BRIEFING PAPER

Residential Tenancies and Housing Legislation Amendment (Public Housing—Antisocial Behaviour) Bill 2015

Redfern Legal Centre (RLC), Marrickville Legal Centre (MLC), Eastern Area Tenants' Service (EATS), Illawarra Legal Centre and Kingsford Legal Centre (KLC) are independent, not-for-profit organisations that provide legal advice and advocacy for vulnerable members of our community. We assist thousands of tenants every year, including a significant number of social housing tenants. Our services are very concerned about the impact of the Bill on vulnerable tenants and the increased risk of homelessness they will face.

ISSUE 1: Undermining the rule of law for the most vulnerable tenants

We are concerned that the proposed changes will turn the Tribunal into an administrative body and undermine the rule of law. The Tribunal will not have discretion in terminating tenancies for damage, injury or illegal use (s154D). It will have to rely on untested evidence by way of 'strike notices' (s156A) and cost of work certificates (s156B). And it will have to give regard to anonymous testimony.

A fair hearing before an independent judicial body that makes a final decision on facts and the law is a cornerstone of our legal system. The Bill undermines that fundamental legal principle and will lead to unsafe and unfair outcomes for the most vulnerable social housing tenants. In particular, Aboriginal and Torres Strait Islander people are likely to be disproportionately affected by these changes as they are more likely to live in public housing and to come in contact with the criminal justice system. Tenants with intellectual disability and mental health are also more likely to be subject to the proposed provisions.

Recommendation

- *Maintain existing decision making powers for the Tribunal in relation to terminations (s154D), and evidentiary certificates (Div 7).*

ISSUE 2: Mandatory termination of social housing tenancies for illegal use of the premises (s154D)

The Bill will remove the discretion of the Tribunal when considering applications for termination of social housing tenancies where a tenant, or occupant, has used the property for an illegal purpose.

There are cases where it is appropriate to terminate a tenancy where there is serious criminal conduct. The **current law currently provides for this**, and strikes the right balance between controlling criminal activity in social housing and sustaining the tenancies of vulnerable tenants. The Tribunal regularly makes termination orders in matters involving illegal use of the property. In 2012–2013, social housing landlords in NSW made over 10,000 applications for termination of social housing tenancy agreements.

NSW Land & Housing Corporation v Raglione **[2015] NSWCATAP 75**

NSW Land & Housing Corporation applied to the Tribunal for termination of John Raglione's social housing tenancy in circumstances where there was serious criminal activity. At first instance, the Tribunal found that John had engaged in illegal activity but declined to terminate after considering the tenant's circumstances.

However, on appeal the Appeal Panel found that the Tribunal had erred in refusing to terminate the tenancy. The Appeal Panel found that the criminal activity was very serious and that John's evidence about his circumstances had little credibility.

This case shows that the current law is working. On the rare occasions that the Tribunal gets it wrong and refuses to terminate a tenancy that should be ended, the Appeal Panel can correct the error and make the appropriate orders.

Termination is not a just outcome in all circumstances. It is only in special circumstances that the Tribunal exercises its discretion to continue a tenancy. The Tribunal's ability to decline to make termination

orders is an important safeguard, especially for the most vulnerable tenants, and removing this discretion will lead to injustice.

Aboriginal Housing Office v Corrie **(Social Housing) [2013] NSWCTTT 650 (23 December 2013)**

Sarah Corrie is an Aboriginal single mother of four young children. Her tenancy was terminated after her casual boyfriend did several $10-$20 marijuana deals from her premises over a period of two weeks. Sarah had never previously had trouble in her tenancy, was not involved in the drug deals, was not charged, and co-operated with police (they even sent a letter of support for her to the Tribunal). The Tribunal terminated her tenancy because it thought it had no discretion to decline the order, following the NSW District Court decision in New South Wales Land and Housing Corporation v Cain [2013] NSWDC 68.

While the Tribunal's discretion was subsequently restored by the Supreme Court of Appeal, Sarah's story provides a clear example of how the changes proposed will lead to unfair and unjust outcomes for the most vulnerable social housing tenants.

This is particularly so in **cases where an occupant, not the tenant, has engaged in the criminal conduct**. The tenant may be unaware of the criminal activity, such a son storing an unlicensed firearm, or a brother using his own computer to access child pornography (in our experience this would not be 'exceptional'). But, if the Tribunal finds that the occupant 'intentionally or recklessly caused or permitted' the criminal activity, the Tribunal will have no choice but to evict them. Elderly tenants, domestic violence victims, and tenants with limited English are likely to be at increased risk of eviction if the Tribunal has no discretion to consider their particular circumstances.

