



# Housing Insecurity and Older People in NSW

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Updated as of 23 March 2020

This is a live document that will be updated as legislative changes are made.

Updates to the original document include:

**1 July 2019:** Landlord and Tenant (Amendment) Act 1948 (NSW)

The LTA Act was repealed on July 1 2019. The repeal of the LTA Act will mean the death of a protected tenant (or their spouse, whichever occurs last) takes their premises out of the LTA Act. Read the full update on p.49.

**23 March 2020:** Residential Tenancies Act 2010 (NSW)

As of March 23 2020 new regulation lists specific minor alterations for which a landlord cannot withhold consent. Read the full update on p.37-38.



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*CPSA is a non-profit, non-party-political membership association founded in 1931 which serves pensioners of all ages, superannuants and low-income retirees. CPSA has 91 branches and affiliated organisations with a combined membership of over 23,000 people living throughout NSW. CPSA's aim is to improve the standard of living and well-being of its members and constituents. CPSA receives funding support from the NSW Government Departments of Communities & Justice and Health, and the Australian Government Department of Health. CPSA engages in systemic advocacy on behalf of its constituency; provides support and assistance to its members and the general public through its branches and an information service through head office; provides a service to reduce social isolation of older people in receipt of care in nursing homes or at home; and a health promotion service for older people.*

## Contents

Abbreviations .....	1
<b>1 Summary of recommendations .....</b>	<b>2</b>
<b>2 Introduction .....</b>	<b>6</b>
<b>3 Housing and Older People.....</b>	<b>8</b>
<b>4 Insecure Housing .....</b>	<b>13</b>
4.1 Insecure housing and older people.....	14
<b>5 Types of Insecure Housing .....</b>	<b>18</b>
5.1 Mainstream Residential Tenancies .....	18
5.2 Boarding Houses.....	18
5.3 Residential Parks .....	21
5.4 Family Accommodation Agreements.....	23
5.5 Residential accommodation in hotels, motels, backpacker hostels, serviced apartments, pubs and clubs .....	24
5.6 Lodgments in private dwellings and share houses .....	25
5.7 Retirement villages.....	27
5.8 Protected tenancies .....	28
5.9 Strata scheme tenants and lot owners .....	30
<b>6 NSW Housing Law.....</b>	<b>31</b>
6.1 <i>Residential Tenancies Act 2010</i> (NSW) .....	32
6.2 <i>Boarding Houses Act 2012</i> (NSW) .....	39
6.3 <i>Residential (Land Lease) Communities Act 2013</i> (NSW) .....	42
6.4 <i>Retirement Villages Act 1999</i> (NSW).....	47
6.5 <i>Landlord and Tenant (Amendment) Act 1948</i> (NSW) .....	50
6.6 <i>Strata Schemes Management Act 2015</i> (NSW) and <i>Strata Schemes Development Act 2015</i> (NSW) .....	53
6.7 Common law .....	55
<b>7 Remedies .....</b>	<b>58</b>
7.1 <i>Civil and Administrative Tribunal Act 2013</i> (NSW).....	58
7.2 Civil litigation.....	59
7.3 Consumer Law .....	61
<b>8 Services for Older People Living in Insecure Forms of Accommodation .....</b>	<b>63</b>
8.1 Gaps in the current service provision .....	64
<b>9 Conclusion: Inadequate Protections and Services for Older People Living in Insecure Accommodation in NSW .....</b>	<b>67</b>
<b>10 Reference List .....</b>	<b>69</b>

## Abbreviations

ABS: Australian Bureau of Statistics

ACH: Assistance with Care and Housing Program

ACOSS: Australian Council of Social Service

ADHC: NSW Ageing, Disability and Home Care

AHURI: Australian Housing and Urban Research Institute

AIHW: Australian Institute of Health and Welfare

ARH: Affordable Rental Housing

AVO: Apprehended Violence Order

CHP: Community Housing Provider

CPSA: Combined Pensioners and Superannuants Association of NSW Inc.

GDP: Gross Domestic Product

NCAT: NSW Civil and Administrative Tribunal

OPTS: Older Persons Tenants Service

PAVS: Park and Village Service

# 1 Summary of recommendations

## Housing and Older People

**Recommendation 1:** That the NSW Government develop a NSW Housing Framework to deliver long-term solutions to ensure affordable, appropriate and secure housing supply.

**Recommendation 2:** That the NSW Government develop a NSW Older Persons Housing Strategy to ensure the demand for age-appropriate, affordable and secure housing is met.

**Recommendation 3:** That the minimum age required to be considered as a priority social housing applicant due to age is lowered from 80 to 65.

**Recommendation 4:** That the NSW Government implements a long term approach to provide a significant boost to the supply of age-suitable public and community housing, incorporated into an Older People's Housing Strategy.

**Recommendation 5:** That the NSW Government ensures age appropriate social housing and affordable private rental housing is provided in all areas and linked to accessible services and public transport.

## Insecure Housing and Older People

**Recommendation 6:** That the NSW Government requires that all new housing is designed and built to meet minimum liveable housing design standards to improve people's ability to age in place.

**Recommendation 7:** That an overarching healthy homes regulation be developed to provide for mandatory minimum standards for all forms of housing, including bathing and cooking facilities, safe and affordable heating, and working unbroken windows.

## Residential Tenancies Act 2010 (NSW)

**Recommendation 8:** That the *Residential Tenancies Act 2010* is amended to remove evictions for 'no grounds' and provide a range of reasonable grounds for ending a lease.

**Recommendation 9:** That the *Residential Tenancies Act 2010* is amended so that where a rent increase exceeds CPI over the relevant period the onus is on the landlord to prove that the increase is not excessive.

**Recommendation 10:** That the *Residential Tenancies Act 2010* is amended to ban landlords refusing a reasonable modification to increase accessibility.

**Recommendation 11:** That the *Residential Tenancies Act 2010* is amended to ban landlords refusing a reasonable modification to make the dwelling feel like a home.

#### Boarding Houses Act 2012 (NSW)

**Recommendation 12:** That the NSW Government increase protections for boarding house residents, including banning no grounds evictions and limiting occupancy fee increases to once per 12 month period and where the increase exceeds increase in CPI the onus is on the proprietor to prove that it is not excessive.

**Recommendation 13:** That the NSW Government require all proprietors to provide written information from NSW Fair Trading related to the Boarding House Act and NCAT to advise occupants of their rights on the commencement of the occupancy agreement.

**Recommendation 14:** That the NSW Government increases monitoring of modern boarding houses that are operating unregistered to ensure compliance with the Act.

#### Residential (Land Lease) Communities Act 2013 (NSW)

**Recommendation 15:** That the NSW Government amend section 45(3) of the Residential (Land Lease) Communities Act 2013 (NSW) to change the word 'tenancy' to 'site'.

**Recommendation 16:** That the NSW Government amend the RLLC Act to clearly provide that park owners are responsible for site maintenance and repair.

**Recommendation 17:** That the NSW Government makes mandatory that the operator provide written information from NSW Fair Trading related to the rights of residents and how to access NCAT to incoming residents at the commencement of the site agreement.

**Recommendation 18:** That the Residential (Land Lease) Communities Act 2013 (NSW) is amended to provide more tailored limitation periods and increase the default NCAT limitation periods.

#### Retirement Villages Act 1999 (NSW)

**Recommendation 19:** That the NSW Government appoint an Ombudsman for Retirement Village Residents.

**Recommendation 20:** That the Retirement Villages Act 1999 (NSW) is amended to ban operators from refusing a reasonable modification to increase accessibility.

**Recommendation 21:** That the NSW Government monitor the introduction of the provisions of the Retirement Villages Amendment Act 2018 to ensure that the amendments are effective in reducing complexity of contracts and fee arrangements.



## Landlord and Tenant (Amendment) Act 1948 (NSW)

**Recommendation 22:** That the NSW Government grandfather existing succession rights of children of protected tenants who are in receipt of a pension.

**Recommendation 23:** That the NSW Government fund an older persons' tenancy advice and advocacy service, with a specialisation in protected tenancies, to assist protected tenants and provide advice to Government.

## Strata Schemes Management Act 2015 (NSW) and Strata Schemes Development Act 2015 (NSW)

**Recommendation 24:** That the Strata Schemes Development Act 2015 is amended to require a unanimous vote by body corporate representatives prior to allowing a block of units to be sold for redevelopment.

**Recommendation 25:** That the NSW Government amend the Strata Schemes Management Act 2015 to increase rights of long term tenants in strata schemes to contribute to strata meetings and decisions.

**Recommendation 26:** That NCAT set the fee for strata scheme residents who are pensioners or people receiving Centrelink payments at parity of the subsidised fee for residential tenancies.

## Common law

**Recommendation 27:** That the NSW Government enact legislation that provides for clear legal coverage for informal and marginal renters to ensure that they have access to legally enforceable protections and rights.

## Civil and Administrative Tribunal Act 2013 (NSW)

**Recommendation 28:** That the NSW Government amends the Residential Tenancies Act to require that landlords provide a written factsheet or other educational material relating to tenants' rights, access to NCAT and tenants advice and advocacy services to tenants at the commencement of a lease and if a claim is made on the bond at the end of the tenancy.

**Recommendation 29:** That the NSW Government amend the Residential Tenancies Act to extend limitation periods for tribunal applications and specify limitation periods for all applications that currently fall under the default period.

## Civil litigation

**Recommendation 30:** That the NSW Government enact specific legislation to define family agreement broadly, include a standard form agreement and provide for appropriate remedies and penalties.

**Recommendation 31:** That the NSW Government fund a specialised mediation and dispute resolution service for family agreements.

## Gaps in the current service provision

**Recommendation 32:** That the NSW Government provide resources to train Specialist Homelessness Services and Tenant Advice and Advocacy Services to improve their accessibility to older people, promote a better understanding of key service linkages and increase understanding of the housing, health and aged care issues affecting older people.

**Recommendation 33:** That the NSW Government increase levels of funding to Specialist Homelessness Services and the Tenants Advice and Advocacy Program to enable these services to extend their current reach to older people living in all forms of accommodation.

**Recommendation 34:** That the NSW Government provide resources to establish a specialised NSW older people's housing information and support service that brings together resources to provide information and support on the range of housing options available to older people across all sectors including aged care housing and retirement living.<sup>1</sup>

**Recommendation 35:** That the NSW Government provides support and financial assistance to people aged over 65 who are reliant on the Age Pension and are forced to move between rental properties due to eviction, rent increase or lack of accessibility of their previous dwelling to assist in moving to another suitable property.

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<sup>1</sup> This recommendation is in line with recommendation 3 in Fiedler, J, Faulkner, D, 'The Older I Get the Scarier it Becomes': Older People at Risk of Homelessness in New South Wales (2017): accessed 21 August 2018, <https://www.oldertenants.org.au/sites/default/files/older-i-get-scarier-it-becomes-291117.pdf>, 9.

## 2 Introduction

This report has been prepared by CPSA to increase understanding of the factors contributing to housing insecurity of older people in NSW. It maps out the types of insecure accommodation in which older people in NSW live. It also identifies the legislation, policies and procedures that relate to these forms of accommodation and how the current housing law perpetuates housing insecurity.

Older Australians typically find themselves in one of three housing situations: homeownership; social housing; or renting in the private market. For the majority of older people who own their homes the existing mix of policy and market solutions provides good housing outcomes. There is only a small proportion of 65-years-or-older households who live in social housing, have fixed rents and the security of knowing that they have a roof over their head. However, due to a shortage of places and subsequent long waiting lists, social housing is not a viable option for most people. Those who cannot access homeownership or social housing are either private renters, the marginally housed or homeless.

The housing situation for Age Pensioners who are renting private housing is critical. This group cannot affordably rent anywhere in Sydney and many pay more than 90% of their income in rent in many Sydney sub-regions. They are facing imminent displacement from Sydney and increasingly from coastal regions due to rapid gentrification, escalating rental prices, a shortage of social housing and the loss of low-cost housing.

Due to this, older people renting in the private market often have no choice but to accept accommodation that offers little to no housing security. This report identifies the types of insecure housing older people find themselves in, including:

- mainstream residential tenancies
- boarding houses
- residential parks<sup>2</sup>
- family accommodation (assets for care) agreements
- residential accommodation in hotels, motels, backpacker hostels, serviced apartments, pubs and clubs
- lodgements in private dwellings/share houses
- retirement villages
- protected tenancies.

Currently, Australian and NSW housing regulation offers limited to no legislative protections and recourse for many forms of accommodation in the private market. There are also limited services for people who need to find new accommodation. The lack of protections

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<sup>2</sup> Residential (land lease) communities will be referred to by the commonly used term 'residential parks' throughout this report.

and services is a major contributing factor to the insecurity of these forms of accommodation.

Older people, due to factors including low income, poor health and social isolation, are particularly vulnerable to these lack of protections. Insecure housing has a detrimental impact on health and wellbeing and is a risk factor for homelessness. With an ageing population and increasing shortage of affordable accommodation, addressing the needs of older people in housing policy should be a priority of the Australian and NSW Governments.

### 3 Housing and Older People

There is no definitive age which defines an older person. Ageing is partially a socio-cultural construction. Within the older population there are major variations as to how people see themselves, their health status and how they experience and participate in society.<sup>3</sup> This report, however, will look primarily at those 65 years and older as per the current Age Pension eligibility age, with some reference to those aged 55 years and older.

Like all other developed economies, Australia is experiencing a significant demographic shift. Sustained low fertility rates and increased life expectancy have resulted in proportionally more older people.<sup>4</sup> In 2016, there were over 1.1 million people aged 65+ in NSW, representing around 15% of the total NSW population. If those aged 55-64 are included, the percentage rises to 22% of the total NSW population.<sup>5</sup> Australia wide, over the past two decades, the number of people aged 85+ increased by 132.9%, compared with a total population growth of 33.5%. This growth is projected to continue into the future. In other developed economies, including Japan, Italy, France, Greece, Sweden, Canada, United Kingdom and Hong Kong, the number of people aged 65 years and over exceeds the number of children aged 0-14 years. In Australia, the number of people aged 65 years and over is projected to exceed the number of children aged 0-14 years in around the year 2030.<sup>6</sup> In NSW, by 2031 more than one in three NSW residents will be aged 50 or above.<sup>7</sup>

Older people, and especially those in receipt of the Age Pension, often live on low incomes. Three-quarters of the older population in Australia receive the Age Pension. However, almost 42% of recipients have their Age Pension benefits reduced by the means test. Australia's public retirement pension is one of the cheapest in the developed world, costing just 4% of Gross Domestic Product (GDP) compared to an average of 9% across the OECD. Public spending on pensions is expected to remain low. In the 2050s the Age Pension is projected to remain at 4% of GDP versus 10% for the OECD. In contrast, the old age income poverty rate in Australia is high at 26% compared to 13% across the OECD in 2015.<sup>8</sup>

With this significant demographic shift, issues affecting older people are increasingly pertinent. One of the issues experienced by older people is access to affordable, secure and appropriate housing. It is recognised that access to affordable, appropriate and secure

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<sup>3</sup> Alan Morris, *The Australian Dream: Housing Experiences of Older Australians*, (Victoria: CSIRO Publishing, 2016): vi, 2-3; NSW Government, *NSW Ageing Strategy 2016-2020* (Australia Square, NSW: FACS, Office for Ageing 2012): 5.

<sup>4</sup> Morris, *The Australian Dream*, 1.

<sup>5</sup> Calculated using data from ABS, *2016 Data in pictures* (2017): accessed 7 May 2018, [http://www.censusdata.abs.gov.au/CensusOutput/copsub2016.nsf/All%20docs%20by%20catNo/Data-in-pictures/\\$FILE/nswER.html](http://www.censusdata.abs.gov.au/CensusOutput/copsub2016.nsf/All%20docs%20by%20catNo/Data-in-pictures/$FILE/nswER.html).

<sup>6</sup> ABS, *Australian Demographic Statistics*.

<sup>7</sup> *NSW Ageing Strategy 2016-2020*, 13.

<sup>8</sup> OECD, *Pensions at a Glance 2017: How does AUSTRALIA compare?*, (2017): <https://www.oecd.org/australia/PAG2017-AUS.pdf>.

housing are key factors influencing older people's quality of life.<sup>9</sup> As older people spend a larger majority of their time in their homes, appropriate housing is vital for older people to age in place and stay connected to their community, live a decent life and maintain a 'positive disposition.'<sup>10</sup>

The Australian Government's continued focus on care at home for older people aims to enable individuals to stay at home and in their communities for as long as possible. This reflects a general desire of many older people to remain independent and at home for longer.<sup>11</sup> This trend further exemplifies the need for policies that ensure access to secure, adequate and affordable accommodation for older people in NSW.

### Homeownership, social housing and the private rental market

Most older Australians (94.8%) live in households, rather than cared accommodation such as nursing homes and aged care hostels (5.2%).<sup>12</sup> Older Australians living in households typically find themselves in one of three housing situations: homeownership, social housing or renting in the private market.

The majority of older people in Australia are homeowners. In 2015, for all households where the household reference person was 65 years or older, over 1.8 million were outright homeowners or paying off a mortgage. This represents almost 85% of all 65 years and over households. Homeownership has long been a fundamental element of the 'Australian dream' and has been socially and culturally linked to notions of stability, security and belonging.<sup>13</sup> The high home ownership rates of older people contribute to lower housing costs in retirement. Older Australians have very high poverty rates when measured before housing costs, but much lower poverty rates when measured after housing costs are deducted because of the high rates of home ownership.<sup>14</sup>

In the 1940s, the Federal Government came to play a central role in housing policy by enacting policies aimed at promoting broad and equitable access to home ownership. These historically high homeownership rates have influenced housing policy more broadly, as if most people own or expect to own a home, the political pressure on governments to fund social housing or protect private renters is reduced. However, home ownership is becoming less accessible. Younger generations are entering home ownership later and in smaller

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<sup>9</sup> Morris, *The Australian Dream*, 26.

<sup>10</sup> Morris, *The Australian Dream*, viii; NSW Government, *NSW Ageing Strategy 2016-2020*, 26.

<sup>11</sup> Department of Health, *Why is Aged Care Changing*, Australian Government (2017): accessed May 7 2018, <https://agedcare.health.gov.au/ageing-and-aged-care-aged-care-reform/why-is-aged-care-changing>.

<sup>12</sup> ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015*, Cat. No. 4430.0, ABS, Canberra (2016): accessed 16 April 2018,

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4430.0Main%20Features302015?opendocument&tabname=Summary&prodno=4430.0&issue=2015&num=&view=>

<sup>13</sup> Morris, *The Australian Dream*, 17-18; Forrest, R and Hirayama, Y, 'The Financialisation of the Social Project: Embedded Liberalism, Neoliberalism and Home Ownership,' *Urban Studies* 52, no. 2 (2015): 234.

<sup>14</sup> Spies-Butcher, B, 'Australia's Broken Housing System: Homelessness and Poverty amid Affluence,' in *Thinking about Poverty*, 4th edn, ed. K Serr (Annandale: The Federation Press, 2017): 108.

numbers due to rising house prices.<sup>15</sup> It is estimated that by 2046 the rate of homeownership in the 65 and over age group will be 10 percentage points lower.<sup>16</sup> Many older people, especially women, face particular challenges if they do not get a foothold in or lose access to home ownership.<sup>17</sup>

Older people locked out of homeownership may turn to social housing. However, social housing represents a small fragment of the total housing occupied by people aged 65+. Of all households where the reference person is 65+ only 4.4% are living in social housing. This represents a decrease from 6.3% in 2011 and 6.8% in 1996.<sup>18</sup> Large proportions of social housing tenants are older persons aged 55 years and over. 33% of public rental housing tenants and 27% of community housing tenants are aged 55 years and over.<sup>19</sup> Social housing provides below market level rent fixed at 25% of income and for most, security of tenure is virtually guaranteed. However, this is not always the case, for example the high profile selling off of the 293 public housing dwellings in Millers Point, Dawes Point and the Rocks and the consequential removal of the residents demonstrates the pitfalls of social housing. Despite this, in 2016, 42% of public housing tenants had been in the same tenancy for over a decade, whilst 63% had been in place for over five years.<sup>20</sup>

In NSW, there is an emphasis on the growth of the community housing sector. There was an 81% increase in mainstream community housing dwellings recorded between 2009–10 and 2015–16 and there are now over 140 not-for-profit Community Housing Providers across NSW.<sup>21</sup> In 2016, the NSW Government announced plans to transfer management of government owned dwellings to the community housing sector with the goal that the community housing sector will own or manage up to 35% of all social housing in NSW.<sup>22</sup> Unlike state housing authorities, community housing providers (CHPs) can receive 100% of Commonwealth Rent Assistance paid to tenants which enables CHPs to potentially generate an operating surplus. Due to the ability to operate at a profit, Morris argues that ‘some CHPs are more likely to rent out their properties to households with higher incomes than the Age Pension, because the higher rent obtained will give the CHP concerned greater capacity to maintain and extend its holdings over time and to be financially self-sustaining.’<sup>23</sup>

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<sup>15</sup> Spies-Butcher, ‘Australia’s Broken Housing System,’ 109.

