

Parliament of NSW Select Committee on the Residential Tenancies Bill 2023

***Residential Tenancies Amendment (Rental Fairness)
Bill 2023***

Shelter NSW submission

31 May 2023



About Shelter NSW

Shelter NSW has been operating since 1975 as the State's peak housing policy and advocacy body. Our vision is to create a sustainable housing system that provides secure homes for all.

We provide systemic advocacy and advice on policy and legislation for the whole NSW housing system to resolve housing inequality.

We are especially concerned for low-income households which struggle to afford good-quality and well-located housing in the private housing market. We consider a sustainable housing system one that delivers what we call Triple-A housing and Triple-P outcomes.

Affordable and diverse homes	Accessible and well-located housing	Appropriate and high-quality development
Housing supply and demand	Proximity to jobs and services	Amenity and aesthetics
Tenure forms and rights	Access to public transport	Energy and environment
Housing types and sizes	Accessibility and adaptability	Standards and maintenance

Productive cities and regions	Poverty-free communities	Protected neighbourhoods
Access to jobs and services	Housing stress and homelessness	Energy use and consumption
Housing costs and consumption	Physical and mental health	Urban heat
Financial and economic stability	Education access and attainment	Climate resilience and adaptation

At Shelter NSW, we believe that all people deserve to live in housing and communities that delivers these priorities and objectives. We maintain that the housing system should deliver safe, secure, and affordable living outcomes for all, regardless of tenure type.

Shelter NSW is proud to work with many other key sector organisations including: NSW Housing & Homelessness Peaks and FONGA (Forum of Non-Government Agencies) led by NCOSS; participate in key alliances and campaigns including: *Ageing on the Edge*; *Opening the Door*; *Healthy Homes for Renters*; and *Make Renting Fair*. On tenancy matters we work closely with the Tenants' Union of NSW

About our submission

Shelter NSW thanks the *NSW Parliament Select Committee on the Residential Tenancies Bill 2023* (*'the Bill'*) for its invitation to make a submission and attend and give evidence during its Inquiry.

We understand that the intent of the Bill, as its short title suggests, is to create more fairness in the rental system. We endorse this intent and the general aim of eliminating secret rent bidding but have serious concerns about the proposal to replace it with a regulated rental bid (an 'auction') process. We fear this will produce a set of unintended (but easy to contemplate) consequences that may undermine the very well-intentioned goals of increasing a sense of fairness and reducing stress within the rental application process.

Beyond issues of administrative complexity for all involved; and a potentially stressful consumer experience, we assume that the widespread adoption of this applicant-driven rent bidding approach would surely increase average rent prices. Worse still we think this would entrench an undesirable approach in the private rental market.

This submission will call for the current draft legislation to be amended to remove rent bidding altogether and instead put in place a fair and administratively simple process whereby:

- A fixed rental price must be advertised at the time a property is put up for rent. This advertised rate would act as a ceiling.
- Landlords, real estate agents and potential tenants must not offer, solicit, or accept a higher rental rate than the originally advertised rate.

Given the Committee's focus on applicant 'transactional behaviour' and protection, our submission will note two other phenomena that we believe the Inquiry should take account of. Firstly, the widening gap of income (and associated ability to pay) within the renting cohort itself and secondly, the incidence of discrimination within the rental system. Discrimination is felt across age, gender, race and indigeneity. There are of course more practical barriers, that while not technically discrimination will be felt as unfairness. How does a worker, like a nurse or a bus driver, prohibited or simply unable to use their personal mobile phone during their work day, fairly and actively participate in a rent bid process?

Shelter NSW questions why NSW would embed practices that not only enable but in fact encourage, one group of renters to further compete against others for a service, an essential service like housing? Surely only landlords would be the winners.

If the Bill proceeds without amendment, we believe there are a number of ways to contain the incidence of any negative 'rent auction' outcomes. These are noted in our paper and centre around restricting the possibility of multiple rounds of offers (of a higher rental price) and counter offers. The restrictions might rest in regulations about the length of time or number of offers or counter offers that might be allowed. Our submission will raise just a few of these issues and options to address them.

Overall, we suggest that an incoming Rental Commissioner will be well-placed to explore this with the real estate sector, tenant advocates and the community sector.