Claudia's story

Claudia has been a public housing tenant for 10 years. She has always paid her rent and has never had any problems with Housing NSW. Claudia has a long-term partner who was an occupant in the property and is the father of her four children, all under ten years of age. Claudia has experienced domestic violence perpetrated by her partner and he has recently moved out.

The NSW Police came to Claudia's property and found a number of cannabis plants being grown in a cupboard under the stairs. Claudia's partner immediately admitted to owning the plants and provided a statement that Claudia had no knowledge that the plants were there. However, Housing NSW have applied to the Tribunal for termination of Claudia's tenancy, on the grounds that she has used the property for an illegal purpose.

Claudia now faces the possibility of homelessness for herself and her children, despite having no involvement or knowledge of the criminal activity. Under the proposed changes, the Tribunal must evict Claudia, it will have no discretion to consider her circumstances.

In his second reading speech, Minister Hazzard indicated that a tenant must cause or permit the behaviour but we do not believe that this is the effect of the current (ss 90 & 91) or proposed law.

Mary's story

Mary is an elderly Aboriginal woman who had been a social housing tenant for over 20 years. The Aboriginal Housing Office applied to the Tribunal to terminate her tenancy under section 90 because her nephew assaulted her neighbour with a weapon (constituting grievous bodily harm). She did not cause or permit him to do so. A community legal centre helped Mary to negotiate with the Aboriginal Housing Office and obtain consent orders at the Tribunal so that she could remain a social housing tenant.

Under the proposed changes, if the Aboriginal Housing Office applied to the Tribunal for termination, the Tribunal must make the termination order.

The Bill will also undermine **rehabilitation and other non-custodial sentencing options**, as these orders require the person to have stable and secure accommodation.

Recommendations

- *Preserve the Tribunal's discretion to take into account the tenant's personal circumstances when deciding whether to make a termination order.*
- *In the alternative, amend s154D(1) to give the Tribunal discretion, in exceptional circumstances, not to terminate the tenancy.*
- *Amend s154D(1) and (2) (and existing ss 90 & 91) to require that before making a termination order in relation to an occupant's actions, the Tribunal must be satisfied that a tenant has intentionally or recklessly caused or permitted an occupant's actions.*

ISSUE 3: Three 'strikes' termination for breaching the tenancy agreement (ss 154C & 156A)

The Bill will allow social housing landlords to issue 'strike' notices if the landlord believes that the tenant has breached the tenancy agreement. If a tenant receives two 'strike notices', the landlord may issue a third 'strike notice' and make an application to the Tribunal for termination of the tenancy agreement. If the tenant does not challenge the strike notice within 14 days of its issue, the notice will constitute **conclusive proof** of the alleged breach at any later Tribunal hearing. If they did challenge it, the tenant will bear the burden of proving that the breach did not occur. If the landlord doesn't withdraw the notice after a challenge, the tenant has only 14 days to apply for internal review.

Vulnerable tenants will face extreme difficulty in challenging strike notices within 14 days. In that time they will have to contact a legal service, obtain legal advice and write a submission. It is unlikely that vulnerable tenants – such as older people, tenants with little English or low literacy, domestic violence victims, Aboriginal and Torres Strait Islander tenants, tenants with physical or intellectual disabilities or mental health conditions – will be able to comply with this very short time limit. The consequences of this will be serious, and have the greatest impact on the most vulnerable tenants who lack the capacity to challenge strike notices. If a third strike is issued and an application is made to the Tribunal for termination, the tenant will not be able to challenge the strikes if they did not initially challenge them.

We are concerned the availability of a 'strike' process will discourage landlords from pursuing **other conflict resolution strategies** and increase the number of terminations sought. Any breach of a tenancy agreement, however minor, could be the subject of a 'strike notice'. There is **no standard of proof** to be applied by the landlord in issuing the notice and **no independent review process**. It reverses the onus of proof between a large government department and a vulnerable tenant and forces a tenant to prove that they didn't do something; a difficult thing to prove.

Other Australian States have implemented 'strike' policies in social housing and there is evidence that it has led to a significant increase in terminations. In particular, in Western Australia, **Aboriginal & Torres Strait Islander tenants have been evicted in greater numbers** (82 of 113 tenancies terminated as a result of the 'three strike' policy were for Aboriginal or Torres Strait Islander tenants).

