



THE LAW SOCIETY
OF NEW SOUTH WALES

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17 June 2015

The Hon Brad Hazzard MP
Minister for Family and Community Services
Minister for Social Housing
GPO Box 5341
Sydney, NSW 2000

By email: office@hazzard.minister.nsw.gov.au

Dear Minister,

Proposed measures relating to crime and anti-social behaviour in public housing

The Human Rights Committee ("HRC") and the Indigenous Issues Committee ("IIC") of the Law Society of NSW¹ write to you in relation to proposed measures relating to crime and anti-social behaviour in public housing.

The Committees understand² that the NSW Government is considering the following:

- "One strike" evictions where a person has committed certain serious offences;
- "Three strikes" termination proceedings for other breaches;
- "Neighbour impact statements"; and
- Probationary periods for some public housing tenancies.

The Committees understand the Government is concerned about addressing criminal and anti-social behaviour in public housing. However, the Committees are concerned that these measures are not adequately balanced with the right to adequate housing, procedural fairness requirements, and other policy goals such as supporting rehabilitative outcomes in the criminal justice system. The IIC is further concerned that these measures are inconsistent with the goals of Closing the Gap.

The Committees comments below are focused on the potential for these measures to increase the rate of homelessness, the proposed "one strike" evictions, and the neighbour impact statements.

¹ The HRC has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society on any proposed changes. The IIC represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW. Membership of the Committees includes experts drawn from the ranks of the Law Society's membership.

² The Committees have considered the media reports and the "TU One Strike Discussion Paper" prepared by the Tenants' Union (March 2015, available online: http://intranet.tenants.org.au/print/policy-papers/TU_Onestrike.pdf (accessed 15 April 2015)).

1. Proposed measures are likely to increase homelessness

The Committees are concerned that these measures may result in higher rates of homelessness. The Committees note that the statistics on homelessness are already concerning. In NSW, 28,190 people are homeless, at a rate of 40.8 people per 10,000. This is an increase of 20.4% since 2006.³ Nationally, approximately 25% of homeless people are Aboriginal or Torres Strait Islander,⁴ and children and young people make up approximately 27% of the national homelessness numbers.⁵

The HRC echoes the United Nations Committee on Economic, Social and Cultural Rights in noting that:

The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.⁶

Homelessness undermines the ability of individuals to enjoy other rights, such as the right to the highest attainable standard of health. Homelessness may also affect individuals' abilities to exercise a range of civil and political rights, such as the right to vote, or can undermine the goals of the criminal justice system such as rehabilitation and the prevention of recidivism.

The Committees' view is that homelessness and the risk of homelessness is a particular symptom of a more general problem of marginalisation and disadvantage experienced by homeless people along with Aboriginal and Torres Strait Islander peoples, refugees, the mentally ill and those fleeing family violence. The proposed measures in relation to public housing are likely to further marginalise already vulnerable people, and are likely to also have downstream effects such as on health, education and the criminal justice system.

2. Human rights obligations

The HRC observes that the right to adequate housing includes the right to be protected against forced evictions. The leading legal interpretation of the right to be protected against forced eviction is comprised in General Comment 7 adopted by the Committee on Economic, Social and Cultural Rights in 1997.⁷ In the General Comment, the UN Committee on Economic, Social and Cultural Rights noted that legislation to prevent forced evictions should be "designed to control strictly the circumstances under which evictions are carried out".⁸

³ Homelessness Australia statistics based on ABS and AIHW statistics, available online: <http://www.homelessnessaustralia.org.au/index.php/about-homelessness/homeless-statistics> (accessed 27 May 2015)

⁴ Homelessness Australia, "Homelessness and Aboriginal and Torres Strait Islanders," fact sheet, available online: http://www.homelessnessaustralia.org.au/images/publications/Fact_Sheets/Homelessness_and_ATSiv3.pdf (accessed 27 May 2015)

⁵ Homelessness Australia, "Homelessness and Children" fact sheet, available online: http://www.homelessnessaustralia.org.au/images/publications/Fact_Sheets/Homelessness_and_Children.pdf (accessed 27 May 2015)

⁶ "CESCR General Comment 4: The Right to Adequate Housing" UN OHCHR, Article 11(1) of the ICESCR, Sixth Session, 1991 contained in document E/1992/23 online from here: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument#*%20Contain%20i](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument#*%20Contain%20i) (accessed 27 May 2015).

⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, available at: <http://www.refworld.org/docid/47a70799d.html> (accessed 28 January 2015)

⁸ Note 7 at [9].