For more information about this submission please contact Cathryn Callaghan, Senior Policy Officer Shelter NSW via email Cathy@sheltersnsw.org.au

Recommendations

The proposed amendments close an obvious ‘loophole’: extending rent bidding restrictions to landlords and other persons. This is a wise move. There is complexity, however, in the Bill’s attempt to address another current contradiction: where real estate agents cannot ask tenants to offer more than the advertised fixed rent but can, however, accept a higher offer made voluntarily by potential tenants.

We are concerned that a law and regulation which allows for prospective tenants to offer a higher rent may trigger an ‘auction’ like process with all the price escalation outcomes that most vendors and their agents (in any auction process) would hope to achieve.

Recommendation: that the current draft legislation be amended to remove rent bidding altogether and instead put in place a fair and administratively simple process whereby:

- **A fixed rental price must be advertised at the time a property is put up for rent. This advertised rate would act as a ceiling.**
- **Landlords, real estate agents and potential tenants must not offer, solicit, or accept a higher rental rate than the originally advertised rate.**

Shelter NSW believes this approach would create a fairer and more transparent rental system that would benefit both tenants and landlords (and their agents). Applicants would have transparency and assurance – that on application they know exactly how much rent they need to pay and whether they can afford it.

We look to the raft of regulations surrounding the housing ‘for sale’ auction environment – with its requirement for professional auctioneers; provision of written contracts up front; registration and declaration of bidders and the very nature of it being public and time-constrained. Surely, we want the consumer process experienced by applicant renters to be more akin to regular purchase processes than veering into the world of auctions?

The outright banning of rent bidding may also encourage landlords to set realistic and reasonable rents that reflect the market value and condition of their properties.

A simple ban of rent bidding in all of its forms would also reduce the administrative burden that a regulated rental auction would cause. Some may suggest that the digital age will alleviate this burden. Our view is that complexity online is still complexity – albeit maybe sped up. Those without the skill, digital access or simply time due to employment or caring responsibilities may find the rent bidding process acutely unfair and stressful.

In the event that this Bill proceeds without major amendment other parts of this submission will explore the practical elements of a possible rental action and suggest, in the interest of fairness, consumer protection and good governance guidance measures that many be required to contain the worst elements of a potential ‘rent auction’ process

Power differentials and discrimination in the private rental market

Not often noted in the traditional Landlord V Tenant community debate is the extent of income disparity within the renting cohort itself.

According to the Reserve Bank of Australia¹, while the average and median incomes of renter households are generally lower than owner-occupiers across age groups, the share of private renters who are in the top half of the income distribution has risen over time. This has been driven by two forces: the rising share of private renters in higher paid jobs, such as professional services and delayed home ownership due to a number of financial barriers. We can easily imagine traditional low-to-moderate income prospective tenants trying to compete against others with much higher incomes/capacity to pay and cash reserves to draw on.

The pervasive and long-term incidence of discrimination within the private rental sector also needs to be recognised. According to this 2021 AHURI research², this happens right across the rental system, from application through to eviction and is felt across *age, gender, race and indigeneity*.

While not an active consideration of the Inquiry we urge that some consideration be given to how any new law and regulations, once implemented, will be practically experienced by any vulnerable cohort trying to compete on the uneven playing field that is currently (and always), the private rental sector. It is for this reason that we have recommended funding a service similar to the *Home at Last Model* in Victoria and Queensland. We commend the submission of the *Ageing on the Edge* coalition of about 150 organisational supporters and members of which Shelter NSW is an active member and signatory.

¹ Reserve Bank of Australia Bulletin (March 2023 by) Agarwal, N., Gao, R and Garner, M. accessed from <https://www.rba.gov.au/publications/bulletin/2023/mar/renters-rent-inflation-and-renter-stress.html> on 3 May 2023

² Maalsen, S., Wolifson, P., Rogers, D., Nelson, J. and Buckle, C. (2021) Understanding discrimination effects in private rental housing, AHURI Final Report No. 363, Australian Housing and Urban Research Institute Limited, Melbourne, <https://www.ahuri.edu.au/research/finalreports/363>, doi: 10.18408/ahuri73245
 Shelter NSW Submission – “Rental Fairness” Bill I | May 2023

As noted earlier in this submission, there are also issues of practical barriers to actively and fairly participating in a future 'rent bid' or extended auction process. How does a worker, like a nurse or a bus driver, prohibited or simply unable to use their personal mobile phone during a demanding work day, practically keep track of and potentially respond in a rent bid process, especially one that may proceed quite quickly and take applicants into making highly-pressured financial assessments and commitments?