<sup>16</sup> Yates, J and Bradbury, B, ‘Home Ownership as a (Crumbling) Fourth Pillar of Social Insurance in Australia’, *Journal of Housing and the Built Environment* 25 (2010): 207.

<sup>17</sup> Spies-Butcher, ‘Australia’s Broken Housing System,’ 109.

<sup>18</sup> Morris, *The Australian Dream*, 24.

<sup>19</sup> Australian Institute of Health and Welfare (AIHW), *Housing Assistance in Australia 2017* (2017): accessed 16 April 2018, <https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia-2017/contents/social-housing-tenants>.

<sup>20</sup> AIHW, *Housing Assistance in Australia 2017*.

<sup>21</sup> Australian Institute of Health and Welfare, *Housing Assistance* (2018): accessed 16 April 2018, <https://www.aihw.gov.au/reports-statistics/health-welfare-services/housing-assistance/overview>; FACS, *Social Housing*, accessed 16 April 2018, <https://www.housing.nsw.gov.au/social-housing>; FACS, *Community Housing Providers*, accessed 16 April 2018, <http://www.housing.nsw.gov.au/community-housing/community-housing-providers>.

<sup>22</sup> NSW Government, *Future Directions for Social Housing in NSW*, (Australia Square, NSW: FACS, 2016): 8.

<sup>23</sup> Morris, *The Australian Dream*, 22-23.

Despite the growth of community housing, social housing is increasingly inaccessible due to a shortage of places and the subsequent long waiting lists. The Tenants Union of NSW put the waiting list figure as of 30 June 2017, including suspended applicants, at 61,448.<sup>24</sup> Housing NSW waiting list figures show an increase of just over 10% to the waiting list over the past five years preceding 2018. There are also wait times of 10 or more years in many areas.<sup>25</sup> To address the growing waiting list, eligibility criteria has been tightened. Social housing is increasingly restricted to tenants who are very poor, often with multiple forms of disadvantage. By 2013, about two-thirds of new public housing tenants had special needs, meaning they had a disability, had a very young or very old head tenant, or were an indigenous household. In NSW, older people can be approved for housing assistance as an 'elderly client' when they turn 80 and or 55 for Indigenous Australians.<sup>26</sup> Nationally in 2016-17, 74.3% of new public housing allocations and 86.4% of new community housing allocations were to households in greatest need. Greatest need households are defined as households that at the time of allocation are homeless, in housing inappropriate to their needs, in housing that is adversely affecting their health or placing their life and safety at risk, or, have very high rental housing costs.<sup>27</sup> As public housing was initially designed to be funded by tenants' rents, the low rents tied to the incomes of many disadvantaged tenants have led to a cycle of under investment and falling supply.<sup>28</sup>

Due to barriers to accessing or retaining homeownership and the stagnation of social housing, growing numbers of older people are relying on the private market for their accommodation.<sup>29</sup> 160, 200 households where the reference person is 65+ live in private rental, that's 7.4% of all households over the age of 65. There was a 79% increase in the number of older people living in the private rental market between 1996 and 2011.<sup>30</sup> Morris posits that this trend is likely to continue with an ageing population, coupled with increasing casualisation of the workforce and unemployment.<sup>31</sup> Research by the Australian Housing and Urban Research Institute (AHURI) projects an increase of 115% from 2001-2026 to a

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<sup>24</sup> 'FACS: Alternative Waiting List Figures', *The Brown Couch*, blog, Tenants Union of NSW, (March, 29, 2018): accessed 18 May 2018, <http://tunswblog.blogspot.com.au/2018/03/facs-alternative-waiting-list-figure.html>.

<sup>25</sup> FACS, Social Housing; FACS, *Expected Waiting Times* (2018): accessed 16 April 2018, <http://www.housingpathways.nsw.gov.au/how-to-apply/expected-waiting-times;>

<sup>26</sup> FACS, *Social Housing Eligibility and Allocations Policy Supplement*, NSW Government (2018): accessed 18 April 2018, <http://www.housingpathways.nsw.gov.au/additional-information/policies/social-housing-eligibility-and-allocations-policy-supplement#efshe>.

<sup>27</sup> Productivity Commission, 'Housing and Homelessness', *Report on Government Services 2018*, Australian Government (2018): accessed 18 April 2018, <https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/housing-and-homelessness/housing/rogs-2018-partg-chapter18.pdf>, 8.

<sup>28</sup> Spies-Butcher, 'Australia's Broken Housing System,' 117.

<sup>29</sup> Spies-Butcher, 'Australia's Broken Housing System,' 111.

<sup>30</sup> Morris, *The Australian Dream*, 25.

<sup>31</sup> Morris, *The Australian Dream*, preface vi.



total of 419,000 in the number of lower-income older people living in rental households. The report argues that this far exceeds the supply capacity of the social housing system.<sup>32</sup>

Historically, governments have increasingly deregulated private rental housing as it was considered a transitory and unattractive form of accommodation for those moving between cities and young people. As a result, Australia's private renters have some of the weakest protections in the developed world.<sup>33</sup> In 2015, the NSW Parliamentary Research Service highlighted a 'paradox in policy settings' in the private rental market. Private rental is a permanent form of accommodation for a growing number of households who require stability in their housing circumstances, however it is concurrently increasingly viewed as an investment opportunity characterised by volatility, instability and unlikely to provide good housing outcomes.<sup>34</sup> In 2015, the Australian Council of Social Service (ACOSS) reported that more than a million Australians, the majority living in private rental, are in housing stress - meaning that they are on low to moderate incomes and the cost of housing consumes at least 30% of that income.<sup>35</sup> For older people, private rental consumes a large proportion of the Age Pension.<sup>36</sup> Morris' study of older people living in private rental reported that tenants were 'plagued with constant anxiety due to their high accommodation costs and the ever-present possibility that they may be subject to an untenable rent increase or be asked to vacate.'<sup>37</sup> Many scholars have highlighted that private rental is the least secure form of housing.<sup>38</sup>

**Recommendation 1:** That the NSW Government develop a NSW Housing Framework to deliver long-term solutions to ensure affordable, appropriate and secure housing supply.<sup>39</sup>

**Recommendation 2:** That the NSW Government develop a NSW Older Persons Housing Strategy to ensure the demand for age-appropriate, affordable and secure housing is met.<sup>40</sup>

**Recommendation 3:** That the minimum age required to be considered as a priority social housing applicant due to age is lowered from 80 to 65.

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<sup>32</sup> Jones, A, Bell, M, Tilse, C and Earl, G, *Rental Housing Provision for Lower-Income Older Australians*, AHURI Final Report 98, (Melbourne: Australian Housing and Urban Research Institute Limited, 2007): accessed 7 May 2018, <https://www.ahuri.edu.au/research/final-reports/98>.

<sup>33</sup> Spies-Butcher, 'Australia's Broken Housing System,' 111.

<sup>34</sup> Roth, L, 'Private Rental Housing and Security of Tenure', *e-brief*, NSW Parliamentary Research Service, (2015): accessed 19 April 2018, <https://www.parliament.nsw.gov.au/researchpapers/Documents/private-rental-housing-and-security-of-tenure/Private%20rental%20housing%20and%20security%20of%20tenure.pdf>.

<sup>35</sup> Spies-Butcher, 'Australia's Broken Housing System,' 109.

<sup>36</sup> Morris, *The Australian Dream*, 18

<sup>37</sup> Morris, *The Australian Dream*, 4-5.

<sup>38</sup> See Spies-Butcher, 'Australia's Broken Housing System,' 109.

<sup>39</sup> From ageing on the edge

<sup>40</sup> This recommendation is in line with recommendation 1 in Fiedler, J, Faulkner, D, 'The Older I Get the Scarier it Becomes': Older People at Risk of Homelessness in New South Wales (2017): accessed 21 August 2018, <https://www.olderrenters.org.au/sites/default/files/older-i-get-scarier-it-becomes-291117.pdf>, 9.

**Recommendation 4:** That the NSW Government implements a long term approach to provide a significant boost to the supply of age-suitable public and community housing, incorporated into an Older People’s Housing Strategy.<sup>41</sup>

**Recommendation 5:** That the NSW Government ensures age appropriate social housing and affordable private rental housing is provided in all areas and linked to accessible services and public transport.

## 4 Insecure Housing

There is no agreed upon, clear or simple definition of housing insecurity. There is also limited research exploring housing insecurity, unlike the extreme of homelessness.<sup>42</sup>

In Australia, housing security has long been tied to home ownership. Research suggests that home ownership provides greater financial and psycho-social security than renting.<sup>43</sup> Literature identifies homeownership as a locale of ontological security.<sup>44</sup> Saunders defines ontological security as ‘where people feel in control of the environment, free from surveillance, free to be themselves and at ease, in the deepest psychological sense, in a world that might at times be experienced as threatening and uncontrollable.’<sup>45</sup> However, Hulse and Saugeres propose that ontological security is not an outcome of a particular type of tenure over another.<sup>46</sup> Social housing tenants and private renters may feel as devoted to their homes as homeowners if their homes are secure, pleasant and affordable.<sup>47</sup>

Private rental has been identified as the most insecure form of housing. This report defines housing security as per AHURI’s 2009 report which found housing insecurity to have six

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<sup>41</sup> This recommendation is in line with recommendation 12 in Fiedler, J, Faulkner, D, ‘The Older I Get the Scarier it Becomes’: Older People at Risk of Homelessness in New South Wales (2017): accessed 21 August 2018, <https://www.older tenants.org.au/sites/default/files/older-i-get-scarier-it-becomes-291117.pdf>, 10.

<sup>42</sup> Cox, R, Henwood, B, Rice, E and Wenzel, S, ‘Roadmap to a Unified Measure of Housing Insecurity’, *CESR-Schaeffer Working Paper Series* (2016).

<sup>43</sup> Hulse, K and Saugeres, L., *Housing Insecurity and Precarious Living: an Australian Exploration*, AHURI Final Report 124 (Melbourne: Australian Housing and Urban Research Institute Limited, 2008): accessed 7 May, <https://www.ahuri.edu.au/research/final-reports/124>.

<sup>44</sup> Hulse, K, Milligan, V and Easthope, H, *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives*, AHURI Final Report 170, Melbourne: Australian Housing and Urban Research Institute Limited, 2011): accessed 7 May 2018, <https://www.ahuri.edu.au/research/final-reports/170>.

<sup>45</sup> Saunders, P, *A Nation of Home Owners* (London: Unwin Hyman, 1990: 361).

<sup>46</sup> Hulse, et.al., *Housing Insecurity and Precarious Living*; Parkinson, S, *The Rise of the Working Insecure Household: Understanding How Labour Insecurity Contributes Housing Insecurity in Australia During a Time of Restructuring and Growth*, PhD Thesis (2010): accessed 7 May 2018, <http://melbourneinstitute.unimelb.edu.au/assets/documents/hilda-bibliography/student-essays-dissertations/SParkinson.pdf>.

<sup>47</sup> Morris, *The Australian Dream*, 12.

dimensions. All dimensions were characterised by a perceived lack of control over housing and other life circumstances<sup>48</sup> That of:

- lack of privacy: not having control to exclude others from one's home and lack of privacy between the home and surroundings, such as feeling under surveillance
- lack of belonging: lack of supportive relationships and connection to the local community and supportive relationships inside and outside of dwelling
- lack of physical comfort: poor housing conditions that impact on health, physical enjoyment of dwelling and ability to relax and feel at home.
- housing mobility: needing to move as a result of circumstances outside of a person's control
- housing instability: changes in peoples housing and vulnerability to changes beyond immediate control
- feeling unsafe: both inside and outside the dwelling.

While this report understands housing security to be determined by a mixture of interrelated factors, it focuses specifically on Australian and NSW legislation, policies and procedures to determine their relationship to housing insecurity for older people.<sup>49</sup> Legal protections are sparse in NSW for renters in general. Additionally, the NSW Government's NSW Ageing Strategy 2016-2020 highlights that the laws that do attempt to protect renters 'do not specifically consider older renters.'<sup>50</sup>

## 4.1 Insecure housing and older people

For older people, the insecurity of renting in the private market can have particular negative effects on health, social inclusion and risk of homelessness. It has been identified that there is a 'deepening divide' within the aged 65+ population in Australia. Whilst homeowners and social housing tenants' accommodation costs are usually manageable and have a relatively high degree of security of occupancy, older private renters will often have to spend a considerable proportion of their income on rent and have limited security of tenure.<sup>51</sup> This is especially pertinent for older people who are often living on low incomes and have special requirements for appropriate housing in regards to type, location, price, ability to move house and accessibility. This means choice may be restricted and the insecure nature of rental housing a greater burden.

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<sup>48</sup> Hulse, K., Saugeres, L, *Housing Insecurity and its Link to the Social Inclusion Agenda*, AHURI Research and Policy Bulletin 113 (Melbourne: Australian Housing and Urban Research Institute Limited, 2009): accessed 7 May 2018, <https://www.ahuri.edu.au/research/research-and-policy-bulletins/113>, 2.

<sup>49</sup>Hulse et. Al., *Secure occupancy in Rental Housing*.

<sup>50</sup> NSW Government, *NSW Ageing Strategy 2016-2020* (Australia Square, NSW: FACS, Office for Ageing 2012): 27.

<sup>51</sup> Morris, *The Australian Dream*, vi-27; NSW Government, *NSW Ageing Strategy 2016-2020*, 27.

Despite the growing numbers of older people forced into the private rental market, research demonstrates that there are not enough affordable rental properties in NSW for older people on low incomes.<sup>52</sup> In Australia, the 65+ population has a weekly median personal income of \$440 per week, compared to \$913 for the 25-64 population.<sup>53</sup> Private renting has also become progressively less affordable for older people. Since 2012, there has been a 53.7% increase in the number of older people paying unaffordable rents of over 30% of income. In 2017, 9,314 low income older households were in severe housing stress paying more than 50% of their income in rent.<sup>54</sup> Anglicare's analysis of the Australian rental market found that on 24 March 2018 just 1.24% of properties were affordable for a single Age Pensioner and 4.43% for an Age Pensioner couple.<sup>55</sup> Due to the lack of affordable and appropriate private rental properties for older people in NSW, older private renters may be forced to accept insecure forms of accommodation with limited legal protections.

Morris' research of older people in the Australian private rental sector reveals a number of specific challenges and sources of insecurity for older private renters. The most common source of insecurity for older renters was rent increases. There was a common view that it wasn't worth modifying or improving a property as it wasn't their house and they might not be there for long, especially as any increase in the quality of the accommodation could lead to a rent increase. Older renters also expressed a hesitancy to complain as it might lead to a rent increase or eviction.<sup>56</sup> A particular difficulty for older private renters is that housing mobility is often not voluntary, but is instead due to rent increases or eviction. Moving house is a significant emotional and financial burden for people, as it requires rent in advance, a bond, installing window coverings and moving household and personal items.<sup>57</sup> The involuntary moving of older people is correlated with adverse physical health and emotional effects.<sup>58</sup>

## Effects on Health and Wellbeing

Renting in the private rental market has been found to have negative effects on physical and mental health, social connectedness and homelessness.<sup>59</sup> The more precarious the housing situation the greater the effect.<sup>60</sup> The precarious nature of renting in the private rental

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<sup>52</sup> NSW Government, *NSW Ageing Strategy 2016-2020*, 28.

<sup>53</sup> ABS, *Ageing Population 2016*, cat. no. 2071.0, ABS, Canberra (2018): accessed 7 May 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Ageing%20Population~14>.

<sup>54</sup> Fiedler, J, Faulkner, D, *'The Older I Get the Scarier it Becomes': Older People at Risk of Homelessness in New South Wales (2017)*: accessed 7 May 2018, <https://www.oldertenants.org.au/sites/default/files/older-i-get-scarier-it-becomes-291117.pdf>, 44.

<sup>55</sup> Anglicare Australia, *Anglicare Rental Affordability Snapshot 2018*, (Canberra: Anglicare, 2018): accessed 7 May 2018, <http://www.anglicare.asn.au/docs/default-source/default-document-library/final---rental-affordability-snapshotb811d9309d6962baacc1ff0000899bca.pdf?sfvrsn=4>

<sup>56</sup> Morris, *The Australian Dream*, 183-229.

<sup>57</sup> Morris, *The Australian Dream*, 93.

<sup>58</sup> See Morris, *The Australian Dream*, 93.

<sup>59</sup> See Morris, *The Australian Dream*, 8; Cox et.al., 'Roadmap to a Unified Measure of Housing Insecurity'.

<sup>60</sup> See Morris, *The Australian Dream*, 147.

market has more profound negative impacts on the health and quality of life of older people than the general population.<sup>61</sup> This is due, in part, to the relatively large amount of time older people spend inside their home. This is especially so for those with dementia, disability or other health and mobility issues. Older people have a greater likelihood of ill health, disability, widowhood and living alone, in addition to low incomes.

Physical health can be compromised through lack of access to nutritious food, physical activity and medical services due to income or location.<sup>62</sup> Almost all the older private renters in Morris' study suffered from 'energy poverty', which is defined as low-income households having to use more than 10% of their income to pay for power combined with an inability to heat or cool their homes adequately.<sup>63</sup> In general, the lack of secure and affordable housing significantly contributes to poverty and risk factors associated with poverty.<sup>64</sup> In terms of mental health, a sense of control is vital to 'maintaining positive and stable subjective wellbeing' and may be particularly important to wellbeing and even longevity in the elderly.<sup>65</sup> Research has demonstrated that renters in the private sector have the highest proportion of individuals excluded on all dimensions, including basic services, neighbourhood and financial exclusion.<sup>66</sup> The inability to maintain social connectedness and feelings of a lack of control over living circumstance are a source of anxiety and can lead to depression in older renters. Morris' study concludes that 'if an older person is in adequate, affordable and secure housing they have far greater capacity to maintain their health.'<sup>67</sup>

## Risk of Homelessness

Insecure housing is a risk factor for homelessness. The NSW Ageing Strategy 2016-2020 highlights that older people in private rental can be at a high risk of homelessness.<sup>68</sup> The most vulnerable older private renters were those who lived by themselves and had minimal or no family support to fall back on.<sup>69</sup> In 2011, 32% of older women and 17% of older men

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<sup>61</sup> See, Mallet, S, Bentley R, Baker, E, Mason, K, Key, D, Kolar, V, Krnjacki, L, *Precarious Housing and Health Inequalities: What Are the Links?*, Summary Report (2011); Bentley R, Baker, E, Mason, K, 'Cumulative Exposure to Poor Housing Affordability and its Association with Mental Health in Men and Women', *Journal of Epidemiology and Community Health* 66, no. 9 (2012): 761-766. Allen, J, 'Older People and Wellbeing', *Institute for Public Policy Research*, July (2008); Windle, G, Burholt, V, Edwards, RT, 'Housing related difficulties, housing tenure and variations in health status: Evidence from older people in Wales', *Health and Place* 12, no. 3 (2006); NSW Government, *NSW Ageing Strategy 2016-2020*, 27.

<sup>62</sup> Morris, *The Australian Dream*, 53/177.

<sup>63</sup> Morris, *The Australian Dream*, 57

<sup>64</sup> Spies-Butcher, 'Australia's Broken Housing System,' 113.

