-renters’ are entitled to longer periods of notice of termination than ‘renter-renters’ and, indeed, tenants under the mainstream provisions of residential tenancies legislation; in New South Wales and Queensland, ‘owner-renters’ cannot be given a notice of termination without grounds, unlike other tenants.

The jurisdictions in which park residents are excluded from residential tenancies legislation are Tasmania and the Northern Territory. In Tasmania, persons who rent a van or manufactured home are covered by the *Residential Tenancy Act 1997* (Tas), but those who own their van or home and rent the site on which it sits are not covered, and instead have a common law lease or licence for the site. In the Northern Territory, renters and owners of caravans and mobile homes in caravan parks are excluded from the *Residential Tenancies Act 1999* (NT) altogether (s 6(h)).

In the ACT, park residents – ‘renter-renters’ and ‘owner-renters’ alike – are covered by the occupancy provisions. This means that unlike ‘owner-renters’ in New South Wales, Queensland, and Western Australia, ACT ‘owner-renters’ currently have much more modest rights and protections than ‘mainstream’ tenants.

NATO submits that a program of law reform to extend the coverage of residential tenancies legislation to all persons who rent their housing should be part of a national approach to the prevention of homelessness. All persons who rent their housing and who are otherwise excluded from residential tenancies legislation should be covered by legislation that reflects the following principles:

- *Written agreements and receipts.* All persons renting should be entitled to a written copy of their agreement and receipts.
- *Reasonable cleanliness, security and state of repair.* All agreements should provide that the landlord will provide and maintain premises in a reasonable state of cleanliness, security and repair.
- *Quiet enjoyment.* All agreements should provide that the person renting will have quiet enjoyment of the premises.

- *Rules.* A person renting should be entitled to know, before they move in, any rules of the premises. Each agreement should set out any rules of the premises.
- *Access by the landlord.* A landlord should be entitled to have access to the premises for reasonable purposes and at reasonable times only.
- *Rent increases.* A person renting should be entitled to a reasonable of notice of a rent increase. Each agreement should set out how the rent may be increased, including the amount of notice that will be given.
- *Termination.* A landlord should be entitled to give a notice of termination on reasonable grounds only, and a person renting should be entitled to a reasonable period of notice. Each agreement should set out the grounds on which the agreement may be terminated and the amount of notice that will be given.
- *Dispute resolution.* Landlords and persons renting should both have access to the tribunal or court that has jurisdiction for tenancy disputes in that State or Territory. In particular, a person renting should have access to the tribunal or court in relation to a dispute about the termination of their agreement, and should be entitled to have their dispute heard before their agreement is terminated.

NATO submits that such a program of law reform might be pursued in one of two ways. One is that States and Territories might extend coverage by legislating specifically for each category of renter otherwise excluded. Something of this approach can be seen in the recent legislative history of each of the States. The advantage of this approach is that the legislation can be tailored specifically to the different sectors of the rental housing system; the disadvantage is that no State yet has found the will to pursue this approach so that complete coverage is achieved.

Alternatively, States and Territories might extend coverage by legislating generally for all renters otherwise excluded. This is the approach of the ACT with its occupancy provisions. The advantage of this approach is that it achieves complete coverage; the disadvantage is that unless the legislation allows for further, more specific regulation of the different types of accommodation covered, the rights and protections tend, because of their generality, to be modest. The ACT occupancy provisions do allow for further specific regulation by providing for the creation of ‘standard occupancy terms’ for different types of occupancy agreements, but no standard occupancy terms have yet been implemented there.

### ***Residential tenancy databases***

Residential tenancy databases, sometimes known as ‘blacklists’ or RTDs, have been in operation for almost twenty years. Operated by private companies, RTDs have for most of that time been unregulated, and have accumulated from landlords and agents hundreds of thousands of listings about tenants and their households members.