The termination of social housing tenancies for minor breaches, without requiring the landlord to prove those a, unreasonably exposes the most vulnerable tenants to the risk of eviction.

Joanna's story

Joanna is a social housing tenant living in a private rental property subsidised by Housing NSW's Private Rental Subsidy scheme. A private neighbour complained about the tenant's cat. The tenant was warned several times, but denied the cat had caused any nuisance. The neighbour ended up leaving the area, and graffitied the common areas as she left. It appeared from the graffiti that the neighbour was offended at the presence of social housing tenants, rather than the tenants' cat.

Under the proposed changes, the tenant could have been given three strikes and issued a termination order. The onus of proof would have been upon the tenant, to prove that their cat did not cause a nuisance.

Recommendations

- *Amend s154C of the Bill to allow a tenant 28 days to make submissions on a proposed strike notice and 28 days to seek review of a strike notice that has been issued.*
- *Remove provisions relating to evidentiary certificates for strike notices from the Bill. In the alternative, amend ss154C(2) and 156A to allow the Tribunal to consider evidence about allegations contained in all strike notices.*
- *Amend s154C(9) to require a formal review process prior to the issuing of a notice of termination, as already provided for under existing section 149.*

ISSUE 4: Anonymous neighbourhood impact statements (s 154F)

The Bill will allow the Tribunal to consider anonymous evidence from neighbours in deciding whether to terminate a social housing tenancy agreement.

This overturns the fundamental legal principle that a person is entitled to know and test the case against them. It will allow neighbours to make mistaken, false or misleading statements without the tenant or the Tribunal being able to question the person about their claims. The proposed changes increase the possibility of tenants losing their housing based on statements that are motivated by inter-personal disputes or prejudice.

Recommendation
- *Delete s154F Neighbourhood impact statement*

Stewart v Yarrawarra Aboriginal Corporation [2015] NSWCATAP 5

Neville Stewart, a social housing tenant appealed against a decision of the Tribunal to terminate his tenancy on the grounds of noise and nuisance. In granting the appeal and remitting the matter back to the Tribunal, the Appeal Panel noted what appeared to be a sustained campaign by a neighbourhood group to force Neville's eviction. The Appeal Panel noted that there was evidence that members the neighbourhood group were motivated by prejudice in making their allegations against the tenant.

Under the proposed changes, Neville would not be able to challenge the evidence of the neighbourhood group, as he would not know their identity or have the opportunity to question them. In such circumstances, he may well be evicted and made homeless.

ISSUE 5: Increased need for legal services

The proposed changes will significantly increase the need for tenants to receive legal advice and representation from community legal centre. In particular, the 'strikes' process will require tenants to engage in submissions and review processes within very short timeframes. In addition, the attempts to restrict the judicial role of the Tribunal will increase the likelihood of tenants being forced to pursue costly and time consuming challenges in the Supreme Court.

Without additional funding to provide legal advice for vulnerable tenants, community legal centres will be unable to meet this increased demand for our services. This will leave vulnerable tenants facing eviction without adequate advice or assistance.

Recommendations
- *Support increase in funding to tenancy advice and advocacy services and community legal centres to address increased legal needs for tenants.*

ISSUE 6: Evidentiary certificate cost of work (s 156B)

The Bill will allow a social housing landlord to submit a certificate of the cost of work to the Tribunal where it claims the tenant has caused damage to the property. This certificate will be accepted as conclusive proof of the cost of the work undertaken. In the Minister's reading of the Bill he stresses that tenants will still be able to dispute whether the repair is necessary and whether they are responsible for the damage. But they will not be able to dispute whether the cost was reasonable.

It is a long-held principle of law that litigants must mitigate their loss. This Bill overturns that principle. The impact of this is not insignificant. In the event that a former tenant is liable for damage costs, this may affect their entitlement to future social housing. The higher the debt, the higher the barrier to seek housing assistance when it is needed.

The principle of mitigation provides much needed protection against an agency that often fails to properly manage their contractors and scrutinise the cost of work.

Elsie's story

Elsie was charged for the removal of some metal sheeting left at her former property. Housing NSW has charged her $1000 for removing and disposing the sheeting. If they had given Elsie the opportunity to fix the problem, she could have arranged for the metal to be removed at no cost by a metal recycler.

Under the proposed changes, the Tribunal would not be able to consider the reasonableness of the costs incurred by Housing NSW.

Recommendation
- *Delete s 156B Evidentiary certificate of cost of work*

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