<sup>65</sup> Aldwin, CM, 'Does Age Affect the Stress and Coping Process? Implications of Age Differences in Perceived Control', *J Gerontol* 46, no. 4 (1991): 174; Quandros-Wander, D, McGillivray, J, Broadbent, J, 'The Influence of Perceived Control on Subjective Wellbeing in Later Life', *Social Indicators Research*, 115 no. 3 (2014): 999.

<sup>66</sup> Barnes, M, Blom, A, Cox, K, Lessof, C, *The Social Exclusion of Older People: Evidence from the First Wave of the English Longitudinal Study of Ageing (ELSA)*, Final Report (Office of the Deputy Prime Minister, 2006): 31.

<sup>67</sup> Morris, *The Australian Dream*, 148-9.

<sup>68</sup> NSW Government, *NSW Ageing Strategy 2016-2020*, 27.

<sup>69</sup> Morris, *The Australian Dream*, 36.

lived by themselves.<sup>70</sup> Living alone ‘can be financially crippling’ as accommodation costs of that of an individual are not that much lower than a couple, even though an individual’s income is much lower. Older private renters faced with relationship breakdown or the death of a partner face accommodation costs that remain the same which can become untenable and have the potential to precipitate homelessness.<sup>71</sup> Most older people experiencing homelessness live in boarding houses (27%), followed by staying temporarily in other households (24%).<sup>72</sup>

This is especially pertinent to consider this link as rates of homelessness grow. In NSW between 2011 and 2016 there was a 37% increase in homelessness amongst the general population. The rates of older people experiencing homelessness are increasing too. In 2016, people aged 55+ made up 16% (18,625 persons) of the total homeless population. Males accounted for 26% of older persons homeless on census night 2016, increasing by 26% from 2011. The number of homeless older females is increasing more rapidly, with an increase of 31% from 2011. It is now recognised that one of the most disadvantaged demographics are those who are old, single, poor, female and in private rental accommodation.<sup>73</sup>

**Recommendation 6:** That the NSW Government requires that all new housing is designed and built to meet minimum liveable housing design standards to improve people’s ability to age in place.

**Recommendation 7:** That an overarching healthy homes regulation be developed to provide for mandatory minimum standards for all forms of housing, including bathing and cooking facilities, safe and affordable heating, and working, unbroken windows.

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<sup>70</sup> ABS, *Reflecting a Nation: Stories from the 2011 Census: Where and How Do Australia’s Older People Live?*, Cat No 2071.0 (2013): accessed 16 April 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>.

<sup>71</sup>Wood, G, Chamberlain, C, Babacan, A, Dockery, M, Cullen, G, Costello, G, Nygaard, A, Stoakes, A, Adam, M, Moloney, K, *The Implications of Loss of a Partner for Older Private Renters*, AHURI Final Report 116 (2008): <https://www.ahuri.edu.au/research/final-reports/116>; Petersen, M and Parsell, C, ‘Homeless for the First Time in Later Life: An Australian Study’, *Housing Studies* 30, no. 3 (2015): 368-391.

<sup>72</sup>ABS, *Census of Population and Housing: Estimating homelessness, 2016*, cat. no. 2049.0, ABS, Canberra (2018): accessed 16 April 2018, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/2049.0Main+Features12016?OpenDocument>

<sup>73</sup> Homelessness Australia and Equality Rights Alliance, ‘Ending and Preventing Older Women’s Experiences of Homelessness in Australia’, Submission to the the Economic Security of Older Women Inquiry (2015): accessed 7 May 2018, [http://www.homelessnessaustralia.org.au/sites/homelessnessaus/files/2017-07/Economic\\_Security\\_of\\_Older\\_Women\\_Inquiry.pdf](http://www.homelessnessaustralia.org.au/sites/homelessnessaus/files/2017-07/Economic_Security_of_Older_Women_Inquiry.pdf); Greenop, K, ‘Understanding Housing Precarity: More than Access to a Shelter, Housing is Essential for a Decent Life,’ *Global Discourse* 7, no. 4 (2017): 489–495.

## 5 Types of Insecure Housing

This section provides an overview of the different forms of insecure housing lived in by older people in NSW. These include:

- mainstream residential tenancies
- boarding houses
- residential parks
- family accommodation agreements
- residential accommodation in hotels, motels, backpacker hostels, serviced apartments, pubs and clubs
- lodgments in private dwellings and share houses
- retirement villages
- protected tenancies

### 5.1 Mainstream Residential Tenancies

#### Relevant Legislation

- *Residential Tenancies Act 2010* (NSW)
- *Strata Schemes Management Act 2015* (NSW)

The most common accommodation in the private market is a mainstream residential tenancy rented through a landlord or agent. Tenancy agreements often apply

when the whole house or apartment is rented. Tenancy agreements are covered by the *Residential Tenancies Act 2010* (NSW). Tenants who rent in a strata scheme apartment, unit or townhouse are also covered by the *Strata Schemes Management Act 2015* (NSW).

Leases are generally six or 12 months long, after which they may be renewed for another fixed period but are often moved onto a periodic agreement. Legal rights for tenants differ depending on whether they have a fixed term lease or a periodic agreement. Generally, there is little security for older renters living in a mainstream residential tenancy as they face rent increases, no grounds evictions and an inability to modify their homes.

### 5.2 Boarding Houses

A boarding house is a building which is subdivided into furnished and lockable bedrooms that are rented on a room-by-room basis with some shared common facilities, such as a living room,

#### Relevant Legislation

- *Boarding Houses Act 2012* (NSW)
- *Residential Tenancies Act 2010* (NSW)
- *Landlord and Tenant (Amendment) Act 1948* (NSW)
- Common Law

bathroom, kitchen or laundry.<sup>74</sup> The agreement often includes utility costs for water, gas and electricity.<sup>75</sup> Some boarding houses also come with services such as meals, cleaning, linen and a caretaker continually on the premises.<sup>76</sup> However, the combined provision of meals and board is less common today with agreements usually limited to a room and shared facilities. Often rental agreements for a room are made orally with an operator, manager or landlord.<sup>77</sup> On census night 2016, 992 people aged 65+ were enumerated as living in boarding houses or private hotels.<sup>78</sup>

The *Boarding Houses Act 2012* (NSW) (BH Act) distinguishes boarding houses from other forms of private rental. The BH Act covers both general and assisted boarding houses. Assisted boarding houses are boarding houses that have two or more 'persons with additional needs', including a permanent disability, mental illness or aged related frailty, who require support with daily tasks. This report however, will address general boarding houses due to the limited number of assisted boarding houses operating in NSW, which is reported to number at about 20.<sup>79</sup>

In practice boarding houses are covered by different legislation depending on the agreement. Occupants may be residents in a registrable boarding house with an occupancy agreement under the *Boarding Houses Act 2012* (NSW), tenants with a residential tenancy agreement covered under the *Residential Tenancies Act 2010* (NSW), or lodgers with a common law lodging license. In very limited situations, a boarding house resident may be a tenant with an agreement under the *Landlord and Tenant (Amendment) Act 1948* (NSW).<sup>80</sup>

Boarding houses have long been a feature of Australian housing provision, however their form and geography has changed over time. There is a growing distinction between three types of boarding houses: traditional boarding houses; modern boarding houses; and 'new generation' boarding houses.

Traditional boarding houses are typically located in inner and middle ring suburbs in larger cities. Many provided accommodation to single men working in inner city industries from the late-nineteenth century through to the mid-twentieth century. Traditional boarding houses have over time increasingly been occupied by people on extremely low incomes who

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<sup>74</sup> Inner Sydney Tenants' Advice & Advocacy Service, 'What is my legal position?', *Share Housing Survival Guide* (NSW), Redfern Legal Centre, accessed 16 April 2018, <https://sharehousing.org/what-is-my-legal-position-2/>; Nheu, N and McDonald, H, 'Case Studies: Boarders and Lodgers Case Study', in *By the People, For the People?* (Sydney: Community participation in law reform, Law and Justice Foundation of NSW, 2010).

<sup>75</sup> Goodman, R, Nelson, A, Dalton, T, Cigdem, M, Gabriel, M and Jacobs, K, 'The Experience of Marginal Rental Housing in Australia', Final Report 210 (RMIT Research Centre: Australian Housing and Urban Research Institute, 2013): 21.

<sup>76</sup> Tenants Union of NSW, 'Chapter 8: Boarding Houses', *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/boarding-houses>.

<sup>77</sup> Goodman et.al., 'The Experience of Marginal Rental Housing in Australia', : 23.

<sup>78</sup> ABS, *2016 Census of Population and Housing*, TableBuilder. Findings based on use of ABS TableBuilder data.

<sup>79</sup> Tenants Union of NSW, 'Chapter 8i: Assisted boarding houses'.

<sup>80</sup> Tenants Union of NSW, 'Chapter 8a: About Boarding Houses', *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/about-boarding-houses>



are outside of the workforce. They often experience multiple forms of disadvantage and are socially isolated.<sup>81</sup> Many live with a physical disability or mental illness and a growing number are elderly.<sup>82</sup> There has, however, been a decline in the redevelopment of these types of boarding houses which are increasingly being converted into single houses or apartments.<sup>83</sup>

In contrast are the emerging 'modern' boarding houses. Modern boarding houses are not always easily identifiable and often blend, undetected, into the suburban street.<sup>84</sup> A study by the Tenants Union of NSW identified potential registrable boarding houses advertised on Gumtree. The study found that a substantial proportion of rooms advertised as room share are likely to be general boarding houses, but are not registered.<sup>85</sup> Modern boarding houses are often converted residential homes which have undergone modifications such as putting locks on bedrooms, partitioning rooms to create extra bedrooms or converting garages and sheds into rooms. This new model of boarding houses is less prevalent in policy discussion. This is due, in part, to a common lack of compliance with the relevant legislation by owners or proprietors and failure to declare that they are providing boarding house accommodation. Due to this, regulatory bodies such as local government authorities have difficulty enforcing boarding house registration, health, building and fire regulations.<sup>86</sup>

A growing number of 'new generation' boarding houses are being developed across Sydney and surrounding regions. New generation boarding house rooms are self-contained with a private en-suite and a kitchenette. These boarding houses are often advertised as luxury studio apartments' that are targeted at students and professionals. The website of an architectural service for a development company states that 'this new building, a next generation boarding house of luxury self-contained units, rejects the run down older boarding house of the past'.<sup>87</sup> Whilst new generation boarding houses are at times more akin to studio apartments which would be covered by the *Residential Tenancies Act 2010*, the *Boarding Houses Act 2012* affords minimal legal protection to boarding house residents and proprietors have more flexibility in writing occupancy agreements.<sup>88</sup>

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<sup>81</sup>Goodman et. al., 'The Experience of Marginal Rental Housing in Australia', 23.

<sup>82</sup> Tenants Union of NSW, *Boarding Houses Act Five Years On* (2017): accessed 16 April 2018, <https://www.tenants.org.au/tu/news/boarding-houses-act-five-years>.

<sup>83</sup> Goodman et. al., 'The Experience of Marginal Rental Housing in Australia', 23.

<sup>84</sup> Goodman et. al., 'The Experience of Marginal Rental Housing in Australia', 25.

<sup>85</sup> Tenants Union of NSW, *Registrable Boarding Houses and the Roomshare Market* (2014): accessed 16 April 2018, [https://files.tenants.org.au/policy/RBH\\_roomshare\\_TU.pdf](https://files.tenants.org.au/policy/RBH_roomshare_TU.pdf).

<sup>86</sup> Goodman et. al., 'The Experience of Marginal Rental Housing in Australia', 25.

<sup>87</sup> Edifice Design, 'New generation boarding house student accommodation at Maroubra is approved by Randwick City Council' (2018): accessed 16 April 2018, <http://edifice.com.au/news/student-accommodation-architects-sydney-new-generation-boarding-house-architects-sydney-eastern-suburbs-2/>.

<sup>88</sup> Martin, C, 'Boarding Houses Act', *Down Under All Over*, 38, no. 1 (2013): accessed 16 April 2018, <https://www.altlj.org/news-and-views/downunderallover/duao-vol-38-1/493-boarding-houses-act>.

## 5.3 Residential Parks

### Relevant Legislation

- *Residential (Land Lease) Communities Act 2013* (NSW).
- *Residential Tenancies Act 2010* (NSW)

Residential parks are properties on which manufactured homes, caravans and other moveable dwellings are situated. NSW legislation refers to residential parks as ‘residential (land lease) communities’.

Residents of residential parks may be homeowners that lease the site on which the dwelling is located or tenants who rent their home from its owner.<sup>89</sup> Homeowners in residential parks have ‘residential site agreements’ with the park operator that are covered by the *Residential (Land Lease) Communities Act 2013* (NSW) (RLLC Act). Tenants renting in residential parks have tenancy agreements that are covered by the *Residential Tenancies Act 2010* (NSW), but are also affected by some aspects of the RLLC Act. Residents’ agreements are usually made with the park operator, although renters may rent from a landlord.

In July 2016, there were 34,297 permanent residents of residential parks in NSW and 497 communities. This is an increase of 665 permanent residents and 20 land lease community registrations since 2012. On census night 2016, 18,221 permanent residents of residential parks, camping grounds and manufactured home estates were aged over 65. In 2016, 20,364 of homes in residential parks were owned and 3,114 were rented.<sup>90</sup>

AHURI reports that the 2007-2008 Global Financial Crisis increased household economic instability in Australia, resulting in more people choosing or being forced into long term accommodation in residential parks.<sup>91</sup> Additionally, increasing numbers of older people are retiring with little superannuation and few assets, preventing them from being able to live in mainstream residential tenancies or raise mortgage finance. In some cases they may have sufficient savings to purchase a relocatable home. Many older women in particular find themselves living in residential parks due to the shortage of social housing for emergency and ongoing accommodation.<sup>92</sup> Some groups, such as older men who were itinerant workers, would have limited alternatives.<sup>93</sup>

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<sup>89</sup> Tenants Union of NSW, ‘Chapter 10a: Residential park residents’, *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/residential-park-residents>.

<sup>90</sup> Tenants Union of NSW, ‘The Act: One Year On’, Outasite: Residential Parks Newsletter (November, 2016): 9.

<sup>91</sup> AHURI, *The Experience of Marginal Rental Housing in Australia*, 59.

<sup>92</sup> Council on the Ageing NSW and The Aged-care Rights Service, *Residential (Land Lease) Communities Regulation 2014 Consultation Draft*, submission (2014): accessed 16 April 2018, [https://www.cotansw.com.au/MediaPDFs/Residential%20\(Land%20Lease\)%20Communities%20Bill%202014%20-%20TARS%20%20COTA%20NSW.pdf](https://www.cotansw.com.au/MediaPDFs/Residential%20(Land%20Lease)%20Communities%20Bill%202014%20-%20TARS%20%20COTA%20NSW.pdf).

<sup>93</sup> Parks and Village Service (PAVS), *Home Among the Gum Trees: Securing the Future for Older People who Live in Residential Parks in NSW*, Combined Pensioners and Superannuants Association of NSW (2004): 6

Older residents generally live in manufactured homes or in older style caravans. The majority of older residents have bought their dwelling as an investment for their retirement, with a minority renting their home. Residents who own their dwellings see themselves as homeowners despite not owning the land on which their home is located. Older residents value the communal lifestyle, sense of community, strong friendships and informal care networks that develop in parks. This environment enables older residents to continue to live independently on very modest incomes.<sup>94</sup> The attitudes and behavior of the park management have a major influence on residents' quality of life.<sup>95</sup> In this way, residential parks not only offer affordable accommodation but a lifestyle as well.

However, this lifestyle is becoming increasingly unaffordable. According to the Tenants Union of NSW, the residential park industry is undergoing an expansion.<sup>96</sup> Many new developments are increasingly out of the price range of older and income poor residents. Old residential parks are being converted and new ones built to fit gentrified tastes. These parks are not explicitly marketed as caravan parks, but instead as over 50's lifestyle villages with new homes being sold for up to \$1 million and regularly for over \$300,000. Whilst gentrification can have a positive impact by improving parks aesthetics and amenities, it also affects affordability with increases in site fees and the cost of homes.<sup>97</sup>

The 2015 Senate inquiry report into affordable housing noted that residents in residential parks faced problems with security of tenure. In particular, the report highlighted the issue of park operators selling residential parks to large-scale developers, which can subsequently displace residents who have few other housing options available to them and who may lose their home if they are unable to relocate to another park<sup>98</sup> COTA Australia's submission highlighted that the legislative and regulatory environment of residential parks needed to be examined carefully to make sure there were good consumer protections in place.<sup>99</sup>

These luxury residential parks present a new area of insecurity for older renters. Many do not clearly outline in promotional materials that these resorts are in fact residential parks and despite the high cost of homes residents do not own the land. The Tenants Union of NSW writes that 'only time will tell whether slick marketing by the corporate operators will continue to attract retirees to part with ever increasing amounts of money for a home with very limited security of tenure.'<sup>100</sup>

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<sup>94</sup> PAVS, *Home Among the Gum Trees*, 3.

<sup>95</sup> PAVS, *Home Among the Gum Trees*, 6.

<sup>96</sup> Tenants Union of NSW, 'The Act: One Year On', *Outasite: Residential Parks Newsletter* (November, 2016): 9.

<sup>97</sup> The Tenant's Union of NSW, 'Million Dollar Home', *Outasite Lite* (20 July 2015): 1, <https://files.thenoticeboard.org.au/outasitelite/Outasite-Lite-20-Colour.pdf>.

<sup>98</sup> Senate Standing Committees on Economics, *Out of Reach? The Australian Housing Affordability Challenge*, report, Parliament of Australia (8 May 2015): 279.

<sup>99</sup> Cited in Senate Standing Committees on Economics, *Out of Reach? The Australian Housing Affordability Challenge*, 279.

<sup>100</sup> Tenants Union of NSW, 'Million Dollar Home', 2.

## 5.4 Family Accommodation Agreements

Family accommodation agreements consist of an older person transferring assets to a trusted person in exchange for a promise to provide accommodation for the older person. The

- RT Act 2010
- Civil litigation in district or supreme court

trusted person is most commonly a family member but may also be a friend or carer. Family accommodation agreements have the potential to combine care, support and housing. These types of agreements are also termed assets for care arrangements, dependent or private care agreements, personal services contracts, and lifetime care contracts.<sup>101</sup>

The accommodation provided by family accommodation arrangements can be a granny flat, an extension on an existing family home, the purchase of a larger home or renting an existing room. An older person may choose to sell their home in order to invest the money in a family member's property to fund building or modification works.<sup>102</sup>

These types of arrangements are increasingly common.<sup>103</sup> In 2011, 8.2% of people aged 65+ were living with their children or other relatives. Of those aged 85+, 12.2% were living with their children or other relatives. Women of all older age brackets, from 65-85+, were much more likely than men to live with children or other relatives. Of women aged 85+, 14.8% were living with their children or another relative.<sup>104</sup>

It is difficult to determine the type of agreement in place from the available data. For example, whether the older person is the home owner, renting from children or living rent free. There are also cultural elements, the Federation of Ethnic Communities' Councils submission to the Elder Abuse Inquiry highlights that intergenerational care is common in many cultures and communities in Australia.<sup>105</sup>

Coinciding with the increase in family accommodation agreements is an increase in instances of elder financial abuse in relation to family accommodation agreements.<sup>106</sup> In 2016/17 the NSW Elder Abuse Helpline and Resource Unit received 1800 calls, 39% of these were related to financial abuse and 58% were related to psychological abuse, which often co-occurs with financial abuse.<sup>107</sup> Children of the victims were the most likely perpetrators

<sup>101</sup> Australian Law Reform Commission, *Family Agreements*, Issues Paper 47, accessed 14 April 2018, <https://www.alrc.gov.au/publications/family-agreements>

<sup>102</sup> Somes, T and Webb, E, 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements', *Law in Context* 33, no. 2 (2015): 24-25; Jones et. al., *Rental housing provision for lower-income older Australians*, 149.

<sup>103</sup> Somes et al., 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children?', 25.

<sup>104</sup> ABS, *Reflecting a Nation*.

<sup>105</sup> Federation of Ethnic Communities Councils of Australia, *Elder Abuse Inquiry*, submission to the Australian Law Reform Commission Inquiry into Elder Abuse (2016): 2016.