NATO considers RTDs to be a two-fold menace. First, the threat of being listed on an RTD discourages tenants generally from raising problems with landlords and agents and asserting their rights. Secondly, actually being listed on an RTD can effectively exclude a person from the private rental market and make them homeless. This is

especially the case in regional Australia, where in many towns all real estate agents are members of an RTD; it is even more especially the case in regional New South Wales and Queensland, where the RTD operator TICA Pty Ltd has a large share of the market.

***Case study: residential tenancy databases***

K was 15 when she and her boyfriend signed a tenancy agreement for a house at Summerland Point, on New South Wales' Central Coast. After six months, K moved out. At some later point, K's boyfriend fell into arrears and both K and her boyfriend were listed on TICA's tenancy database.

That was six years ago. K now has two children and is trying to find a house to rent, but she is still listed on TICA and real estate agents always knock her back. K is advised by Central Coast Tenants Advice and Advocacy Service that there is no provision in New South Wales law to have the listing removed or amended, and the prospects of a complaint under the *Privacy Act 1988* (Cth) are poor. K and her children are homeless; they are currently staying with friends.

***Case study: residential tenancy databases 2***

L is a young mother who was living in private rental housing Bathurst, New South Wales, with an abusive partner. The tenancy ended when he assaulted L and damaged the premises. He is now in gaol, and both he and L are listed on TICA.

L now lives with her father, who is also an abusive man. She cannot access private rental housing because of the TICA listing, and Southwest Tenants Advice and Advocacy Service (SWTAAS) advises that the listing is lawful. SWTAAS has encouraged L to contact a refuge.

During the period in which they were unregulated, RTDs were able to take listings from landlords and agents without regards to the reasons for the listing, the accuracy of the listing, or the tenancy status of persons listed (that is, tenants' household members could be listed), and a culture of abusive practice grew up around landlords' and agents' use of RTDs. Persons listed had no way of getting listings removed and often had difficulty even finding out if they were listed.

Since the early 2000s, RTDs have become subject to regulatory regimes in several jurisdictions: at a national level, the private sector amendments to the *Privacy Act 1988* (Cth), including the National Privacy Principles, which commenced in 2002, apply to RTD operators; in Queensland, chapter 7A of the *Residential Tenancies Act 1994* (Qld) restricts the circumstances in which persons can be listed and provides for dispute resolution through the Small Claims Tribunal; in the ACT, part 6A of the *Residential Tenancies Act 1997* (ACT) makes provisions similar to Queensland's; in New South Wales, the use of RTDs by real estate agents is subject to a rule of conduct under the *Property, Stock and Business Agents Regulation 2003*.

These regimes have improved practices relating to RTDs, but each is only partial regulation and their effect altogether is patchy and unsatisfactory. For example, the National Privacy Principles have improved the ability of persons to find out if they

are listed and the content of a listing, but they do not restrict the circumstances in which a listing may be made, nor do they prescribe effective timeframes for listings. Furthermore, the process for making complaints to the Federal Privacy Commissioner under the *Privacy Act 1988* (Cth) is impractical, with proceedings taking 18 months or more to determine. To give another example, the New South Wales regime restricts the circumstances in which real estate agents may list persons, but it does not include a dispute resolution mechanism. It also prescribes timeframes for listings depending on the stated reason for the listing, but these prescriptions have been evaded by TICA, which now lists without the stated reasons for the listing.

The need for stronger national regulation of RTDs is widely acknowledged, including by agencies such as the Residential Tenancy Database Working Party of the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General (RTDWP),<sup>2</sup> the Office of the Federal Privacy Commissioner,<sup>3</sup> and the Victorian Law Reform Commission.<sup>4</sup> NATO submits that the leading view on how to better regulate tenancy databases is that tenancy databases should be subject to the Commonwealth's general privacy legislation, as well as State- and Territory-based legislation that deals with tenancy databases specifically and provides for dispute resolution through the State- and Territory-based tribunals and courts. This is the view of the RTDWP and the Victorian Law Reform Commission; it is also the view of NATO.