We can easily imagine these factors combining. A well-paid applicant with high autonomy and control over their work day quickly and efficiently beating other applicants with a higher bid. We see no overall public net gain in having one prospective tenant succeed at the expense of another.

Beyond goals such as addressing acute unaffordability in the private rental system and the issue of protecting people from discrimination, there is a strong rationale for the provision of public and community housing. Unless and until the supply of that form of rental housing is increased though, it will be the private rental system that provides the overwhelming majority of rental dwellings in NSW.

Closing the loop on rent bidding

Extending rent bidding restrictions to landlords and other persons

Shelter NSW welcomes the proposal to amend the *Residential Tenancies Act 2010* (the Act) to extend rent bidding restrictions to landlords and other persons. As suggested in the discussion paper, the absence of this in the current regulation does appear to be a 'loophole' that ought to be closed.

We understand this will include and apply in instances where third parties, including third party platforms or services, are used to advertise or list a rental property and/or otherwise assist with managing the application process. This recognises the increasing role of digital platforms across many sales and service areas including rental tenancies. We understand however, that such platforms do not always comply with require regulations. This raises the question of how the extension of this rent bidding restriction to 'other persons' will be enforced.

Banning 'secret' rent bidding

The Bill proposes to require landlords or their agents to notify prospective tenants who have submitted a tenancy application about a higher rent offer they have received for that rental property within one business day.

As it stands, the Bill implies a simple, singular potential event: a singular *acceptable applicant* making a one-off offer of a higher price. The Bill doesn't appear to contemplate the obvious likelihood of counter offers and, further cycles of counter offer. At worst, a series of offers and counter offers, each being communicated back to applicants would certainly create a de facto and potentially protracted 'rent auction'. Assuming that counter offers are expected we recommend the Bill explicitly address this, along with any limitations about the length of time,

number of offers, notification requirements or other constraints.

As stated, we do not support the proposed amendment. Instead, we recommend restrictions should be extended to ensure unsolicited offers made by an applicant of a higher amount cannot be entertained or accepted by landlords or their agents.

If, however, the Bill proceeds in its current form we recommend that every effort be made to restrict or contain any negative elements of a 'rent auction' that may otherwise emerge. There will need to be a clear set of guidelines and safeguards to ensure transparency about the very practice that is being enabled (and may be entrenched); the various responsibilities of various parties and safeguards against harm. These may include consideration of notification before during and after a rent auction; reasonable timeframes (beyond the one business day notification for the first higher offer); limits or caps on offers; opt out and withdrawl options.

Over time, practices associated with the auction of dwellings for sale has become highly-regulated – recognition of the need to ensure good governance, fairness and efficiency. Are there any consumer protection elements or even principles of the regulation of 'for sale' auctions that ought to be mirrored in this rental reform bill or in subsequent regulation?

Questions requiring clarification:

- The Bill refers to a 'amount of rent' that might be offered by an applicant. Does this extend to other forms of offers that are often made by prospective tenants to landlords to secure a tenancy e.g. offers to pay months' rent in advance. Does the Bill intend to cover these types of offers and if so, how will they be treated?

Considerations to prevent or contain a 'rent auction', reduce negative outcomes and protect consumers:

- Allow only one offer per applicant be made and/or accepted by the landlord or their agent
- Regulate and limit the time at which higher offer needs to be communicated to other prospective tenants e.g., at the point a 'serious offer' of a higher rent is being entertained. This will prevent speculative (and potentially not serious) higher offers from triggering an unnecessary communication event and potential rental increases
- Limit the number of times a higher offer can be made – one time only and at the point of application
- In the case of multiple offers of the same amount – require a first in, first served response by the landlord/agent.
- Ensure no higher offers can be accepted after a holding fee has been provided by the successful applicant
- Limit the number of days offers/counter offers can be made
- Provide clear option for landlords not wishing to entertain higher offer/s
- Establishment of clear and reasonable notification requirements so that all parties are clear on their rights, obligations as the process proceeds