<sup>106</sup> Legislative Council, General Purpose Standing Committee No. 2, *Elder abuse in New South Wales*, final report, Parliament of NSW, Sydney (2016): 102.

<sup>107</sup> Kaspiew, R, Carson, R, Rhoades, H, *Elder abuse: Understanding issues, frameworks and responses*, Research Report No. 35, (Melbourne: Australian Institute of Family Studies 2015).

of elder abuse, with an incidence of almost 50% of perpetrators.<sup>108</sup> The Older Persons Rights Service in Western Australia estimates that 70% of financial abuse matters it deals with involve the breakdown of family agreements.

Legal difficulties arise as most family accommodation agreements are informal and verbal.<sup>109</sup> Where a written agreement is prepared, it may have been prepared by one party to the contract, without legal advice and without consideration of what will happen if there is a relationship breakdown. In a limited number of cases, an agreement may be a residential tenancies agreement covered by the RT Act. The Australian Law Reform Commission's elder abuse report detailed that 'stakeholders identified significant problems with family agreements, typically where the family relationship has broken down and the older person has been evicted from the property without recompense'.<sup>110</sup> The main form of redress in these instances is currently by way of civil litigation. However this can be costly, lengthy and stressful for older people.<sup>111</sup>

## 5.5 Residential accommodation in hotels, motels, backpacker hostels, serviced apartments, pubs and clubs

Accommodation in hotels, motels, backpacker hostels, serviced apartments, pubs and clubs is designed for short stays. Whilst many don't allow permanent residents, some encourage

long stays. These arrangements tend to be informal, relying on a continually negotiated longer stay and managers typically request minimal personal details.<sup>112</sup> A study by AHURI found that the types of hotels and motels used by permanent residents tended to be budget accommodation that were 'multi-storey, 50–100-year-old brick, brick-veneer or weatherboard structures with a weathered appearance and poorly maintained'.<sup>113</sup>

It is difficult to determine the numbers of people living long term in these forms of accommodation. For the 2016 census, the type of non-private dwelling in which people were enumerated on Census night were recorded, including hotels, motels and bed and breakfasts. There were 12,464 people aged 65+ living in hotels, motels and bed and

### Legal Options

- Common law

<sup>108</sup> Elder Abuse Helpline & Resource Unit, *Annual Highlights Report 2016/17* (2017): accessed 16 April 2018, [http://www.elderabusehelpline.com.au/uploads/pdf/EAHRU\\_Annual\\_Highlights\\_Report\\_2016-17.pdf](http://www.elderabusehelpline.com.au/uploads/pdf/EAHRU_Annual_Highlights_Report_2016-17.pdf).

<sup>109</sup> Somes et al., 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children?', 26.

<sup>110</sup> Australian Law Reform Commission (ALRC), *Elder Abuse— A National Legal Response*, final report (2017): accessed 3 April 2018,

[https://www.alrc.gov.au/sites/default/files/pdfs/publications/elder\\_abuse\\_131\\_final\\_report\\_31\\_may\\_2017.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/elder_abuse_131_final_report_31_may_2017.pdf), 203-204.

<sup>111</sup> ALRC, *Elder Abuse*, 207.

<sup>112</sup> AHURI, *The Experience of Marginal Rental Housing in Australia*, 54.

<sup>113</sup> AHURI, *The Experience of Marginal Rental Housing in Australia*, 54.

breakfasts on census night 2016.<sup>114</sup> However, the census website states that ‘as well as being increasingly difficult to determine whether some dwellings are private or non-private, it is also becoming increasingly difficult to determine the Type of Non-Private Dwelling’.<sup>115</sup> For example, blocks of self-contained apartments or units may provide a mix of short term hotel-style accommodation or long term accommodation.<sup>116</sup>

Individuals who reside long term in these forms of accommodation are considered marginal renters. The informality of ‘permanent’ arrangements leave people living in these accommodation forms vulnerable to eviction at short notice, resulting in a lack of confidence in their ability to complain about facilities, maintenance and conditions.<sup>117</sup>

## 5.6 Lodgments in private dwellings and share houses

People lodging in a private dwelling or renting a room in share housing usually have their own bedroom and share the rest of the premises.

### Relevant Legislation

- *Residential Tenancies Act 2010* (NSW)
- Common law

Whilst the growth of older people living in share housing has been acknowledged in news media, it is difficult to locate data related to older people lodging in private dwellings or living in share housing. The 2016 census data gives some indication showing that on census night there were 11,736 people aged 65+ living in a group household.<sup>118</sup> The ABS defines a group household as ‘a household consisting of two or more unrelated people where all persons are aged 15 years and over. There are no reported couple relationships, parent-child relationships or other blood relationships in these households’.<sup>119</sup>

Data from Flatmates.com.au, a large Australian share accommodation website, indicates that there is a growth in older people searching for this type of accommodation online. They report that between 2015 and 2016 there was a 43% increase in the amount of room-wanted advertisements by people in the 60-64 age bracket. The 65+ age group rose by 29% and the 50-54 by 31%. In 2016, people over the age of 40 accounted for one in 12 members on the site, the year before they accounted for one in 17 members. The website’s CEO

<sup>114</sup> ABS, *2016 Census of Population and Housing*, TableBuilder. Findings based on use of ABS TableBuilder data.

<sup>115</sup> ABS, *Census of Population and Housing: Understanding the Census and Census Data, Australia, 2016*, Cat No 2000.0 (2017): accessed 16 April 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2900.0~2016~Main%20Features~NPDD%20Type%20of%20Non-Private%20Dwelling~10131>.

<sup>116</sup> ABS, ‘Dwelling Type (DWTD)’, accessed 7 May 2018, <http://www.abs.gov.au/websitedbs/censushome.nsf/4a256353001af3ed4b2562bb00121564/f0902d184f045a1aca257aa10005f56a!OpenDocument>

<sup>117</sup> AHURI, *The Experience of Marginal Rental Housing in Australia*, 55.

<sup>118</sup> ABS, *2016 Census of Population and Housing*, TableBuilder. Findings based on use of ABS TableBuilder data.

<sup>119</sup> ABS, *Census Dictionary, 2011 - Group Household*, Cat No. 2901.0 (2011): accessed 23 May 2018, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2901.0Chapter34302011>.

stated that ‘there is definitely growing acceptance of shared living, particularly amongst those over 50 ... in some cases, it has simply come down to people being priced out of the steep rental market and being left with little choice but to share.’<sup>120</sup> Additionally, researchers at the University of Sydney are currently conducting research into share housing in Sydney. Maalsen, the lead researcher, writes that ‘share housing is increasingly common as people are excluded from home ownership due to high property prices. This includes older people who are increasingly choosing to share accommodation’. As part of the research they will explore online real estate platforms such as SeniorFlatmates.com.au that are targeted specifically towards older people looking for share housing.<sup>121</sup>

In NSW, share accommodation exists in a legal grey-area, with many share house occupants outside the protections of the RT Act. There are three legal categories of agreement that can cover lodgments in private dwellings and share house arrangements. One share house may contain a number of different legal relations. These include sub-letting, transferring the lease or having additional occupants live in the dwelling.

In the case of sub-letting, a head tenant rents out part of the premises to a subtenant. The head tenant takes on the role of the landlord and is liable to recover costs from the subtenant. Head tenants must first seek the landlord or agent’s written consent before sub-letting.<sup>122</sup> A lease may be transferred by taking on a new co-tenant who is jointly responsible for the lease. Tenants must seek written consent from the landlord or agent before transferring the lease. Lodgments and share houses may also simply add additional occupants on an informal basis. This can also occur where there is a live-in landlord renting to tenants or lodgers. The additional occupant may pay rent to the tenant and the tenant is responsible for the actions of the additional occupant. Consent from the landlord or agent is not required to have an additional occupant but the maximum number of permitted occupants stated on the lease must not be exceeded.<sup>123</sup>

Any of these arrangements may be covered by the RT Act if a written residential tenancy agreement is prepared. If no tenancy agreement is prepared and the individual is not named on the lease their tenancy may be governed by common law, in which they have the rights and obligations of a licensor under the common law of lodging.<sup>124</sup>

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<sup>120</sup> Wischusen, A, ‘Average Age of Sharers Increase in 2016’, Flatmates.com.au (2016): accessed 16 April 2018, <https://flatmates.com.au/info/average-age-of-sharers-increase-in-2016>.

<sup>121</sup> Tenants Union of NSW, *Share Housing in Sydney: Questionnaire* (n.d.): accessed 3 March 2018, <https://www.tenants.org.au/tu/news/share-housing-sydney-questionnaire>.

<sup>122</sup> NSW Fair Trading, *Sharing a Rented Home*, accessed 16 April 2018, [http://www.fairtrading.nsw.gov.au/ftw/Tenants\\_and\\_home\\_owners/Renting\\_a\\_home/During\\_a\\_tenancy/Sharing\\_a\\_rented\\_home.page](http://www.fairtrading.nsw.gov.au/ftw/Tenants_and_home_owners/Renting_a_home/During_a_tenancy/Sharing_a_rented_home.page)

<sup>123</sup> NSW Fair Trading, ‘Sharing a Rented Home’.

<sup>124</sup> Tenants Union of NSW, ‘Chapter 7a: Who’s Who in Share Housing’, *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/whos-who-share-housing>.  
<http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/share-housing>

## Marginal Rental Accommodation

Marginal rental accommodation does not have an agreed upon definition. The Tenants Union of NSW defines it as residential rental accommodation that is not covered by any residential tenancy regulations. AHURI conceptualises marginal rental housing as 'highly managed or controlled housing, with fewer occupancy rights for tenants than in other forms of private rental and social housing, and some degree of shared facilities and spaces'.

The marginal rental sector is small relative to the mainstream residential tenancy sector. However, it is difficult to accurately say how many people live in marginal rental accommodation, as measures such as the Census tend to undercount marginal rental properties and occupants.

## 5.7 Retirement villages

A retirement village is a residential complex which is occupied mainly by retired people aged 55 years and over. Accommodation can be in the form of freestanding cottages, villas or blocks of

units. Many provide additional facilities such as a swimming pool, hobbies room or library. Retirement villages are attractive options for older people as they can provide accommodation appropriate to older people's changing needs, allowing them to downsize, are maintenance free and provide for community style living.<sup>125</sup>

The number of over 65's living in retirement villages is projected to continue to grow. According to the NSW Department of Fair Trading, in 2017 there were more than 55,000 residents across 640 registered retirement villages in NSW.<sup>126</sup> In 2014 about 184,000 people lived in retirement villages across Australia or 5.7% of the over 65 population. This is projected to increase to 382,000 people or 7.5% of the 65+ population in 2025.<sup>127</sup>

In NSW, retirement villages are predominately regulated under the *Retirement Villages Act 1999* (NSW) (RV Act).<sup>128</sup> NSW Fair Trading outlines the common occupancy and ownership arrangements offered by retirement home operators. These are lease arrangements,

### Relevant Legislation

- *Retirement Villages Act 1999* (NSW)
- *Residential Tenancies Act 2010* (NSW)

<sup>125</sup> Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older people and the Law*, final report, Parliament of the Commonwealth of Australia, Canberra (2007): 205.

<sup>126</sup> NSW Fair Trading, *Retirement Villages*, NSW Government (n.d): accessed 7 May 2018, [http://www.fairtrading.nsw.gov.au/ftw/Tenants\\_and\\_home\\_owners/Retirement\\_villages.page](http://www.fairtrading.nsw.gov.au/ftw/Tenants_and_home_owners/Retirement_villages.page)

<sup>127</sup> Property Council of Australia, *National Overview of the Retirement Village Sector* (2014): accessed May, 7, 2018, <http://www.retirementliving.org.au/wp-content/uploads/2015/03/National-overview-of-the-retirement-village-sector-Grant-Thornton.pdf>, 1, 5.

<sup>128</sup> *Retirement Villages Act 1999* (NSW), section 5.



loan and licence arrangements and rental arrangements, company title schemes and strata or community schemes.<sup>129</sup>

Whilst retirement village resident's contracts are excluded from the RT Act generally, it is possible for tenants in retirement villages to be covered by the RT Act if their agreement is in the standard form prescribed by the RT Act and contains a term that specifies that the RV Act 1999 does not apply.<sup>130</sup> About 20% of Australia's retirement villages are standard residential tenancies according to the Retirement Living Council.<sup>131</sup>

The inadequacy of protections afforded to residents in retirement villages have been acknowledged by both state and federal governments. The 2007 Commonwealth Inquiry into Older People and the Law dealt specifically with retirement villages, highlighting issues with complex contracts and difficulties accessing legal assistance.<sup>132</sup> In 2017, the NSW Government launched a state inquiry into Retirement Villages, which informed the Retirement Villages Amendment Act 2018 (NSW).

## 5.8 Protected tenancies

There are very limited circumstances under which someone can be recognised as having a protected tenancy.

### Relevant Legislation

- *Landlord and Tenant (Amendment) Act 1948* (NSW)

Protected tenancies are defined by the legislation that covers them, the *Landlord and Tenant (Amendment) Act 1948* (NSW) (LTA Act). Whilst the tenants covered by the LTA Act are referred to as 'protected tenants' the LTA Act does not apply to a person but rather to a property, described as 'prescribed premises'.<sup>133</sup>

The number of protected tenancies in existence has declined significantly over time. In 2012, the Older Persons Tenants Service (OPTS) estimated that there were around 450 to

<sup>129</sup>NSW Fair Trading, *Types of Retirement Village Arrangements*, NSW Government (n.d): accessed 7 May 2018, [http://www.fairtrading.nsw.gov.au/ftw/Tenants\\_and\\_home\\_owners/Retirement\\_villages/Moving\\_into\\_a\\_village/Types\\_of\\_retirement\\_village\\_arrangements.page](http://www.fairtrading.nsw.gov.au/ftw/Tenants_and_home_owners/Retirement_villages/Moving_into_a_village/Types_of_retirement_village_arrangements.page)

<sup>130</sup> *RT Act (2010) s8*; Tenants Union of NSW, 'Chapter 10d: Retirement village residents', *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/retirement-village-residents>.

<sup>131</sup> Cited in Choice, *The Hidden Costs of Retirement Village Contracts* (2017): accessed 7 May 2018, <https://www.choice.com.au/money/property/buying/articles/retirement-village-contracts>

<sup>132</sup> Parliament of the Commonwealth of Australia, Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older people and the Law*, final report (September 2007, Canberra): 205.

<sup>133</sup> Schneller, W, *Protected Tenancies: History and Proposals for Reform*, e-brief, NSW Parliamentary Research Service (2013): accessed 16 April 2018, <https://www.parliament.nsw.gov.au/researchpapers/Documents/protected-tenancies--history-and-proposals-for-r/Protected%20Tenants.pdf>.

900 current protected tenancies.<sup>134</sup> The NSW Parliamentary Research Service however states that 'there does not appear to be a clear answer at present' to how many prescribed premises still exist.<sup>135</sup>

Protected tenants are in most cases older tenants who are Age Pensioners and have lived in their home for more than 30 years. The Tenants Union of NSW writes that 'generally protected tenancies are found in older suburbs where many residents rented until gentrification gobbled up their suburb, or in country towns where no-one worried about paperwork in the good old days'.<sup>136</sup> These tenants would be unlikely to be able to afford private rental in the areas they currently live in.<sup>137</sup> Many tenants are unaware that they are covered by the LTA Act. Landlords may also be unaware that their tenants are covered by the LTA Act. The landlord may seek to evict them in order to 'decontrol' the premises, because premises are removed from the LTA Act upon vacant possession, in order to sell or redevelop the property. Whilst the LTA Act affords greater protections than other residential tenancies legislation in terms of protection against eviction and rent increases, it does not provide for repairs.<sup>138</sup> This is a major shortcoming, as demonstrated in the OPTS article 'Don't grow old as a protected tenant'.<sup>139</sup>

On Wednesday, 21 November 2018 the Fair Trading Legislation Amendment (Miscellaneous) Bill 2018 passed both chambers in the NSW Parliament and received assent on 28 November 2018. The Act stipulates that the Landlord and Tenant (Amendment) Act 1948 ('1948 Act') is to be repealed on the commencement of Sch 2.3 to the Fair Trading Legislation Amendment (Miscellaneous) Act 2018 No 79. This is to commence on 1 July 2020 or earlier by proclamation. The changes will place the bulk of the 1948 Act into the Residential Tenancies Act 2010 as part of 'Schedule 2: Savings, transitional and other provisions' under the heading 'Savings provision—1948 Act continues to apply to certain premises'. The changes include that the death of a protected tenant or their spouse (whichever occurs last) effectively de-controls rent controlled premises. This means that a child of a protected tenant who was on the pension at the time of their parent's death will no longer have 'succession rights'.

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<sup>134</sup> Older Persons Tenants Service (OPTS), *Submission to the Commissioner for Fair Trading, Response to Issues Paper Entitled 'Making NSW Number 1 Again: Reducing Regulatory Burden* (2013): 7.

<sup>135</sup> Schneller, *Protected Tenancies*.

<sup>136</sup> Tenants Union of NSW, *It's Tough Being a 'Protected Tenant'*, accessed 16 April 2018 <https://www.tenants.org.au/news/its-tough-being-protected-tenant>.

<sup>137</sup> OPTS, *Response to Issues paper*, 10.

<sup>138</sup> Older Persons Tenancy Service, *Are you a Protected Tenant?* (2009): accessed 5 March 2018, [https://www.cpsa.org.au/files/OPTS/Protected\\_Tenancies\\_Factsheet\\_1.pdf](https://www.cpsa.org.au/files/OPTS/Protected_Tenancies_Factsheet_1.pdf).

<sup>139</sup> OPTS, 'Don't Grow Old as a Protected Tenant', newsletter, no. 73 (July 2008): [http://www.cpsa.org.au/files/OPTS/Newsletter73\\_proofs2\\_pp16-7%203.pdf](http://www.cpsa.org.au/files/OPTS/Newsletter73_proofs2_pp16-7%203.pdf), 16-17.

## 5.9 Strata scheme tenants and lot owners

A strata scheme is comprised of lots and common property. Lots are properties which are owned individually. Common property is owned by an owners corporation, of which all the individual lot owners are members. Many apartment blocks and townhouse complexes are strata schemes. The owners corporation comprises of all the individual owners of the lots in a strata title building. Members of the owners corporation make decisions about the management of the whole building.

Many older strata scheme tenants are on low incomes and have been living in their homes for a long period of time. Older strata buildings provide relatively affordable housing in areas such as the inner and middle suburbs of Sydney. The Tenants Union of NSW estimates that there were about 29,000 older, lower-income owner-occupiers and about 14,000 older lower-income private tenants living in strata schemes in the inner and middle rings of Sydney in 2011. The majority of these live alone and have incomes of less than \$600 per week.<sup>140</sup>

Whilst strata scheme tenants are covered by the RT Act, there are many aspects of the legislation and regulation of strata schemes that have impacts on tenants' housing security. Whilst homeowners on strata schemes own their lot, they too face insecurity under law concerning strata schemes.

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<sup>140</sup> Tenants Union of NSW, Submission: Strata and community title law reform (2012): accessed 24 May 2018, <https://tenants.org.au/tu/submission-strata-and-community-title-law-reform>.

## 6 NSW Housing Law

This section maps out the relevant NSW legislation related to the insecure accommodation lived in by older people. It will discuss the protections and limitations of the law and how this contributes to the insecurity of these forms of accommodation, particularly for older people.

The law, legislation and regulation addressed in this section includes:

- *Residential Tenancies Act 2010* (NSW) – RT Act
- *Boarding Houses Act 2012* (NSW) – BH Act
- *Residential (Land Lease Communities) Act 2013* (NSW) – RLLC Act
- *Landlord and Tenant (Amendment) Act 1948* (NSW) – LTA Act
- *Retirement Villages Act 1999* (NSW) – RV Act
- *Strata Schemes Management Act 2015* (NSW) – SSM Act
  - *Strata Schemes Development Act 2015* (NSW) – SSD Act
- Common law

The main legislation related to rental accommodation in NSW is the RT Act which covers most situations where a person pays rent for their housing.<sup>141</sup> It covers private rental housing owned by a private landlord and managed by the landlord or by a real estate agent. Renters living in residential parks may be covered by the RT Act, whilst homeowners in caravan parks are likely to be covered by the RLLC Act. The other key legislation is the BH Act, which is applicable to registrable boarding houses, however those living in boarding houses may also be covered under the RT Act or the common law of lodging. Other forms of accommodation, including hotels, pubs and clubs, are considered forms of marginal housing as they are not covered by residential tenancies legislation and are instead primarily subject to the common law.<sup>142</sup> Family accommodation arrangements are also not specifically governed by any legislation and are instead subject to common law doctrines and applicable statutes.