The recommendations of the RTDWP set out the elements for a strong national regime of regulation established through uniform or consistent legislation enacted in each State and Territory. These recommendations were made in 2005 and there appears to have been little progress on a national regime by the States and Territory Governments since then. NATO submits that this law reform should proceed as a matter of urgency, as part of the new national approach to homelessness.

### ***Termination of tenancies 'without grounds'***

The mainstream provisions residential tenancies legislation of each Australian State or Territory allow landlords to give notices of termination (or notices to vacate, or notices to leave – the terminology varies between jurisdictions) 'without grounds.' The periods of notice required and some other details vary between jurisdictions, as shown in table 3.

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<sup>2</sup> Residential Tenancy Database Working Party of the Ministerial Council on Consumer Affairs and the Standing Committee of Attorneys-General (2006) 'Report on Residential Tenancy Databases' and (2006) 'Regulation Impact Statement'.

<sup>3</sup> Office of the Federal Privacy Commissioner (2005) 'Getting in on the Act: Review of the Private Sector Provisions of the Privacy Act 1988'.

<sup>4</sup> Victorian Law Reform Commission (2006) 'Residential Tenancy Databases: Report'.

*Table 3: period of notice for notices of termination 'without grounds'*

<b>Period of notice 'without grounds'</b>	<b>NSW</b>	<b>Qld</b>	<b>SA</b>	<b>Tas</b>	<b>Vic</b>	<b>WA</b>	<b>ACT</b>	<b>NT</b>
At end of fixed term of agreement	14 days	14 days	no notice needed *	14 days	60/90 days **	no notice needed *	n/a ***	14 days
Continuing/ periodic agreement	60 days	2 mths	90 days	n/a ****	120 days	60 days	26 weeks	42 days

\* In South Australia and Western Australia, landlords can, at the expiry of the fixed term of a tenancy, apply for termination orders without first giving notice to the tenant.

\*\* In Victoria, the period of a notice without grounds at the end of the fixed term of a tenancy depends on the length of the fixed term: where it is less than six months, the period is 60 days; where it is six months or more, it is 90 days.

\*\*\* In the ACT, there is no provision for notices of termination without grounds at the end of the fixed term of a tenancy.

\*\*\*\* In Tasmania, there is no provision for notices of termination without grounds for periodic tenancies.

NATO acknowledges that there are many reasons why a landlord might want to end a tenancy, and that some of these reasons are fair: for example, where the tenant is in breach, or the landlord wants to move into the premises, or the premises are to be sold or renovated. Some reasons for termination, however, are not fair, such as retaliation or discrimination. Notices of termination without grounds give cover to terminations motivated by these unfair reasons.

NATO believes that no tenant should have to go through the financial and emotional cost of moving out of their home without a good reason. No tenant should have to worry about receiving a notice of termination without grounds when they raise a problem with their landlord. As well as notices of termination without grounds being unfair, we are concerned that they contribute to homelessness. This is because it tends, in the experience of NATO members, to be landlords of low-quality, low-rent housing who give retaliatory or discriminatory notices, and it tends to be poorer, more marginalised persons who rent this sort of housing and who receive notices for these reasons.

***Case study: termination without grounds***

M is a client of Southern Sydney Tenants Advice and Advocacy Service (SSTAAS) from Campsie, New South Wales. M asked his landlord to make a number of repairs to the premises: some of the roof tiles were broken and power to the adjoining premises was running through M's meter. The landlord gave M a notice of termination without grounds. The landlord subsequently applied to the Consumer, Trader and Tenancy Tribunal for termination orders, and M attended to give his side of the story; nonetheless, the Tribunal terminated his tenancy. M has five children; he has nowhere to go and faces imminent homelessness.

***Case study: termination without grounds 2***

After being served with a notice of termination without grounds, N's tenancy in Perth was terminated by the Court. N has a large family, is from a non-English speaking background and only got in touch with TASWA after the Court had made its orders. TASWA tried to negotiate with the landlord to reinstate N's tenancy, without success. TASWA also tried to get N and his family housed in public housing; N was eligible, but the Department of Housing and Works had no suitable premises available.