The HRC notes that the present legislation in respect of terminations is human rights compliant, and provides a framework in which members of the NCAT can exercise their discretion and decline to make a termination order in relation to social housing tenancies, where considered appropriate.

3. "One strike" evictions

The HRC is concerned that removing the NCAT's discretion in termination decisions may have the effect of justifying arbitrary evictions. The HRC is particularly concerned about reports that the NCAT's discretion to reinstate tenancies may be curtailed even if a person other than the tenant has committed the offence; and where other household members not involved in the offence would also be evicted; and where the rehabilitation goals of the criminal justice system might be undermined by eviction.⁹ The HRC refers the Minister to the case example of Ms Rachel Corrie set out in the Tenants' Union's briefing note as illustrative of the unjust outcomes in circumstances where the Tribunal believed it did not have the discretion to decline termination.

As noted above, Aboriginal and Torres Strait Islander people are likely to be disproportionately affected by any removal of the NCAT's discretion. Indigenous people are six times as likely to live in social housing,¹⁰ and are more likely to come into contact with the criminal justice system.¹¹ The IIC submits that there are serious implications for Indigenous children if parents lose their social housing tenancies, noting that Indigenous children are already critically over-represented in the care and protection system.¹²

In support of its submission that the NCAT's discretion in determining termination of social housing tenancies is necessary to avoid injustice, the IIC provides a case example arising from its members' experience. There have been matters where the grandchildren of elderly tenants have carried out the illegal activity on social housing premises (such as storing stolen goods). However, if the NCAT's discretion in termination decisions is removed, the outcome would be that the grandparent loses his or her tenancy. The IIC submits that penalties for criminal offences in social housing should be imposed in the criminal justice system.

In the HRC's view, this proposal may place Australia in breach of its international obligations pursuant to the International Covenant on Civil and Political Rights ("ICCPR"). Article 17 of the ICCPR provides that:

⁹ Note 1.

¹⁰ Australian Institute of Health and Welfare, "Housing assistance for Indigenous Households," 28 July 2014 at p7, available online: <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548051> (accessed 28 January 2015)

¹¹ For statistical information about Indigenous contact with law enforcement, see Australian Bureau of Statistics, *Australian Social Trends 2005, Crime and Justice, Aboriginal and Torres Strait Islander People, Contact with the Law*, 12 July 2005, available online: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/94713ad445ff1425ca25682000192af2/a3c671495d062f72ca25703b0080ccd1!OpenDocument> (accessed 28 January 2015). For information about rates of offending, see Australian Bureau of Statistics, *Recorded Crime – Offenders 2012-2013, Aboriginal and Torres Strait Islander Offenders*, 27 January 2014, available online: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2012-13~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20offenders~20> (accessed 28 January 2015)

¹² The rates of removal of Aboriginal children have reached the point where they exceed previously recorded numbers at any time in the 20th century, including during the Stolen Generations (see the Bringing Them Home 1997 report). Almost 10% of all Aboriginal children have been removed (6200 removals in NSW) (figures from the Productivity Commission Report on Government Services, 2014). NSW has the highest numbers of removals of Aboriginal children in Australia (approximately 13,000 Aboriginal children were removed across Australia. For the purpose of comparison, it is noted that 59 out of 1000 Aboriginal children will have contact with the care and protection system, compared to 6.6 out of 1000 non-Aboriginal children.

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.

The HRC is concerned that the proposed measures may be incompatible with Article 17. Further, the HRC is concerned that removal of the NCAT's discretion could result in a breach of Article 10 of the Universal Declaration of Human Rights¹³ which provides that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The Committees recommend that the NCAT's discretion in termination decisions not be removed. In the Committees' view, it is neither necessary nor proportionate to remove the NCAT's discretion in relation to termination decisions in order to address criminal and anti-social behaviour in public housing. Such discretion is a necessary safeguard against arbitrary or unjust outcomes.

4. Neighbour impact statements

The Committees understand that it is proposed that confidential neighbour impact statements be allowed as evidence in termination proceedings.

The Committees are concerned about the procedural fairness implications of this measure, in respect of the principle that a respondent to proceedings is entitled to test the case against them.

The Committees seek more information about whether it is proposed that these statements will be anonymous, and whether they will be available to tenants.

The Committees seek your advice in relation to whether the NSW Government intends to proceed with this proposal. In this regard, if there is to be legislative change, the Committees request the opportunity to be consulted in the drafting of any Bill.

If your office has any comments please contact Vicky Kuek, A/ Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,



John F Eades
President

¹³ The HRC notes that Australia was one of the eight nations involved in drafting the Declaration.