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<sup>141</sup> The RT Act specifies that a residential tenancy agreement is an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence. For value is not necessarily money. For example, it could take the form of gardening or companionship.

<sup>142</sup> Tenants Union of NSW, 'Chapter 1b: About the Residential Tenancies Act 2010', *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/about-residential-tenancies-act>; Tenants Union of NSW, 'Chapter 9: Marginal rental', *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/marginal-rental>.

## 6.1 Residential Tenancies Act 2010 (NSW)

- Tenants in mainstream residential tenancies
- Renter-renters in residential parks
- Tenants in share houses
- Some retirement villages

The RT Act defines a residential tenancy agreement as ‘an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence.’<sup>143</sup>

NSW Fair Trading describes the Act as the ‘first comprehensive overhaul of NSW tenancy laws in more than 20 years’. The Act aimed to modernise the regulatory framework for residential tenancies in NSW that ‘strikes an appropriate balance between the interests of tenants and landlords.’<sup>144</sup>

However, rights and protections for tenants still remain amongst the weakest in the OECD.<sup>145</sup> Aspects of the RT Act contribute to the insecurity of the tenancy agreements that it covers. These include a lack of protection against rent increases and no grounds evictions, a lack of enforcement against landlords who refuse to maintain properties, the provision for periodic agreements and the constrained ability to make modifications to properties.

The Residential Tenancies Amendment (Review) Act 2018 No 58 (NSW) made positive changes to tenancy laws in NSW, including new provisions to establish rental housing standards for safety and liveability, allowing tenants to more easily make minor modifications, changes to break lease fees, limiting rent increases to once per year, improved flexibility for tenants in cases of domestic and family violence. However, the major issue with the Residential Tenancies Act 2010 (NSW) was not addressed, that is the ability for landlords to evict tenants without a reason.

### Periodic agreements

Tenants have minimal legal security of tenure once their fixed term lease expires and they move onto a periodic agreement. Australia wide, 83% of renters have a periodic agreement.<sup>146</sup> The difference in the protections afforded to renters on a periodic and fixed term lease are outlined below.

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<sup>143</sup> RT Act 2010 (NSW) s13.

<sup>144</sup>NSW Fair Trading, *Residential Tenancies Act 2010 – Statutory Review*, (2016): accessed 7 May 2018, [https://www.parliament.nsw.gov.au/la/papers/DBAssets/tailedpaper/webAttachments/68407/Res%20Ten%20Act%20Ca%20Sub%20Attachment%20A%20\(Review%20Report\).pdf](https://www.parliament.nsw.gov.au/la/papers/DBAssets/tailedpaper/webAttachments/68407/Res%20Ten%20Act%20Ca%20Sub%20Attachment%20A%20(Review%20Report).pdf).

<sup>145</sup> Shaw, K, ‘Renting for life? Housing shift requires rethink of renters’ rights’, *Conversation* (7 January 2014): accessed 7 May 2018, <https://theconversation.com/renting-for-life-housing-shift-requires-rethink-of-renters-rights-20538>.

<sup>146</sup> Choice, National Shelter and NATO, *Unsettled: Life in Australia’s Private Rental Market* (2017): 9.

## No grounds evictions

A landlord may terminate a tenancy for any reason or no reason as long as a termination notice has been given within the legislated timelines.

For a fixed term agreement a landlord can give a termination notice that is to take effect on or after the end of the fixed term at any time before the end of the fixed term. The date of termination may not be earlier than 30 days after the day on which the notice is given.

For a periodic agreement, a landlord may give a termination notice at any time as long as it is 90 days before the termination date. On a periodic agreement, if the landlord sells the property and a term of the contract for sale is vacant possession, only 30 days written notice is required.

For either a fixed term or a periodic agreement, if a tenant has breached the tenancy agreement the landlord may give a termination no earlier than 14 days before the date of termination.

The timelines provided, ranging from 14 to 90 days, do not represent enough time for older renters to reorganise their affairs to move to another suitable rental property. Moving house is a significant financial burden for older people<sup>147</sup> as it requires rent in advance, a bond and moving furniture.<sup>147</sup> The involuntary moving of older people is correlated with adverse physical health and emotional effects.<sup>148</sup>

The Residential Tenancies Amendment (Review) Act 2018 (NSW) did not ban grounds evictions. As long as tenants can be legally evicted for no reason, the other changes of the review are undermined.

## Rent increases

The possibility of rent increases contributes to the insecurity of accommodation covered by the RT Act and represents a major source of anxiety for renters.

The Act states that under a fixed term agreement of less than two years rent must not be increased during the fixed term. In a fixed term agreement of two years or more, rent can be increased once in every 12 month period.

Under a periodic lease, there is no limit to how often rent may be increased. The tenant must be given 60 days written notice of a rent increase by the landlord or the landlord's agent specifying the amount of increased rent and the day from which it is payable.

The incoming changes will limit rent increases to once per year for tenants with a periodic agreement. However, the amendments need to go further than this, so that where the rent

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<sup>147</sup> Morris, *The Australian Dream*, 93.

<sup>148</sup> See Morris, *The Australian Dream*, 93.

increase exceeds CPI over the relevant period the onus is on the landlord to prove that the increase is not excessive. Limiting rent increases to once per year is also likely to be of limited effect whilst no grounds evictions are still provided for. If the once per year rent increase is linked to the tenancy, rather than the property, and the landlord wishes to increase the rent more than once per year, they will simply evict the tenant or choose to offer 6 month leases, resulting in even more insecurity for renters.

For older people in particular there may not be much room to manoeuvre and reorganise finances to accommodate a rise in rent. This is due to the low fixed incomes older people often have to manage and the already expensive accommodation costs, particularly for single older renters. If the rent increase is too high and the older tenant is forced to leave, 60 days does not represent enough time for many older people due to limited access to finances and other resources such as the internet to find and move to suitable and affordable accommodation.

### Landlords who refuse to maintain properties

The RT Act stipulates that a landlord must provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant. A landlord must also maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.<sup>149</sup> A landlord's obligation to provide and maintain the residential premises in a reasonable state of repair applies even though the tenant had notice of the state of disrepair before entering into occupation of the residential premises.<sup>150</sup>

There are, however, no minimum property standards to make sure all rental properties are liveable, other than the vague guideline that it must be in 'a reasonable state of cleanliness and fit for habitation'. The Everybody's Home campaign is calling on the NSW Government to ensure that there are minimum property standards to make sure all rental properties are liveable.<sup>151</sup>

The changes also provide for circumstances in which residential premises would not be fit for habitation by a tenant. However, these circumstances are missing the inclusion of mould, which is a common complaint made by tenants and has serious implications for tenants' health. These amendments to the RT Act need to go further to ensure that rental housing includes minimum habitation standards including regulated sustainability, safety, accessibility and efficiency measures. CPSA recommends that such measures include basic appliance standards for efficiency, a standard of insulation and that hot water systems should have a minimum energy rating. This information should be required to be disclosed at the time of signing a lease. This is a practical policy, CPSA notes that New Zealand

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<sup>149</sup> RT Act (NSW) s52.

<sup>150</sup> RT Act (NSW) s63.

<sup>151</sup> Everybody's Home, *A Better Deal for Renters*.

required rental homes to be retrofitted with ceiling and under floor insulation from 1 July 2019. The review also does not include a lack of communication services such as fixed-line telephone and internet connections as a circumstance in which a residential premises is not fit for habitation, despite the fact that many older people and people living on low incomes rely on them as their sole form of communication technology.

The review also provides for tenants and landlords to request Fair Trading investigate and assess claims relating to damage or repairs to the rental property to ensure landlords live up to their obligation to maintain residential premises in a reasonable state of repair. However, without an end to no grounds evictions, this provision will likely only be used by landlords and confer no benefit to tenants. The fear of retaliatory eviction for renters that attempt to exercise their rights will remain if no grounds evictions are not removed from the Residential Tenancies Act 2010 (NSW).

A central aspect of secure housing is that it is not only affordable, but also appropriate. As older tenants spend large amounts of time in their home, unsuitable and poorly maintained dwellings contribute to the insecurity of their accommodation as it undermines their health and wellbeing.

### Lack of protection for renters who make a complaint

Many renters do not assert their rights as a tenant, due to fear of retaliation from landlords. A survey of over 500 renters conducted by the Tenants Union of NSW found that 77% of respondents put up with problems or did not complain because they were 'worried about adverse consequences.'<sup>152</sup> Additionally, Shelter NSW found that 50% of renters fear being blacklisted for complaining.<sup>153</sup> Morris' study found that older renters were often hesitant to complain as it might lead to a rent increase or eviction.<sup>154</sup> Older private renters dependent on the Age Pension are particularly vulnerable because they often do not have the financial, emotional or physical resources to manage potential retaliation in the form of rent increases or eviction.<sup>155</sup>

### Inability to modify premises

The RT Act provides that 'a tenant must not, without the landlord's written consent ... install or cause to be installed a fixture or make or cause to be made any renovation, alteration or addition to the residential premises.' Whilst the Act stipulates that 'a landlord must not unreasonably withhold consent to a fixture, or to an alteration, addition or renovation that

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<sup>152</sup> Cutcher, N, Patterson Ross, L, *Affordable Housing and the New South Wales Rental Market*, 2014 Survey Report, Tenants Union of NSW (2014): accessed 19 April 2018, <https://files.tenants.org.au/policy/AHS-final-report.pdf>, 11.

<sup>153</sup> Everybody's Home, *A Better Deal for Renters*.

<sup>154</sup> Morris, *The Australian Dream*, 183-229.

<sup>155</sup> Morris, *The Australian Dream*, 179.



is of a minor nature' they may 'withhold consent to any other action by the tenant that is permitted under this section whether or not it is reasonable to do so.'<sup>156</sup>

As of 23 March 2020, the new Residential Tenancies Regulation 2019 lists specific kinds of fixtures, alterations, additions or renovations of a 'minor nature' for which it would be unreasonable for a landlord to withhold consent. They are as follows:

- Securing furniture to a non-tiled wall for safety reasons
- Fitting a childproof latch to an outdoor gate of a single dwelling
- inserting fly screens on windows
- installing or replacing an internal window covering (i.e. curtains)
- installing cleats or cord guides to secure blind or curtain cords
- installing child safety gates inside the property
- installing window safety devices for child safety
- installing hand-held shower heads or lever-style taps to assist elderly or disabled occupants
- installing or replacing hooks, nails or screws for hanging paintings, picture frames and other similar items
- installing a carriage service to connect a phone line or to access the internet and any associated facility or customer equipment
- planting vegetables, flowers, herbs or shrubs (shrubs that don't grow more than 2 meters) in the garden if existing vegetation or plants do not need to be removed
- installing a wireless removable outdoor security camera
- applying shatter-resistant film to window or glass doors
- making modifications that don't penetrate a surface, or permanently modify a surface, fixture or structure of the property.

Even if the modification is included in the above list, tenants are still required to get a landlord's written consent to make the change. Although it is unreasonable for a landlord to refuse or place conditions on the consent for a change that is on the list.

If a modification is refused by the landlord, a tenant may apply to the NSW Civil and Administrative Tribunal (NCAT) for an order that the tenant may install a fixture or make a renovation, alteration or addition to the residential premises. However, this process may prove difficult to navigate, stressful and costly for older tenants.

Even if the modification is approved, Morris' study found that there was a common view amongst older Australians that it wasn't worth modifying or improving a property as it

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<sup>156</sup> RT Act (NSW) s66.

wasn't their house and they might not be there for long, especially as any increase in the quality of the accommodation could lead to a rent increase.<sup>157</sup>

These amendments and new regulation should go further so that tenants are not required to obtain consent to make these minor modifications and that landlords are required to demonstrate why any modifications intended to increase accessibility are unreasonable, as such modifications may mean a tenant is enabled to stay in their home for a much longer period of time or delay entering a residential aged care facility.

## Domestic violence

Family crises, including domestic violence, are one of the more common reasons older women experience homelessness.<sup>158</sup> A 2014 report by the Mercy Foundation emphasises the linkages between violence, housing insecurity and homelessness for older women. Family and domestic violence was the reason for 13.6% of women over 65 attending Specialist Homelessness Services.<sup>159</sup>

The Residential Tenancies (Review) Act, passed on 26 October 2018, improved flexibility for tenants in cases of domestic and family violence. The reforms came into effect on 28 February 2019. The reforms enable victims-survivors of domestic violence to terminate their tenancy immediately without penalty when they provide a domestic violence termination notice to the landlord and each other co-tenant. Evidence of domestic violence includes a domestic violence order, or a personal protection injunction under the Family Law Act, or a copy of a certificate of conviction in proceedings against the relevant domestic violence offender for the domestic violence offence, or a declaration by a medical practitioner. Perpetrators who damage property are liable for that damage and a victim of violence or another tenant who is not the domestic violence offender will not be liable for damage to residential property caused during the commission of a domestic violence offence. A victim-survivor of domestic violence who terminates their tenancy by providing a domestic violence termination notice cannot be listed on a residential tenancy data list.

These recent changes represent a significant improvement on the prior provisions which required victims of domestic violence on a fixed lease have to give 14 days notice to their landlord and provide them with a final apprehended violence order (AVO). NSW Fair Trading's Statutory Review of Residential Tenancies Act 2010 acknowledged that the

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<sup>157</sup> Morris, *The Australian Dream*, 183.

<sup>158</sup>Homelessness NSW and Older Women's Housing and Homelessness Group, *A Plan for Change: Homes for Older Women* (2016),: accessed 7 May 2018,

<https://sheltersnsw.org.au/sites/sheltersnsw.org.au/files/public/documents/Plan%20for%20Change%20-final.pdf>.

<sup>159</sup>Institute for Social Science Research, *Older Women's Pathways out of Homelessness in Australia*, report for the Mercy Foundation (2014): accessed 7 May 2018, <https://www.mercyfoundation.com.au/wp-content/uploads/2017/07/FINAL-Feb-2014-Petersen-Parsell-Older-womens-pathways-out-of-homelessness.pdf>.

previous provisions of the RT Act ‘provided little real protection to victims of domestic violence and require reform’.<sup>160</sup>

The significant improvement to the added flexibility and safety of domestic violence victim-survivors with the reforms that came into effect on 28 February 2019 is welcomed. However, elder abuse should be included alongside the domestic violence declaration form so that people who are suffering from abuse and need to move home to mitigate the abuse are able to terminate a tenancy contract without penalty. Elder abuse occurs where there is an expectation of trust which causes harm or distress to an older person. It can take many forms, including physical, emotional, sexual and financial abuse.<sup>161</sup> Evidence presented by the Australian Institute of Family Studies has found that between 2 per cent and 14 per cent of older Australians experience elder abuse every year.<sup>162</sup> This is an issue that is not going away as more than one fifth of the Australian population is estimated to be over the age of 65 by 2050.<sup>163</sup>

**Recommendation 8:** That the *Residential Tenancies Act 2010* is amended to remove evictions for ‘no grounds’ and provide a range of reasonable grounds for ending a lease.

**Recommendation 9:** That the *Residential Tenancies Act 2010* is amended so that where a rent increase exceeds CPI over the relevant period the onus is on the landlord to prove that the increase is not excessive.

**Recommendation 10:** That the *Residential Tenancies Regulation 2019* expands its list of minor modifications to include more changes that will enable accessibility to rental homes for older tenants.

**Recommendation 11:** That the *Residential Tenancies Act 2010* is amended to ensure victim-survivors of elder abuse receive similar protections when terminating tenancies as victims of domestic violence.

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<sup>160</sup>NSW Fair Trading, *Residential Tenancies Act 2010 – Statutory Review*.

<sup>161</sup>World Health Organisation. ‘The Toronto Declaration on the Global Prevention of Elder Abuse’ (2002): 3.

<sup>162</sup> Kaspiew, Carson and Rhoades ‘Elder abuse in Australia’. (2016): 65-66.

<sup>163</sup> Ibid. 72

## 6.2 Boarding Houses Act 2012 (NSW)

- Registrable boarding houses

Most boarding houses in NSW are ‘registrable boarding houses’ that are covered by the BH Act.<sup>164</sup> The BH Act was enacted following growing acknowledgment of the need for reform in the sector. The NSW Ombudsman’s 2011 report on boarding house reform was highly critical of the boarding house sector and expressed concern for the wellbeing and safety of what were formerly termed ‘licensed’ boarding house residents. In 2012, the NSW Coroner published a report into the deaths of six residents at a licensed boarding house in Marrickville. Pressure for reform began to mount as a result of these reports, over 40 years of campaigns by housing and disability advocates, and growing community concern.<sup>165</sup> Until 2012, limited regulation existed to protect residents from exploitation and many suffered under extremely poor conditions.<sup>166</sup>

The Act distinguishes between two classes of registrable boarding houses; general boarding houses and assisted boarding houses. The large majority in NSW are general boarding houses.<sup>167</sup> There are a relatively small proportion of assisted boarding houses. The Tenants Union of NSW reports that there are only about 20 authorised assisted boarding houses currently operating.<sup>168</sup>

The Act’s objective is to ‘establish an appropriate regulatory framework for the delivery of quality services to residents of registrable boarding houses and for the promotion and protection of the wellbeing of such residents’. This is to be achieved by:

- requiring registrable boarding houses to register with NSW Fair Trading
- the introduction of occupancy principles and appropriate mechanisms for the enforcement of those principles
- providing for the licensing and regulation of assisted boarding houses and their staff (including providing for service and accommodation standards)
- promoting sustainability and continuous improvements of service provision at registrable boarding houses.<sup>169</sup>

From 1 January 2013, proprietors of registrable boarding houses have been required to register their premises and certain other information on a Boarding House Register maintained by NSW Fair Trading. The proprietor must supply the Commissioner with information to be included in the register, including if it is an assisted or general boarding

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<sup>164</sup> Tenants Union of NSW, ‘Chapter 8a: About Boarding Houses’.

<sup>165</sup> Tenants Union of NSW, *Boarding Houses Act Five Years On*.

<sup>166</sup> Tenants Union of NSW, *Boarding Houses Act Five Years On*.

<sup>167</sup> Tenants Union of NSW, ‘Chapter 8a: About Boarding Houses’.

<sup>168</sup> Tenants Union of NSW, ‘Chapter 8i: Assisted boarding houses’.

<sup>169</sup> *BH Act 2012 (NSW) s3*.

house, the number of residents and the number under 18 years of age, and the total number of bedrooms provided as sleeping accommodation.

Registrable boarding houses are required to be inspected within 12 months of registration. The investigation determines if the registered boarding house complies with requirements imposed under the *Local Government Act 1993* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW) in relation to building and fire safety. Assisted boarding houses are subject to further regulation by NSW Ageing, Disability and Home Care (ADHC).<sup>170</sup> ADHC can inspect assisted boarding houses, issue compliance notices, prosecute breaches and suspend or revoke authorisations.<sup>171</sup>

Under the Act, proprietors now have an obligation to ensure that occupancy agreements are in writing. This does not impose an obligation on the resident of a registrable boarding house to prepare an occupancy agreement or affect the enforceability to an occupancy agreement not in writing or only partially in writing.<sup>172</sup>

Prior to the Act, residents had limited avenues for arbitration and resolution if there was a dispute with the proprietor. Whilst previously excluded, under the BH Act boarding house residents can now access the NSW Civil and Administrative Tribunal (NCAT). The Tribunal can order the ceasing of any action that breaches occupancy principles.<sup>173</sup>

### Proprietors who do not register registrable boarding houses

Whilst the Act captures many traditional boarding houses within its remits, these types of boarding houses are facing a decline. Conversely, 'modern' boarding houses are becoming increasingly common and due to their features may not be easily identifiable as boarding houses. For example, they are often informal set ups that blend into the suburban street. Registration of the premises on the Boarding House Register triggers an initial compliance check of the premises and appropriate enforcement action if the premises are found to be non-compliant. However, research by the Tenants Unions of NSW indicates that up to 50% of known proprietors are not registering their boarding houses and that existing listings are often incomplete or inaccurate. These boarding houses are operating 'under the radar.'<sup>174</sup> Due to this, residents may not be aware they are living in a registrable boarding house, meaning they are potentially unaware of their rights under the Act and the premises may be non-compliant.