NATO submits that notices of termination and evictions 'without grounds' should not be allowed under Australian residential tenancies laws, and that landlords should be allowed to give notices of termination on certain reasonable grounds only. The residential tenancies legislation of each State or Territory already specifies various grounds for termination: the grounds and their exact formulation varies between jurisdictions. NATO submits that these grounds should be retained and, where necessary, expanded to cover the following reasonable grounds:

- *Serious or persistent breach* – including failure to pay rent.
- *Frustration* – that is, the premises are uninhabitable.
- *Sale of premises* – and the contract of sale requires vacant possession. Landlords should not be allowed to give notice on this ground during the fixed term of a tenancy.
- *Landlord requires the premises for their own housing, or an immediate family member's housing* – landlords should not be allowed to give notice on this ground during the fixed term of a tenancy.
- *Demolition, approved change of use or major renovation* – landlords should not be allowed to give notice on this ground during the fixed term of a tenancy.
- *Tenant has ceased to be employed by the landlord* – and the tenancy arose out of a contract of employment between the landlord and the tenant, and the landlord needs the premises to house another employee. Landlords should not be allowed to give notice on this ground during the fixed term of a tenancy.

NATO submits that law reform for reasonable grounds for termination is actually quite modest law reform. We are not arguing for security of tenure guaranteed in the manner of the old rent control legislation of the 1940s. Law reform that provides for reasonable grounds for termination would neither require nor entail a change to the structure of the rental market or the investment strategies of landlords. Landlords would be able to redevelop their properties, or sell them in the owner-occupied market, or turn them to non-residential uses, or move into them themselves.

Law reform for reasonable grounds for termination would not disadvantage the large majority of landlords who operate reasonably and who seek to terminate tenancies only where there are reasonable grounds for doing so. It would affect the small minority of landlords who seek to terminate tenancies for unfair motives – such as retaliation and discrimination – and who use notices of termination without grounds as cover for these motives.

A final note about tenancy law reform: NATO anticipates that governments may be concerned that law reform could discourage investment in rental housing, or cause existing landlords to disinvest; certainly representatives of real estate agents and individual landlords will make this assertion. We submit that the assertion is not supported by the evidence. The evidence strongly indicates that residential tenancies law is not sufficiently important in landlords' investment decisions to actually encourage investment or, for that matter, cause net disinvestment. Economic factors dominate decisions to invest in rental housing, almost to the exclusion of residential tenancies law.

Seelig, Burke & Morris have conducted interviews with landlords and agents about their motivations,<sup>5</sup> and NATO has had the benefit of a preview of the findings that the researchers are currently writing up. From their research, it appears that residential tenancies law was the most important factor for less than two per cent of landlords, and only about seven per cent considered residential tenancies law at all.<sup>6</sup>

This is consistent with previous research findings. In 1993, the ABS surveyed investors in rental housing and asked about the factors they had considered when they invested. Of the nine factors nominated, 'tenants' rights' was the least considered: just 6.4 per cent of landlords said that they considered tenants' rights.<sup>7</sup> Much as economic factors dominate decisions *to* invest, they also dominate decisions to disinvest. In 1991, two years after the commencement of the *Residential Tenancies Act 1987* (NSW), the NSW Department of Housing reported on a survey of New South Wales landlords that asked, amongst other things, whether certain issues, including 'residential tenancy laws', were a 'problem' for them.<sup>8</sup> Leading questions notwithstanding, just over 10 per cent of small landlords (that is, owners of one rental property) nominated 'residential tenancy laws' as a major problem. Altogether, small landlords comprised more than 80 per cent of all landlords at the time. Of the small proportion of landlords with larger holdings, less than 30 per cent considered residential tenancy laws a major problem.<sup>9</sup> Also in 1991, Brian Elton & Associates conducted focus groups with landlords across Australia that indicated that the recent residential tenancies law reform in New South Wales and elsewhere may have been a disincentive to investment.<sup>10</sup> The researcher considered that the impact might be more 'psychological' than 'substantial', and that it varied according to the investment strategies of landlords and the overall state of the market.<sup>11</sup>