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<sup>170</sup> Tenants Union of NSW, *Boarding Houses Act* (2014): accessed 16 April 2018 <https://www.tenants.org.au/factsheet-27-boarding-houses-act>.

<sup>171</sup> Tenants Union of NSW, 'Chapter 8i: Assisted Boarding Houses'.

<sup>172</sup> *Boarding Houses Act 2012* (NSW) s28.

<sup>173</sup> Adabie, P, 'Boarding Houses in New South Wales: Two Steps Forward, One Step Back', *Parity* 29, no. 10 (2016): 40.

<sup>174</sup> Tenants Union of NSW, *Boarding Houses Act Five Years On*.

## Occupancy fee increases

Under the Act residents are entitled to four weeks written notice before the proprietor increases the occupancy fee. Many people living in boarding houses live on very low incomes and occupancy fee increases may become too high to manage. This contributes to the insecurity of boarding house accommodation, especially for older people with limited financial resources.

## No grounds eviction

Due to the more generalised prescription in the Act, proprietors have a relatively high degree of flexibility in writing their occupancy agreements and there is relatively greater variation across the sector, as compared to uniformity of residential tenancy agreements.<sup>175</sup> The boarding house occupancy agreement should set out the grounds for termination and the period of notice for each ground. However, the Act does not specify any particular grounds of termination or particular notice periods for different grounds. Instead, the Act leaves the determination of notice periods and grounds for termination to what the proprietor deems 'reasonable'.

If the occupant does not vacate the premises by the notice period specified, the proprietor does not need to apply to the Tribunal or court to evict them. The proprietor is entitled to use reasonable force or ask the police to evict them.<sup>176</sup>

The potential to be evicted at any time for any reason greatly increases the insecurity of boarding house accommodation for residents. As many boarding house residents are single, socially isolated and on very low incomes they may not have the ability to locate replacement accommodation. As traditional boarding house buildings are increasingly being converted for other uses and tend to be located near the centre of cities where rents are high, residents facing eviction may not be able to find alternative and affordable accommodation in the same area. They may have to move further away to where rents are cheaper and face disconnection from the area in which they may have lived for a long time, or face homelessness if no alternatives are available.

## Lack of knowledge about NCAT and fear of retribution

Whilst the Act prescribes increased rights for residents, in terms of cleanliness, state of repair, reasonable notices of rent increase and termination, many residents are not accessing these rights due to a lack of knowledge about NCAT and fear of retaliatory actions by proprietors.

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<sup>175</sup> Martin, 'Boarding Houses Act'.

<sup>176</sup> Tenants Union of NSW, 'Chapter 8h: Ending an occupancy', *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016), accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/ending-occupancy>.

Research by Western Sydney University showed that only 10% of boarding house residents named the Tribunal as a place they would attend to resolve disputes. This is compared to 64% of proprietors. Residents are often reluctant to raise complaints due to fears that it will lead to retaliatory actions, such as eviction or refusal to lease to that person. There are no legislative protections against retaliatory eviction or excessive rent for residents who wish to speak out and access their rights.<sup>177</sup>

**Recommendation 12:** That the NSW Government increase protections for boarding house residents, including banning no grounds evictions and limiting occupancy fee increases to once per 12 month period and where the increase exceeds increase in CPI the onus is on the proprietor to prove that it is not excessive.

**Recommendation 13:** That the NSW Government require all proprietors to provide written information from NSW Fair Trading related to the Boarding House Act and NCAT advising occupants of their rights on the commencement of the occupancy agreement.

**Recommendation 14:** That the NSW Government increases monitoring of modern boarding houses that are operating unregistered to ensure compliance with the Act.

## 6.3 *Residential (Land Lease) Communities Act 2013* (NSW)

- Homeowners with a site agreement in a residential park
- some sections apply to tenants in residential parks

Homeowners in residential parks are covered by the RLLC Act. Tenants in residential parks are largely covered by the RT Act and limited sections of the RLLC Act.<sup>178</sup> An array of manufactured homes, caravans, vans and other ‘portable devices for human habitation’ can be a ‘home’ in a residential park under the RLLC Act, with the exception of tents.<sup>179</sup>

Home owners in residential parks have ‘residential site agreements’ with the park operator. In some aspects, the Act has improved the situation for those living in residential parks. The Act provides more equitable coverage for homeowners and improved access to dispute resolution processes.<sup>180</sup> The RLLC Act provides that an operator of a park must not enter into a site agreement with a person unless the operator has provided a disclosure statement

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<sup>177</sup> Tenants Union of NSW, *Boarding Houses Act Five Years On*; Adabie, ‘Boarding houses in New South Wales,’ 40.

<sup>178</sup> See, community rules (s86), park infrastructure (s40, s41, s47) and residents committee (s96, s97).

<sup>179</sup> Tenants Union of NSW, ‘Chapter 10a: Residential park residents’.

<sup>180</sup> Tenants Union of NSW, *Report on the Residential (Land Lease) Communities Act 2013* (2017): accessed 3 March 2018, <https://files.tenants.org.au/policy/2017-RLLCAct-One-Year-Report-final.pdf>.

relating to the residential site at least 14 days before entering into the agreement.<sup>181</sup> The statement must include details of fees and charges, services and facilities available, and compliance with statutory requirements. There is also a legislated 14 day cooling off period that enables a person entering into an agreement to rescind the site agreement by serving a notice in writing to the operator.<sup>182</sup>

Whilst owners in residential parks pay upfront for the dwelling, they do not own the land. Site agreements cannot be terminated by a park operator without grounds. The RLLC Act sets out grounds for the termination of residential site agreements. These include breach of community rules or misconduct, obligation on behalf of the operator to do repairs or upgrades, closure of the community, change in use of a site, compulsory acquisition, lack of authority for use of a site and non-use of a residential site. In relation to some of these grounds, the resident is entitled to be compensated by the park operator.

There remains, however, a number of shortfalls in the law that contribute to the insecurity of owning a home and renting a site in a residential park for older people. The Tenants Union of NSW writes that ‘the Act has failed to strike the desired balance between enhancing the protections of home owners and encouraging the continued growth and viability of the industry’.<sup>183</sup> They argue that the Act fails to improve the governance of residential communities and lift operator standards. They also report other aspects of the Act that are not working, including that site fees in new site agreements are rarely set at fair market value and that maintenance and repair of sites has created a new area of dispute with operators.

### Site fees not set at fair market value

The Act provides that site fees in new site agreements must not exceed fair market value and sets a method for determining fair market value site fees. However, the Tenants Union of NSW reports that these provisions are failing and that site fees are being escalated above fair market value. This is due to a lack of specification in the legislation that means that for individuals purchasing a home in a residential park and signing new site agreements, the site fee is not required to be the same as the previous owner of the home. This can artificially inflate site fees for the whole park.<sup>184</sup> As site fees are largely determined either by agreement between the home owners and operator or by the Tribunal. Therefore, site fees paid by current home owners are set at fair market value and there is no need to adjust them for incoming homeowners.<sup>185</sup> The Tenants Union of NSW believes that a drafting error in the Act in which the word ‘tenancy’ is used instead of ‘site’ undermines the ability for homeowners to assign their site agreement to a prospective buyer. In this way,

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<sup>181</sup> RLLC Act 2013 (NSW) s21.

<sup>182</sup> RLLC Act 2013 (NSW) s23.

<sup>183</sup> Tenants Union of NSW, *Report on the Residential (Land Lease) Communities Act*, 1.

<sup>184</sup> Tenants Union of NSW, *Report on the Residential (Land Lease) Communities Act*, 5.

<sup>185</sup> Tenants Union of NSW, *Report on the Residential (Land Lease) Communities Act*, 6.



homeowners in residential parks lose a 'valuable right and essential bargaining tool' as without it sales can be compromised and the value of homes decreased because some operators do not offer fair terms in new site agreements to prospective purchasers.<sup>186</sup> With limited income older people facing increases in site fees often have no other options and may feel trapped and hesitant to challenge increases.

### Operators pursuing home owners for cost of repairs

There is an omission in the Act that has transferred responsibility for the maintenance of sites to home owners. The Tenants Union of NSW believes that this was not an intentional act of omission as under the previous legislation, the *Residential Parks Act 1998* (NSW), it was clearly provided for that park owners were responsible for site maintenance and repair. In the RLLC Act however, operators are only required to ensure the site is in reasonable condition and fit for habitation at the commencement of the site agreement. As home owners lease the land, they have a general responsibility to look after the site but should not be required to organise or finance repairs or maintenance.<sup>187</sup>

### Voluntary sharing arrangements

During the development phase of the Act, voluntary sharing arrangements were seen to be a potential problem and their inclusion in the bill was discouraged by organisations such as CPSA through its Park and Village Service. This is because homes in residential parks rarely increase in value and capital gains therefore do not occur. Introducing such a measure could deter people from choosing a residential park lifestyle because of the potential loss of money at the end of the tenancy. It could also lead to exploitation by park operators of vulnerable residents as the provision enables operators to increase the site fees for rent only agreements so home owners must choose between sharing their capital with the operator or paying higher site fees.<sup>188</sup>

However, housing advocacy services have had little contact from people in voluntary sharing arrangements. This is likely because of the changing context of residential parks, as voluntary sharing arrangements were designed to allow residents with less available financial resources to pay lower site fees in exchange for giving up some capital gain to the operator at the point of sale. Since the new Act there has been increased investment in parks. As parks become gentrified, they are increasingly occupied by wealthier residents, who are not likely to take up the voluntary sharing arrangements. Despite this, some housing advocacy organisations remain opposed to the inclusion of the voluntary sharing arrangement provision in the Act.

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<sup>186</sup> *Tenants Union of NSW, Report on the Residential (Land Lease) Communities Act*, 3.

<sup>187</sup> *Tenants Union of NSW, Report on the Residential (Land Lease) Communities Act*, 7.

<sup>188</sup> Parks and Village Service, 'Sharing Arrangement Expanded', *Outasite Bite*, no. 18 (n.d.): accessed 24 May 2018, [http://www.cpsa.org.au/files/PAVS/Outasite\\_Bite/Outasite\\_Bite\\_18.pdf](http://www.cpsa.org.au/files/PAVS/Outasite_Bite/Outasite_Bite_18.pdf).

## Gentrification of parks

Unlike the *Residential Parks Act 1998* (NSW), which aimed to ‘establish legislative protection for residents’,<sup>189</sup> one of the aims of the RLLC Act is to ‘encourage the continued growth and viability of residential parks in the State.’<sup>190</sup> As a result, there has been a surge in investment in residential parks. Whilst parks were traditionally family owned businesses, there is a growth of large companies that own multiple parks. Developers are buying up old parks and gentrifying them.

Those that are most vulnerable in residential parks are the older homeowners with limited incomes who are living in older style homes. This is because their homes are more likely to be targeted by developers and they will get less money in compensation or from a sale.

Even though the Act prescribes compensation for residential park closures, in the case of gentrifying parks they don’t get compensation. Even if compensation is granted from a park closure, it is often not enough. Paradoxically, the higher the value of the home the more likely the individual is to get compensation. It is also unclear in the Act how compensation is calculated.

## Consent to modify home

Homeowners in residential parks are not permitted to make alterations or additions to their home unless the operator consents. Consent cannot be unreasonably refused. Disputes about what is reasonable can be taken to NCAT. However, many homeowners would rather not take matters to the Tribunal.<sup>191</sup> This is particularly true for older residents who may not have the emotional or financial resources to attend the Tribunal. They might not wish to promote animosity with the park operator as the attitudes and behavior of the park management have a major influence on older residents’ quality of life.<sup>192</sup>

## Casual occupation agreements

In smaller parks, there are cases where a person buys a home and is given a casual occupation agreement which excludes them from the Act and undermines their rights. If the residents take the case to the Tribunal to be recognised as a permanent resident, the burden of proof is on the resident to prove they are entitled to a site agreement and that they live there long term. This is particularly difficult for a resident who has paid for a permanent site agreement and signed a casual occupation agreement as when they want to sell, the home is worth less with a casual occupancy agreement. Parks also require approval

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<sup>189</sup> S4A

<sup>190</sup> S3.

<sup>191</sup> Tenants Union of NSW, *Electricity in land lease communities - it's complicated*, accessed 16 April 2018, <https://www.tenants.org.au/tu/news/electricity-land-lease-communities-its-complicated>.

<sup>192</sup> PAVS, *Home Among the Gum Trees*, 6.

for permanent site agreements by the local council. If long term residents are found to be living on a short term site the agreement will be terminated.

## NCAT

In the previous Residential Parks Act only a breach of agreement could be taken to the tribunal. However, in the RLLC Act both a breach of the Act or agreement can go to the Tribunal meaning that there is improved access to the Tribunal for a broader range of issues. However, the RLLC has few limitation periods specified, where a limitation period is not specified they default to 28 days. Residents' with limited knowledge of legal avenues for dispute resolution are likely to discover NCAT as an option after the limitation period has expired, shutting off their remedial options.

Another difficulty for residents wishing to access NCAT is that operators make the rules and control the running of a residential park. They can make life difficult for residents and there is no way to control operator conduct. Large operators have been known to take people to the Supreme Court to make a point to fellow residents not to complain. Often older people will know other people who have been to the tribunal and haven't been successful. They may also not know how to find assistance or advice due to a lack of access to the internet.

**Recommendation 15:** That the NSW Government amend section 45(3) of the Residential (Land Lease) Communities Act 2013 (NSW) to change the word 'tenancy' to 'site'.

**Recommendation 16:** That the NSW Government amend the RLLC Act to clearly provide that park owners are responsible for site maintenance and repair.

**Recommendation 17:** That the NSW Government makes mandatory that the operator provide written information from NSW Fair Trading related to the rights of residents and how to access NCAT to incoming residents at the commencement of the site agreement.

**Recommendation 18:** That the Residential (Land Lease) Communities Act 2013 (NSW) is amended to provide more tailored limitation periods and increase the default NCAT limitation periods.

## 6.4 Retirement Villages Act 1999 (NSW)

The majority of residents in retirement villages are covered by the RV Act 1999. The RV Act recognises a number of different types of residents' rights and arrangements, including strata title, community title, company title, leasehold title and licence.<sup>193</sup>

The COTA NSW 2017 Housing Survey suggests that the most common form of residents' right of tenure is a leasehold arrangement, with the second most common a loan and license arrangement. A variety of other types of tenure are available but less commonly used under the Act. In just over 10% of cases residents said they were not sure about their type of tenure arrangement.<sup>194</sup>

Whilst retirement village arrangements take different forms, the RV Act requires that the resident and the village operator enter into a village contract. The village contract must outline village rules, disclosure of information, other rights and obligations in relation to village management, the termination of agreements and dispute resolution through NCAT.<sup>195</sup>

Retirement village law is complex and often confusing. Stories highlighting the exploitation of older people in retirement villages frequently appear in the media<sup>196</sup> and prompted the 2017 NSW Government's Inquiry into Retirement Villages in NSW.

The NSW Parliament passed the Retirement Villages Amendment Bill 2018 in November 2018 in an attempt to address many of these issues. The reforms began on 1 July 2019. The reforms include:

- Annual contract 'check-up' meetings;
- new requirements for emergency plans and annual evacuation exercises;
- display of key safety information;
- a mandatory Code of Conduct for all retirement village operators;
- stronger transparency through clearly highlighting the key contract terms, exit fees, and living costs to a resident before signing a contract;
- an improved dispute resolution and mediation service for residents, managed by NSW Fair Trading;
- new auditor appointment process.<sup>197</sup>

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<sup>193</sup> COTA NSW, *Inquiry into NSW Retirement Villages*, submission (2017): accessed 7 May 2018, <https://www.cotansw.com.au/MediaPDFs/COTA%20NSW%20RV%20Submission%202017.pdf>.

<sup>194</sup> COTA NSW, *Inquiry into NSW Retirement Villages*.

<sup>195</sup> Tenants Union of NSW, 'Chapter 10d: Retirement village residents'.

<sup>196</sup> See Ferguson, A, Toft, K, Danckert, S, 'Aveo: Exploitation of the Elderly Rife in Retirement Villages', *ABC News* (4 July 2017): accessed 7 May 2018, <http://mobile.abc.net.au/news/2017-06-24/elderly-exploited-in-aveo-retirement-villages/8645876>.

The changes are positive, however, it is yet to be seen if the reforms practically improve the situation for retirement village residents.

## Complex contracts

A consistent criticism of retirement village contracts is that they are confusing and difficult to read. For example, a 2017 investigation by the ABC's Four Corners and Fairfax Media into retirement village company Aveo uncovered complex contracts that exceeded 100 pages in length.<sup>198</sup> The NSW Government developed standard village contracts, general enquiry documents and disclosure statements in 2013. However, COTA's 2017 submission to the Inquiry into NSW Retirement Villages stated that 'consumers tell COTA NSW that contracts are still too complex to understand. For example, consumers are often either unaware of, or confused by, the range of tenures that underpin a person's right to occupy a unit in a retirement village.' Other respondents to the 2017 NSW Inquiry into Retirement Villages raised concerns with the transparency and fairness of contracts, village budgets and accounts and clarity around rights and responsibilities of operators and residents.<sup>199</sup>

The complexity of retirement village contracts is compounded by poor marketing of retirement villages. COTA's submission describes that the standard of information provided on retirement village operators websites and other marketing material is variable. Websites and brochures often use the words 'ownership', 'buying' and 'for sale' in brochures, despite the fact that these agreements are usually a type of lease agreement.<sup>200</sup>

## Fees

There are no standards or regulations around what a retirement village operator can charge. This includes how often the fees can change, what is done with these fees and how much the resident receives back when they leave the village. COTA NSW writes that 'there are currently huge variances and few checks and balances around retirement village costs, fees and charges.' This is in contrast to residential care under the *Aged Care Act 1997* (Cth) or tenancy agreements under the RT Act which have more stringent guidelines around the purpose of payments, how much can be charged and what is done with the money.<sup>201</sup> COTA NSW believes that the diversity of possible fees and charges can be confusing and costly for a resident. The Seniors Rights Service argues that with 'exit fees often as high as 40% of the value of the property many people cannot afford to leave and are locked into situations that

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<sup>197</sup> NSW Fair Trading, 'Retirement village laws and inquiry', accessed 13 February 2019, <https://www.fairtrading.nsw.gov.au/housing-and-property/strata-and-community-living/retirement-villages/retirement-village-laws-and-inquiry>.

<sup>198</sup> Ferguson et al. 'Aveo: Exploitation of the Elderly Rife in Retirement Villages'.

<sup>199</sup> NSW Fair Trading, *Inquiry into the NSW Retirement Village Sector Hornsby Community Forum* (3 October 2017): accessed 7 May 2018, [http://www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/Tenants\\_and\\_home\\_owners/Retirement\\_villages\\_Hornsby\\_Community\\_Forum\\_summary.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/Tenants_and_home_owners/Retirement_villages_Hornsby_Community_Forum_summary.pdf).

<sup>200</sup> COTA NSW, *Inquiry into NSW Retirement Villages*.