Following up on the Brian Elton & Associates research, Paris, Randolph & Weeks conducted further consultations and found that the 'psychological impact' of residential tenancies law reform was short-lived, and that there was no evidence of net disinvestment.<sup>12</sup> They also concluded that there was no evidence that recent law

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<sup>5</sup> Seelig, Burke & Morris (2005) *Motivations of Investors in the Private Rental Market: positioning paper*, AHURI, Melbourne.

<sup>6</sup> Seelig (2007) *Residential Tenancy Law and Rental Investment: a review of claims about rental law reform and disinvestment*, paper prepared for the TUQ, Brisbane: 2.

<sup>7</sup> Castles (1994) *Investors in Rental Dwellings, Australia, July 1993*, ABS, Canberra: 12.

<sup>8</sup> DoH (1991) *Rental for Investment: a study of landlords in New South Wales*, DoH, Sydney.

<sup>9</sup> DoH, 1991: 23.

<sup>10</sup> Brian Elton & Associates (1991) *The Supply Side of the Private Rental Market*, National Housing Strategy, Canberra.

<sup>11</sup> Cited at Kennedy, See & Sutherland (1995) *Minimum Legislative Standards for Residential Tenancies in Australia*, Commonwealth Department of Housing and Regional Development, Canberra: 109.

<sup>12</sup> Paris, Randolph & Weeks (1992) *Impacts on the Investment Market following Changes to Landlord and Tenant and Associated Legislation*, National Housing Strategy, Canberra.

reform had affected the ‘fundamental economics’ of investment in private rental housing, observing that the majority of landlords were motivated by equity growth and that this was not affected by residential tenancies law reform.<sup>13</sup>

These findings are consistent with NATO’s own impressions. At present, there is a real need for large-scale investment in new, affordable rental housing. The question of how to direct investment to this end has been much discussed in policy circles and the public media. NATO members have participated in this discussion and followed closely the contributions of other participants, including representatives of the construction, finance and superannuation industries. The main problem they identify is the inadequacy of rental yields relative to the high capital cost of housing. They have also pointed to deficiencies in the planning and funding of urban infrastructure; deficiencies in the data they need to assess investments in housing; and deficiencies in the size and level of skill of the tenancy and property management sector. Not once have they mentioned residential tenancies law.

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<sup>13</sup> Cited at Kennedy, See & Sutherland, 1995: 109; Seelig, 2007: 2.

### **3. Housing policy for the prevention of homelessness**

In the previous parts of our submission, NATO's analysis and recommendations focused specifically on tenants advice services and the legal rights of tenants and other persons who rent their housing. This final part of our submission, NATO adds its support to proposals for broader housing policy reform that we submit should be part of a national approach to homelessness.

NATO supports the submission by the National Association of Community Legal Centres (NACLC) that Australian governments should legislate to recognise the right to housing as a human right. The human right to housing is affirmed by the Australian Government in international law; it should be enshrined in domestic legislation to provide real legal protection to individual persons against eviction into homelessness. It should also be the basis for Australian governments and government agencies, like the States' and Territories' social housing authorities, to examine how their own policies and practices might contribute to homelessness.

NATO supports National Shelter's proposal that the funding commitments of Australian governments to social housing under the forthcoming National Affordable Housing Agreement (the NAHA) should be at least equivalent to the levels of funding before 1996. We further submit that the NAHA should include amongst its objectives a commitment to accessibility and security in rental housing, and in support of this objective, two requirements on all housing providers in receipt of a subsidy under the NAHA: first, that they should take proceedings to terminate tenancies only where there are reasonable grounds for termination; and secondly that they must not use RTDs to list tenants or vet prospective tenants.