<sup>201</sup> COTA NSW, *Inquiry into NSW Retirement Villages*.

are emotionally and financially distressing. This is financial exploitation, which is one form of Elder Abuse.<sup>202</sup>

### Renovations and alteration of fixtures and fittings

A resident of a retirement village may modify premises with written consent of the operator of the retirement village. For example, a resident may wish to modify the home to make it more accessible by installing grab rails. Whilst the operator of a retirement village must not unreasonably withhold consent, if the modification is refused by the operator the onus is on the resident to take the matter to the Tribunal to be resolved and an order be made permitting the modification of the premises.<sup>203</sup>

### Lack of adequate dispute resolution mechanisms

There is inadequate access to legal advice and dispute resolution for retirement village residents. COTA NSW argues that ‘despite recent reforms, there is still no timely, accessible grievance process for consumers and few consequences for developers and operators who contravene the law.’<sup>204</sup> COTA NSW writes that pursuing grievances through NCAT ‘can be lengthy, intimidating and expensive if it is drawn out and residents find it difficult to continue to fund legal advice when up against the resources of an operator and their legal teams.’<sup>205</sup> Other respondents to the inquiry raised issues relating to obtaining legal advice to review and dispute contracts including the complexity of the contract, the required level of specialist expertise and the cost to engage a legal expert.<sup>206</sup>

Under the Act it is not mandatory for residents of a retirement village to elect a residents’ committee. The Act states that they may ‘if they wish to’. As COTA NSW argues, resident committees should be mandatory as they provide a way to help ensure operators remain transparent and accountable, provide a mechanism for a formalised communication between the operator and the residents and provide a platform to manage internal grievances with management in the village.<sup>207</sup>

The 2018 reforms resulted in the NSW Government appointing a NSW Retirement Village Ambassador. The Ambassador’s role is to inform residents about the changes to retirement village laws, listen to issues faced by residents and present these issues to the NSW Government, advocate for residents where appropriate, including representing the residents’ perspective to create awareness and generate recommendations for further change and monitoring and reporting on continuing and emerging issues faced by the

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<sup>202</sup> Seniors Rights Service, *Exploitation of People in Retirement Homes* (2017): accessed 7 May 2018, [http://seniorsrightsservice.org.au/srs\\_news/exploitation-people-retirement-homes/](http://seniorsrightsservice.org.au/srs_news/exploitation-people-retirement-homes/).

<sup>203</sup> *Retirement Village Act s41*

<sup>204</sup> COTA NSW, *Inquiry into NSW Retirement Villages*,16.

<sup>205</sup> COTA NSW, *Inquiry into NSW Retirement Villages*,16.

<sup>206</sup> NSW Fair Trading, *Inquiry into the NSW Retirement Village Sector Hornsby Community Forum*, 4.

<sup>207</sup> COTA NSW, *Inquiry into NSW Retirement Villages*,17.

sector.<sup>208</sup> However, the role of Ambassador does not include dispute resolution. Although an ombudsman was recommended in forty submissions and was raised at most of the inquiry's consultative community forums, the retirement village inquiry's final report did not recommend an ombudsman, and instead an ambassador has been appointed.<sup>209</sup>

**Recommendation 19:** That the NSW Government appoint an Ombudsman for Retirement Village Residents.

**Recommendation 20:** That the Retirement Villages Act 1999 (NSW) is amended to ban operators from refusing a reasonable modification to increase accessibility.

**Recommendation 21:** That the NSW Government monitor the introduction of the provisions of the Retirement Villages Amendment Act 2018 to ensure that the amendments are effective in reducing complexity of contracts and fee arrangements.

## 6.5 *Landlord and Tenant (Amendment) Act 1948* (NSW)

### UPDATE JULY 1 2019

The LTA Act was repealed on July 1 2019. The repeal of the LTA will cease the succession rights of the tenant. This means the death of a protected tenant (or their spouse, whichever occurs last) takes their premises out of the LTA Act. Until July 1 2019 a child of pension age could inherit 'like-rights' of the protected tenant known as 'statutory protected tenants'.

Existing 'statutory protected tenants' will not have their status revoked – their situation is 'grandfathered'.

The section on the LTA Act will remain in the Report to provide record of its existence. For tenants affected by this change, please refer to Part 7 of the Residential Tenancies Act 2010 as the bulk of the LTA Act has been incorporated into this section of NSW housing legislation.

- Protected tenants living in prescribed premises

The LTA Act was introduced after World War II to provide rent control and security of tenure for tenants. The only buildings that can be prescribed are houses, residential units, sheds and garages that were built or under construction before 16 December 1954. These dwellings can be prescribed only if the agreement, whether under written lease or oral, began on or before 1 January 1986. If a building was subdivided into residential units, those units can be prescribed only if the subdivision took place before 1 January 1969.

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<sup>208</sup> Finance, Services and Innovation, Terms of Reference for the NSW Retirement Village Ambassador Program, [https://www.fairtrading.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0003/437421/RV-Ambassador-Program-Terms-of-Reference.pdf](https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0003/437421/RV-Ambassador-Program-Terms-of-Reference.pdf), NSW Government, 5.

<sup>209</sup>NSW Fair Trading, *Inquiry into the NSW Retirement Village Sector*, NSW Government, report, 70.

One of the objectives of the Act is to provide tenants with security of tenure. The LTA Act gives tenants of prescribed premises greater protection against eviction and rent increases than the RT Act.<sup>210</sup> The Act does not allow for eviction without grounds. The notice to quit must comply with the grounds specified in the Act. Most of these grounds, however, are unlikely to be used today.<sup>211</sup> The premises are 'decontrolled' when this tenant dies or moves out, unless a new tenancy is entered into without vacant possession occurring.<sup>212</sup>

In theory protected tenants are secure, but in practice they are vulnerable due to factors including a lack of provisions for repairs in the Act and the repeated attempts by landlords to gain vacant possession.

## Repairs

A major shortcoming of the Act is that it does not require a landlord to undertake repairs. For this reason, many prescribed properties are in a derelict condition. A tenant may complain to the local council seeking repairs. However, there is a risk that an order could be made to demolish or to make repairs that require vacant possession, which may lead to termination of the property's prescribed status.<sup>213</sup> Due to the current rarity of protected tenancies in NSW, many councils do not have knowledge of the LTA Act or understand the implications and impacts of orders. The Fair Rents Board may also reduce rent until repairs are completed. A landlord may deliberately fail to do important repairs to force the person out. For example, the protected person may be forced to leave because the landlord refuses to fix dangerous electrical wiring.<sup>214</sup>

## Attempts by landlords to create vacant possession

Protected tenants face landlords' attempts to evict the tenant.<sup>215</sup> Some landlords may offer their tenant money to move out which effectively decontrols the premises. Whilst this is allowed under the LTA Act, the landlord must first seek the approval of a magistrate. In the past, settlements have been paid to compensate for costs protected tenants may incur by giving up the benefits of their tenancy, such as relocation expenses or higher weekly rental costs. However, compensation is based on a case by case basis and outcomes of settlement vary. The Older Person's Tenants Service (OPTS) recommends that protected tenants should seek legal advice in order to determine if the short term gain of compensation money will outweigh the long term higher costs of buying a house, renting in the private market or waiting for social housing, particularly as many protected tenants are low income earners.

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<sup>210</sup> OPTS, *Are you a Protected Tenant?*,

<sup>211</sup>OPTS, *Guide to Protected Tenancies in NSW*, 4<sup>th</sup> edn, Older Persons Tenants' Service, 37.

<sup>212</sup> OPTS, *Are you a Protected Tenant?*

<sup>213</sup> Schneller, *Protected Tenancies*.

<sup>214</sup> OPTS, *History and Experiences Landlord and Tenant (Amendment Act) 1948*, Audio CD, part 7.

<sup>215</sup> The Brown Couch, *The Landlord and Tenant (Amendment) Act 1948*, The Tenants Union of NSW Blog (2009): accessed 7 May 2018, <http://tunswblog.blogspot.com.au/2009/08/landlord-and-tenant-act.html>.



OPTS details other methods landlords use to drive the tenant out and decontrol the premises. These include threats and harassment toward the tenant and offers to do work on the premises such as painting that would require the tenant to move out. If the tenant does vacate, the landlord may claim they have been given vacant possession and that protected tenancy has ended. For tenants in a boarding house, the landlord may offer a move to another, perhaps nicer room, which would end the protected tenancy.<sup>216</sup>

### Lack of knowledge of the LTA Act

It is very likely that there are people who are unaware that they are protected tenants under the LTA Act and are unaware of the protections it affords. These tenants likely do not benefit from the fair rents that the Act prescribes. They will also be unaware of the implications of giving vacant possession to the landlord.

### Removal of succession rights to children

The Fair Trading Legislation Amendment (Miscellaneous) Bill 2018 included changes that the death of a protected tenant or their spouse (whichever occurs last) effectively de-controls rent controlled premises and removes 'succession rights' to 'statutory protected tenants'. 'Statutory protected tenants' are children of a protected tenant who are pension at the time of their parent's death and inherit the protected tenant status. The removal of 'statutory protected tenants' from the benefits of the 1948 Act will severely impact those who currently hold this status. In most, if not all cases, the statutory protected tenant is someone who has been living in the premises for many years and would be very vulnerable in the market if they lost this status.

**Recommendation 22:** That the NSW Government grandfather existing succession rights of children of protected tenants who are in receipt of a pension.

**Recommendation 23:** That the NSW Government fund an older persons tenancy service, with a specialisation in protected tenancies, to assist protected tenants and provide advice to Government.

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<sup>216</sup> OPTS, *Guide to Protected Tenancies in NSW*, 54.

## 6.6 *Strata Schemes Management Act 2015 (NSW)* *and Strata Schemes Development Act 2015 (NSW)*

A strata scheme comprises of lots and common property, occupied by either tenants or owner-occupiers. Lots are properties which are owned individually. Common property is owned by an owners' corporation, of which all the individual lot owners are members. Members of the owners' corporation make decisions about the management of the whole building.

Many lots are rented out by the owners. The Tenants Union of NSW states that about half of all persons living in strata schemes are tenants. Tenants in strata schemes are covered by the RT Act. The RT Act does not make any special provisions in relation to strata scheme tenants. Tenants are also not entitled to be a part of decision making within the owners' corporation. This is one amongst a number of issues that contribute to the insecurity in strata title accommodation.

### Repairs

Strata scheme tenants often have particular problems in relation to repairs and maintenance. The owners' corporation must repair common property and owners must repair their lot. However, it is not always clear what is common property and what is the lot.<sup>217</sup> Unlike the RT Act, strata schemes legislation also does not contain urgent repairs provisions if the defect is on common property.<sup>218</sup>

### Access to dispute resolution

Access to dispute resolution is more costly and more difficult than accessing the Tribunal under the RT Act. Mediation is compulsory for certain types of strata applications before a dispute can be heard before the tribunal. There is no fee charged by NSW Fair Trading for mediation services, however the tribunal application fee is higher for strata scheme disputes than residential proceedings.<sup>219</sup>

### Barriers to tenant participation

Tenants can attend meetings of the owners' corporation. However, they cannot vote or speak without permission. If at least half the lots in the strata scheme are occupied by

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<sup>217</sup>NSW Fair Trading, *Repairs and Maintenance* (n.d): accessed 7 May 2018, [http://www.fairtrading.nsw.gov.au/ftw/Tenants\\_and\\_home\\_owners/Strata\\_schemes/Repairs\\_and\\_maintenance.page](http://www.fairtrading.nsw.gov.au/ftw/Tenants_and_home_owners/Strata_schemes/Repairs_and_maintenance.page).

<sup>218</sup> Tenants Union of NSW, 'Chapter 10c: Strata scheme tenants', *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/strata-scheme-tenants>.

<sup>219</sup> NSW Civil and Administrative Tribunal, 'Fees and Charges' (2018): accessed 25 May 2018, [http://www.ncat.nsw.gov.au/Pages/apply\\_to\\_ncat/fees\\_and\\_charges/fees\\_and\\_charges.aspx](http://www.ncat.nsw.gov.au/Pages/apply_to_ncat/fees_and_charges/fees_and_charges.aspx).

tenants, those tenants can elect one tenant representative for the strata committee. However, the tenant representative is legally not entitled to vote on decisions of the committee or to put a motion or nominate a person for office, is not entitled to act as an officer of the owners corporation for committee purposes, and cannot be counted in determining whether there is a quorum of the committee.<sup>220</sup>

The strata committee can also determine that a tenant or tenant representative is not entitled to be present and exclude them when matters including financial statements and auditors' reports, levying of contributions, recovery of unpaid contributions and a strata renewal proposals are being discussed or determined.<sup>221</sup>

## Collective sales

Under the *Strata Schemes Development Act 2015 (NSW)* (SSD Act), strata schemes can be terminated for sale or redevelopment, termed 'renewal', through the approval of 75% of owners. Unlike owners, tenants do not have a say in the collective sale or renewal process. If the strata renewal process is successful and the scheme is terminated, any fixed term or periodic tenancies are also terminated.<sup>222</sup> Under the previous legislation, strata schemes were usually only terminated by an application to the Registrar General with unanimous approval of lot owners, lessees and mortgagees.<sup>223</sup>

The current law does not provide adequate protections for vulnerable homeowners and tenants living in strata schemes facing forced sales or eviction through this process. Housing organisations Shelter NSW and the Tenants Union of NSW highlighted the social impacts during the development of the SSD Act.<sup>224</sup> Both older owner-occupiers and private tenants were identified as particularly vulnerable to adverse effects of the renewal laws. These groups' outcomes will be determined by the financial resources available to them. Owner-occupiers are likely to have no other assets than their strata unit and if forced to sell may not be able to afford to buy again in the same area, particularly if the strata scheme is run down. This may also prove an issue if owners are forced to sell whilst they hold a reverse mortgage on the property, as they may have little equity left in the property to repurchase. If they are forced to rent instead, like private tenants facing strata scheme terminations, it is likely that they would not be able to rent affordably in the local area. Even after renewal the

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<sup>220</sup> NSW Fair Trading, 'Tenant Participation', accessed 3 April 2018, [http://www.fairtrading.nsw.gov.au/ftw/Tenants\\_and\\_home\\_owners/Strata\\_schemes/Meetings\\_in\\_a\\_strata\\_scheme/Tenant\\_participation.page](http://www.fairtrading.nsw.gov.au/ftw/Tenants_and_home_owners/Strata_schemes/Meetings_in_a_strata_scheme/Tenant_participation.page).

<sup>221</sup> *SSM Act 2015 (NSW)* s33.

<sup>222</sup> *SSD Act 2015 (NSW)* s184, s185; Tenants Union of NSW (2016j), 'Chapter 10c: Strata scheme tenants'.

<sup>223</sup> NSW Fair Trading, *Making NSW No. 1 Again: Shaping Future Communities*, Strata & Community Title Law Reform Discussion Paper (2012): accessed 7 May 2018, [http://www.fairtrading.nsw.gov.au/pdfs/About\\_us/Have\\_your\\_say/Making\\_nsw\\_no\\_1\\_again\\_shaping\\_future\\_communities.pdf](http://www.fairtrading.nsw.gov.au/pdfs/About_us/Have_your_say/Making_nsw_no_1_again_shaping_future_communities.pdf), 23.

<sup>224</sup> Shelter NSW, *Submission to the Strata and Community Scheme Review* (2012): accessed 7 May 2018, <https://sheltersnsw.org.au/sites/sheltersnsw.org.au/files/public/documents/sub1211stratatitlelaw.pdf>.

new premises will rent for substantially more than those in the old scheme. They would be faced with renting unaffordably or moving away, severing social ties to the area and losing connection to local services. They may also attempt to access a social-housing placement, seek aged care, supported accommodation or emergency accommodation for the homeless.<sup>225</sup>

The issue of collective sales has been acknowledged to be an issue by NSW Fair Trading, writing that ‘additional support is available to eligible owners who are vulnerable or elderly through the Collective Sale Advice and Advocacy program, coordinated by Fair Trading.’<sup>226</sup> Whilst there is an advice and advocacy program, there are no provisions in the legislation to protect older people or people on low incomes from the renewal law.

**Recommendation 24:** That the Strata Schemes Development Act 2015 is amended to require a unanimous vote by body corporate representatives prior to allowing a block of units to be sold for redevelopment.

**Recommendation 25:** That the NSW Government amend the Strata Schemes Management Act 2015 to increase rights of long term tenants in strata schemes to contribute to strata meetings and decisions.

**Recommendation 26:** That NCAT set the fee for strata scheme residents who are pensioners or people receiving Centrelink payments at parity of the subsidised fee for residential tenancies.

## 6.7 Common law

- Long-term residential accommodation in hotels, motels, backpacker hostels, serviced apartments, pubs and clubs.
- lodgements in a private residence and share houses where occupants do not have a written residential tenancy agreement
- boarding houses where there is no residential tenancy agreement and where they are not occupants in a registrable boarding house
- family accommodation agreements where there is no residential tenancy agreement

Accommodation types that are outside residential tenancy law are governed by common law. These types of accommodation still have a contract with the accommodation provider, called a lodging licence.<sup>227</sup> A lodging licence is a contract that is negotiated between the

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<sup>225</sup> Shelter NSW, *Submission to the Strata and Community Scheme Review*, 10

<sup>226</sup> NSW Fair Trading, *Strata Living: Get Involved* (2017): accessed 16 April 2018, [http://www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/About\\_us/Publications/ft045.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Publications/ft045.pdf).

<sup>227</sup> Tenants Union of NSW, ‘Chapter 9: Marginal rental’.

lodger and landlord. The Tenants Union of NSW argues that in practice this means that the terms are decided by the landlord.<sup>228</sup> The informal nature of a lodging license can lead to problems to which there is no easily accessible dispute resolution.

### Oral contracts and unclear terms

A lodging licence may be written or oral, however many marginal renters do not receive a written copy of their contract. Where there is uncertainty as to the terms of a licence, the law will regard the licence as having such terms as the parties reasonably intended and such terms as are necessary to make it effective as a contract. The periods of notice required for rent increases and termination are those set out in the licence. In the case of family accommodation agreements there may be limited or no terms set out due to an initial sense of trust and the personal nature of these agreements.

Common law lodging licences offer little protection against inadequate housing conditions, rent increases and evictions. The common law does not oblige landlords to provide standardised contracts for marginal rental accommodation or to do any action, such as provide a receipt for paid rent. Unclear contractual rights and obligations often lead to disputes between marginal renters and landlords.

### No easily accessible dispute resolution

Common law lodging licenses have no easily accessible or fair mechanism for resolving disputes.<sup>229</sup> Remedies may be pursued through the courts, either the NSW Local Court, the NSW District Court or the NSW Supreme Court. If the lodger wishes to pursue a specific performance of their agreement, for example an order that the landlord allow them to occupy the premises, they can apply to the Supreme Court. However, Supreme Court proceedings can be cost prohibitive, emotionally taxing and potentially unsuccessful.<sup>230</sup> Marginal landlords also have no access to the Tribunal and the courts are not an accessible option for them either. As a result, disputes often end with landlords evicting marginal renters.<sup>231</sup>

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<sup>228</sup>Tenants Union of NSW, 'Chapter 9: Marginal rental'.

<sup>229</sup> Tenants Union of NSW, *Reforming Marginal Rental*, Policy Paper, accessed 19 April 2018, <https://www.tenants.org.au/tu/policy-paper-reforming-marginal-renting>.

<sup>230</sup> Tenants Union of NSW, 'Chapter 9b: Lodging agreements at common law', *Tenants Rights Manual: A Practical Guide to Renting in NSW* (2016): accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/lodging-agreements-common-law>.

<sup>231</sup> Tenants Union of NSW, *Reforming Marginal Rental*.

### The Complex Nature of Family Accommodation Agreements

Family accommodation agreements are not generally considered a form of marginal rental. Family accommodation agreements don't follow a single tenure type, some individuals may rent informally from the trusted person, whilst others may use assets to build a granny flat on the trusted persons property in exchange for accommodation for life. However, like forms of marginal rental, there are no clear and easily accessible dispute resolution mechanisms in place for people facing problems with family accommodation agreements. The only option is to go to court where the courts apply the common law and applicable statutes to find a remedy in the particular factual instance of the case.<sup>232</sup>

**Recommendation 27:** That the NSW Government enact legislation that provides for clear legal coverage for informal and marginal renters to ensure that they have access to legally enforceable protections and rights.

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<sup>232</sup> Monro, R, 'Family Agreements: All with the Best of Intentions', *Alternative Law Journal* 27, no. 2 (2002): 71.

## 7 Remedies

This section provides an overview of the remedies available to individuals living in insecure accommodation. It will also highlight the pitfalls of each remedy, with particular reference to the difficulties that face older people wishing to access dispute resolution.

### 7.1 *Civil and Administrative Tribunal Act 2013 (NSW)*

The New South Wales Civil and Administrative Tribunal (NCAT) is the main forum for resolving disputes for individuals whose agreements are covered by the following legislation:

- *Boarding Houses Act 2012 (NSW)*
- *Residential (Land Lease) Communities Act 2013 (NSW)*
- *Residential Tenancies Act 2010 (NSW)*

The *Civil and Administrative Tribunal Act 2013 (NSW)* (NCAT Act 2013) established NCAT. The Tribunal is divided into several Divisions, including the Consumer and Commercial Division. The Consumer and Commercial Division deals with most types of residential tenancy disputes, including issues with rental bonds, rent increases, unpaid rent, termination of tenancy agreements, compensation, repairs and other breaches of the residential tenancy agreement. NCAT has the power to make legally binding and enforceable decisions on behalf of both tenants and landlords.<sup>233</sup> However, in a number of ways NCAT fails to provide adequate recourse for older people in private rental due to lack of access, limits on orders, fees and limitation periods.

#### NCAT does not apply to all forms of housing

NCAT does not apply to all forms of private rental housing agreements and there are limits on the disputes that can be brought before NCAT. NCAT only applies to the rental agreements covered by the aforementioned Acts. It does not cover those living in types of marginal housing governed by the common law, most family accommodation agreements (unless they have a tenancy agreement), or tenants covered by the LTA Act.

#### Limit on types of orders

The Tribunal can only produce orders based on the protections that exist within the enabling legislation. If the enabling legislation does not prescribe for certain protections or rights for people living in insecure accommodation they cannot seek redress through the Tribunal.

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<sup>233</sup> NSW Civil and Administrative Tribunal, 'Tenancy: Consumer and Commercial Division' (2018): accessed 5 April 2018, <http://www.ncat.nsw.gov.au/Pages/cc/Divisions/Tenancy/tenancy.aspx>.

## Fees

The standard fee to apply to NCAT for residential proceedings is \$49. The reduced or concession fee is \$12. Fees may be waived for those who would be caused financial hardship. However, the waiver form requires extensive information on income, expenses and debt with attached documents for proof. This may be difficult to complete for individuals facing major changes to their situation, including eviction or fleeing domestic violence.

## Lack of knowledge of NCAT

There is a general lack of knowledge about the existence and function of NCAT. Without this knowledge, tenants are unaware of their rights to access dispute resolution and there is a power imbalance tilted towards landlords, operators and proprietors who are more likely to be aware of NCAT.

## Limitation periods for Tribunal applications

There are limitation periods, or periods within which one can make a claim, that disadvantage vulnerable people who may not have the knowledge or resources to apply to NCAT within the stipulated time frame. Limitation periods range from seven days upwards. Where a limitation period is not specified, the default period is 28 days. If limitation periods are missed individuals lose access to a remedy.<sup>234</sup> In some cases the power is tipped towards the landlord, owner or proprietor, who are more likely to be aware of limitation periods, whilst the tenant or resident is not.

**Recommendation 28:** That the NSW Government amends the Residential Tenancies Act to require that landlord provide a written factsheet or other educational material relating to tenants rights, access to NCAT and tenants advice and advocacy services to tenants at the commencement of a lease and if a claim is made on the bond at the end of the tenancy.

**Recommendation 29:** That the NSW Government amend the Residential Tenancies Act to extend limitation periods for tribunal applications and specify limitation periods for all applications that currently fall under the default period.

## 7.2 Civil litigation

- family accommodation agreements where there is no residential tenancy agreement

Remedies to financial elder abuse in family accommodation arrangements largely involve civil actions in the Supreme Court or less commonly the district court.<sup>235</sup> The courts apply

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<sup>234</sup> *Civil and Administrative Tribunal Rules 2014*, Part 6, Rule 23.

<sup>235</sup> Older Persons Rights Service in Western Australia, *Elder Abuse Inquiry*, submission to the Australian Law Reform Commission Inquiry into Elder Abuse (2016): accessed May 7, 2018,



the common law and applicable statutes to find a remedy.<sup>236</sup> The submissions to the Federal Government's Elder Abuse Inquiry brought to light many cases where family accommodation agreements had gone wrong, with older people losing their family home or life savings with no chance of redress. Webb writes that:

The legal framework regulating family accommodation arrangements is precarious. Despite the prevalence of 'assets for care' arrangements, and the recognition of the potential for exploitation of the older person, the law is difficult to understand and, from a practical perspective, largely ineffectual.<sup>237</sup>

The difficulties older people face taking civil actions include that is cost prohibitive, time consuming and emotionally draining.

### Cost prohibitive and time consuming

Civil actions in the Supreme Court of NSW are cost prohibitive for many older people, potentially costing tens of thousands of dollars in legal fees. Even if the legal action is successful, only a fraction of those costs are recoverable.<sup>238</sup> The Western Australian Older Persons Rights Service's submission to the Australian Law Reform Commission Inquiry into Elder Abuse described anecdotal statements from lawyers who practise in this jurisdiction who advised that 'this remedy is in reality only available to the very rich and/or to companies with access to considerable funds'.<sup>239</sup> The assets involved in the agreement may be the remaining financial resources of the older person, and they therefore may not be able to pay for legal assistance and pursue litigation.<sup>240</sup> Public funding is generally not available for family agreement disputes. Specifically, Community Law Australia noted that older people 'being financially abused by their carer or family, will often, find it extremely difficult to access free ongoing legal help if they can't afford a lawyer'.<sup>241</sup>

Legal action is also prohibitively time consuming.<sup>242</sup> Actions in the Supreme Court may take many years to be resolved. In many cases of a breakdown of family accommodation agreements, older people need access to a remedy quickly. In the instance of an older person facing eviction, they need to find new accommodation immediately.<sup>243</sup> Even if the lengthy proceedings are successful, they commonly supply insufficient compensation to enable an older person to fully recover from the breakdown. Due to both the cost of legal

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<sup>236</sup> Monro, 'Family Agreements', 70.

<sup>237</sup> Webb, E, 'Close to home: Financial Hazards for Older People in Family Accommodation', *Conversation*, (2013): accessed 16 April 2018, <https://theconversation.com/close-to-home-financial-hazards-for-older-people-in-family-accommodation-16382>.

<sup>238</sup> Australian Research Network on Law and Ageing (ARNLA), *Submission to the Elder Abuse Inquiry* (n.d): accessed May 7, 2018, <https://www.alrc.gov.au/inquiries/elder-abuse/submissions>

<sup>239</sup> ALRC, *Elder Abuse*, 207

<sup>240</sup> Monro, 'Family Agreements'.

<sup>241</sup> ALRC, *Elder Abuse*, 73.

<sup>242</sup> ARNLA, *Submission to the Elder Abuse Inquiry*.

<sup>243</sup> ALRC, *Elder Abuse*, 207

action and the time it takes to pursue this remedy, all resources are targeted towards finding new accommodation rather than trying to recoup the investment.<sup>244</sup>

### Socio-cultural resistance to legal action

Older people in particular often do not have the emotional resources to pursue legal action.<sup>245</sup> Due to the family context of the dispute, older people may fear the social costs of litigation. For example, civil action may exacerbate family breakdown or lead to a loss of access to grandchildren.<sup>246</sup> They may also not pursue legal action to avoid a sense of shame and powerlessness that stems from the abuse. The older person may have had a relationship of dependency with the individual involved in the problems and this person may still provide important support to the older person.<sup>247</sup>

**Recommendation 30:** That the NSW Government enact specific legislation to define family agreement broadly, include a standard form agreement and provide for appropriate remedies and penalties.<sup>248</sup>

**Recommendation 31:** That the NSW Government fund a specialised mediation and dispute resolution service for family agreements.

## 7.3 Consumer Law

In some circumstances a marginal renter may be considered a ‘consumer’ of rental accommodation services and can access additional rights and remedies under consumer legislation.<sup>249</sup>

The Australian Consumer Law, the *Competition and Consumer Act 2010* (Cth) contains numerous provisions that address conduct in relation to consumers and the content of consumer contracts. The Australian Consumer Law imposes obligations on persons who are in ‘trade or commerce’ and supply goods or services to consumers. *The Fair Trading Act 1987* (NSW) applies to those who are carrying on a ‘business’.<sup>250</sup> Breaches of consumer law may be investigated and prosecuted by NSW Fair Trading and the Australian Competition and Consumer Commission. You can also apply to the courts for a range of remedies.

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<sup>244</sup>Webb, ‘Close to Home’.

<sup>245</sup> ALRC, *Elder Abuse*, 207.

<sup>246</sup> ALRC, *Elder Abuse*, 207.

<sup>247</sup> Monro, ‘Family Agreements’, 73.

<sup>248</sup> [https://www.alrc.gov.au/publications/family-agreements#\\_ftn25](https://www.alrc.gov.au/publications/family-agreements#_ftn25)

<sup>249</sup> Tenants Union of NSW (2016h), ‘Chapter 9c: Consumer legislation and marginal renters’, *Tenants Rights Manual: A Practical Guide to Renting in NSW*, accessed 16 April 2018, <http://legalanswers.sl.nsw.gov.au/tenants-rights-manual-practical-guide-renting-nsw/consumer-legislation-and>.

<sup>250</sup> *The Fair Trading Act 1987* (NSW) s79.

## An untested remedy

Not all marginal landlords are considered to be in 'trade or commerce' or in 'business'. Most boarding house operators will be in trade or commerce, or business, but it is unlikely that a person who rents out a room in their own house or a head-tenant in a typical share house will be. Additionally, as the Tenants Union of NSW writes, 'this legislation does not refer to marginal renters specifically, and because its application to marginal renters is largely untested, it is difficult to say with certainty how these remedies may apply in any particular case.'<sup>251</sup>

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<sup>251</sup> Tenants Union of NSW, 'Chapter 9: Marginal rental'.

## 8 Services for Older People Living in Insecure Forms of Accommodation

There are government and non-government services available to assist people living in insecure forms of housing or who are at risk of homelessness. These include services that provide alternative accommodation, such as social housing, temporary and crisis accommodation, and assistance to find and maintain tenancy in the private rental market. A number of non-government services can assist older people with general information, legal advice or referrals.

### Social housing, temporary and crisis accommodation and private rental assistance

Options for alternative accommodation include social housing, temporary accommodation and private rental assistance. Social housing is provided by the NSW Government and community housing providers. Social housing provides below market level rent that is fixed to income and security of tenure. Some cater to specific demographics, such as the recently completed Woolloomooloo Older Womens' Housing Hub.<sup>252</sup>

The NSW Government and service providers also provide emergency temporary accommodation in low-cost hotels, motels, caravan parks and similar accommodation for people who are homeless or experiencing a housing crisis.<sup>253</sup> Specialist homelessness services support people experiencing or at risk of homelessness by providing services aimed at prevention and early intervention, crisis and post crisis assistance.

Housing NSW offers private rental assistance which aims to establish and maintain a tenancy in the private rental market. This financial help is geared towards those facing homelessness and households whom Housing NSW has assessed as ineligible for a public housing lease extension due to their income and assets.<sup>254</sup> These services include the private Rental Brokerage Service, brokerage Funds, tenancy guarantees and the private Rental Subsidy.

### Information, referral and legal advice

There are a number of other services that can assist older people with housing related issues. These include the NSW Fair Trading's Residential Tenancy and Real Estate Complaint Service, the NSW Tenants' Advice and Advisory Program funded from interest generated by rental bonds, the Australian Government funded Assistance with Care and Housing (ACH)

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<sup>252</sup>Women's Housing Company, *Properties* (n.d): accessed May 7, 2018, <http://www.womenshousingcompany.org.au/aboutus/property>.

<sup>253</sup>FACS, *Are You Homeless?*, NSW Government (n.d): accessed May 7, 2018, <http://www.housingpathways.nsw.gov.au/ways-we-can-help/are-you-homeless>.

<sup>254</sup>FACS, *Help Renting in the Private Market*, NSW Government (n.d): accessed May 7, 2018, <http://www.housingpathways.nsw.gov.au/ways-we-can-help/private-rental-assistance>

program and the NSW Government’s Elder Abuse Helpline & Resource Unit. Some services are also available through non-government NSW organisations including the Tenants Union of NSW, Homelessness NSW, Shelter NSW, Carers NSW, Dementia Australia NSW, CPSA, COTA NSW, and the Older Women’s Network.<sup>255</sup>

## 8.1 Gaps in the current service provision

### Shortage of social housing and crisis accommodation

Social housing is an increasingly inaccessible option due to a shortage of places and the subsequent long waiting lists. There is a waiting list of over 60,000 households in NSW and wait times of 10 or more years in many areas.<sup>256</sup> Additionally, as the proportion of social housing stock has fallen, to reduce demand social housing eligibility criteria has been tightened. Social housing is increasingly restricted to those who are very poor, often with multiple forms of disadvantage. In NSW, older people can be approved for housing assistance as an ‘elderly client’ when they turn 80 or 55 for Indigenous Australians.<sup>257</sup> This means that it is not a viable option for many older people who are not old enough or do not otherwise fit the criteria of ‘special needs’.

### No specialist housing information or homelessness services for older people in NSW

Specialist housing information or homelessness services provide services aimed at prevention and early intervention, crisis and post crisis assistance to support people experiencing or at risk of homelessness. According to the Australian Institute of Health and Welfare (AIHW) specialist homelessness services 2016–17 web report, there are 330 government funded specialist homelessness agencies in NSW. Some of these specialist services cater to high needs groups including but not limited to multicultural families, women with children escaping domestic violence, young parents and men exiting custody. There is not, however, any specialist services for older people at risk of or experiencing homelessness.<sup>258</sup>

In their 2017 report, Faulkner and Fiedler described a loss of NSW Government funded services for older people needing housing assistance in recent years. Housing sector advocates involved in the report consistently emphasised that ‘there are no specialist housing information or homelessness services for older people in NSW and no overall policy framework or approach by government and the community sector to address the needs of this group.’ The last dedicated services for older people and housing lost their NSW

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<sup>255</sup> Fiedler et al., *Older people at Risk of Homelessness in New South Wales*, 138.

<sup>256</sup> FACS, *Social Housing*; FACS, *Expected Waiting Times*.

<sup>257</sup> FACS, *Social Housing Eligibility and Allocations Policy Supplement*.

<sup>258</sup> Fiedler et al., *Older people at Risk of Homelessness in New South Wales*, 136.

Government grants and ceased operations in 2013. These services were the Older Persons Tenants Service (OPTS) and the Park and Village Service (PAVS) that were operated by CPSA. OPTS was described by a housing advocate as ‘the only service catering to older tenants in NSW.’ PAVS was not exclusively a service for older people but as many older people reside in residential parks in NSW, older people formed a large proportion of the client base.<sup>259</sup>

### Older people do not identify as homeless or at risk of homelessness

Services that are geared towards older people in particular are important as many older people do not identify as homeless or at risk of homelessness, and thus many do not see mainstream services as appropriate for them. Due to the lack of specialist services for older people in insecure housing or experiencing homelessness the service system is not in a position to understand the needs of older people or provide early intervention.<sup>260</sup>

### Lack of awareness and connections between services providers

There is a lack of awareness and connection between service providers of the other services and programs that would be relevant to older people in insecure housing. For example, Faulkner and Fiedler’s report demonstrated that many community sector and government agency representatives in NSW were unaware of the ACH programs existence.<sup>261</sup> Community sector organisations working with older people also stated that they were not adequately ‘connected up’ and there was a lack of an overall service strategy on housing.<sup>262</sup>

**Recommendation 32:** That the NSW Government provide resources to train Specialist Homelessness Services and Tenant Advice and Advocacy Services to improve their accessibility to older people, promote a better understanding of key service linkages and increase understanding of the housing, health and aged care issues affecting older people.

<sup>263</sup>

**Recommendation 33:** That the NSW Government increase levels of funding to Specialist Homelessness Services and the Tenants Advice and Advocacy Program to enable these services to extend their current reach to older people living in all forms of accommodation.

**Recommendation 34:** That the NSW Government provide resources to establish a specialised NSW older people’s housing information and support service that brings

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<sup>259</sup> Fiedler et al., *Older people at Risk of Homelessness in New South Wales*.

<sup>260</sup> Fiedler et al., *Older people at Risk of Homelessness in New South Wales*, 134.

<sup>261</sup> Fiedler et al., *Older people at Risk of Homelessness in New South Wales*, 138.

<sup>262</sup> Fiedler et al., *Older people at Risk of Homelessness in New South Wales*, 138.

<sup>263</sup> This recommendation is in line with recommendation 4 in Fiedler, J, Faulkner, D, ‘The Older I Get the Scarier it Becomes’: Older People at Risk of Homelessness in New South Wales (2017): accessed 21 August 2018, <https://www.older tenants.org.au/sites/default/files/older-i-get-scarier-it-becomes-291117.pdf>, 9.

together resources to provide information and support on the range of housing options available to older people across all sectors including aged care housing and retirement living.<sup>264</sup>

**Recommendation 35:** That the NSW Government provides support and financial assistance to people aged over 65 who are reliant on the Age Pension and are forced to move between rental properties due to eviction, rent increase or lack of accessibility of their previous dwelling to assist in moving to another suitable property.

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<sup>264</sup> This recommendation is in line with recommendation 3 in Fiedler, J, Faulkner, D, 'The Older I Get the Scarier it Becomes': Older People at Risk of Homelessness in New South Wales (2017): accessed 21 August 2018, <https://www.oldertenants.org.au/sites/default/files/older-i-get-scarier-it-becomes-291117.pdf>, 9.

## 9 Conclusion: Inadequate Protections and Services for Older People Living in Insecure Accommodation in NSW

Due to the increasing inaccessibility of affordable and appropriate housing, many older people on low incomes are pushed into insecure forms of accommodation. These forms of housing are located in the private market, ranging from mainstream rental housing to marginal forms of accommodation including lodging in a private dwelling, boarding houses and residential parks.

An analysis of the protections and remedies available to older people living in insecure accommodation has revealed a number of key themes that contribute to the insecurity of these types of accommodation. These include:

- lack of protections against rent increases and eviction
- lack of protections against retaliatory actions by landlords towards residents in relation to complaints or asking for repairs
- lack of specific legislation and regulation to protect individuals living in marginal forms of accommodation and the subsequent reliance on the common law
- lack of minimum property standards or maintenance of property
- inability to modify premises to improve accessibility or make it feel like a home
- lack of simple, cheap and satisfactory access to dispute resolution
- lack of specialised services for older people who need support to access or maintain housing or are at risk of homelessness.

Currently, NSW housing policy and law offers limited protections or remedies for older people living in insecure accommodation. There are also limited services for people who are at risk of homelessness or need to find new accommodation. The lack of protections is a major contributing factor to the insecurity of these forms of accommodation. Increased protections and improved access to remedies and services are required to minimise the insecurity of these forms of accommodation.

The Australian Government's plans to further expand programs such as the Pension Loans Scheme demonstrate an entrenched view of older people as asset rich homeowners. The assumption of homeownership that underpins Australia's Age Pension system severely disadvantages those living in the private rental market. Housing is increasingly a cost for older people, rather than an asset. The decline in homeownership amongst an ageing population is a great cause for concern in light of the inadequacies of the Age Pension for those living in private rental and the insecurity pervasive in the private rental sector.



National Shelter writes that ‘we have a long-term intergenerational headache that is really starting to grow and grow’ for those who have not achieved homeownership ‘the private rental market is a brutal place if you are on a fixed income or even a pension’.<sup>265</sup>

Whilst the lack of protections and inability to access effective remedies affects all renters in NSW, older people are particularly vulnerable due to commonly experienced factors such as low incomes, poor health and social isolation. Whilst Commonwealth aged care policy increasingly emphasises ageing in place, there is no comprehensive policy to ensure that older people have secure and appropriate housing in which they can age. With a rapidly ageing population and an increasing shortage of appropriate and affordable accommodation, addressing the needs of older people in housing policy should be a priority of both the Australian and NSW Governments.

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<sup>265</sup> Cited in Senate Standing Committees on Economics, *Out of Reach? The Australian Housing Affordability Challenge*, 165.

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