




THE LAW SOCIETY
OF NEW SOUTH WALES

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11 August 2015

The Hon. Brad Hazzard, MP
Minister for Family & Community Services, and
Minister for Social Housing
GPO Box 5341
SYDNEY NSW 2001

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

Dear Minister, 

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

I write to you on behalf of the Human Rights and Indigenous Issues Committees of the Law Society of NSW. The Committees wrote to you on 17 June 2015 and again on 4 August 2015 in respect of their concerns about proposed measures aimed at crime and anti-social behaviour in social housing. The Committees note that the Residential Tenancies and Housing Legislation Amendment (Public Housing - Antisocial Behaviour) Bill 2015 (the "Bill") has been introduced and is due to be debated on 11 August 2015 in the Legislative Assembly.

The Committees have serious reservations about the Bill from a rule of law and human rights perspective, and are of the view that it should not be passed in its current form.

1. Overview of the Committees' concerns

The Committees understand that the Government is concerned about addressing crime and antisocial behaviour in public housing, and about the safety of social housing tenants. However, the Committees submit that the Government has demonstrated neither the necessity for the Bill in its current form, nor its proportionality to the objectives of the Bill. The Committees are also concerned that the amendments are not consistent with the rule of law and human rights.

In particular, the Committees note that the primary goal of this Bill is to "Improve the behaviour of a minority...of tenants engaging in antisocial behaviour."¹ Given this, the Committees are of the view that it is both unnecessary and disproportionate to this goal to remove the NCAT's discretion to review termination decisions. This measure has the potential to result in injustice and in the eviction of tenants who are not perpetrators. It is also inconsistent with the right to adequate housing, and other legitimate policy aims such as criminal and other rehabilitation. The IIC is further concerned that these measures are

¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 August 2015, 20 (Bradley Hazzard)



inconsistent with the goals of Closing the Gap, as the measures may result in long-term and potentially permanent homelessness for people evicted under them.²

Further, the Committees' view is that it is both unnecessary and disproportionate to remove the ability of the NCAT to consider evidence in respect of the circumstances around strike notices and the cost of repairs. The Committees are also concerned about the procedural fairness implications of confidential neighbourhood impact statements.

The Committees' submissions are set out in more detail below.

2. Removal or fettering of NCAT's discretion (proposed s 154D)

2.1. Current practices of concern

The Committees' concerns are based on the recent concerns of its members that suggest that antisocial behaviour policies may have been applied to evict social housing tenants on accusations of unlawful conduct that have not been successfully sustained on further investigation in the criminal justice process. It is necessary for an oversight mechanism like the NCAT to retain its discretion in order to avoid or correct unjust outcomes.

2.2. Termination decisions are complex

The Committees note that social housing tenants are likely to have complex needs. Given this, decisions whether to terminate tenancies are likely to involve complex considerations.

For example, termination decisions may affect people who have rehabilitation goals in respect of substance addiction, or in respect of criminal justice outcomes. They may affect people who have mental health concerns. Termination decisions are also likely to have an effect on a household of people, and may result in children who may be sent into out of home care. Crucially, termination decisions may affect people who are in fact victims of violence within a household.

The Committees are concerned that the proposed s 154D may have the effect of discouraging victims of family violence from reporting for fear of eviction. Family violence is already under-reported, and the Committees are not able to support measures that may act as a further barrier to reporting.

2.3. Power to terminate in respect of unlawful use already exists

The Committees note that there is already a power to terminate tenancies for serious damage or injury, or where there is illegal use of the property (ss 90 and 91 of the *Residential Tenancies Act 2010*). The Committees understand that the NCAT already regularly makes termination orders in matters involving the illegal use of property.

The Committees are concerned that as drafted, proposed s 154D is so broad that it may have the effect of evicting tenants who are not perpetrators (and who may be victims of family or domestic violence).

² In the Committees' experience, currently "unsatisfactory former tenant" ratings are very difficult to reverse. If a person is evicted under the proposed measures, the Committees are of the view that the current difficulties can only be magnified for those people.



2.4. Rule of law concerns

The Committees consider that aspects of proposed s 154D are likely to be inconsistent with the rule of law and the requirements of procedural fairness.

First, the NCAT would have no discretion to review termination decisions in respect of the offences that fall under proposed s 154D(1), and would retain discretion only in "exceptional circumstances" in respect of the offences that fall under proposed s 154D(2). The Committees note that the only body that retains discretion in these circumstances is the landlord (in relation to whether to file an application) and in respect of proposed s 154D(1), there is no review at all of an administrative decision. The Committees are particularly concerned that there is no discretion for NCAT to consider the circumstances of a tenant who may not be the perpetrator of the offences to which s 154D(1) is directed.

Second, the Committees note that under proposed s 154D, the NCAT is required to determine conduct defined by reference to definitions in the Crimes Act, but presumably only has to do so by a civil burden of proof. It is unclear to the Committees how this will operate in practice.

Third, the Committees note that the Minister said in his Second Reading speech that:

If a tenancy is at risk through the one-strike process because of the behaviour of other household members, the Department of Family and Community Services will still have to prove, as now, **that the tenant intentionally or recklessly caused or permitted the behaviour**. Take for example a scenario where a mother and son are living together in social housing with the mother holding the lease and the son found to be dealing drugs. While the mother is the tenant and is liable for the breach, if she is unaware of the drug dealing it is unlikely she will be evicted. However, if it is shown that she is aware then she is liable for the breach and will be evicted. Further, we will not apply these measures to people who get into difficulty through no fault of their own. Family and Community Services currently has tenancies where a serious crime such as drug dealing is carried out by a violent partner against the tenant's wishes. In these cases, if the partner cannot be forced to leave, Family and Community Services will rehouse the innocent tenant.³

However, the Committees understand that this example may not accurately reflect current practices and note again the example of Ms Sarah Corrie provided in the briefing note of the Tenants' Union dated March 2015.⁴ Tenants can currently be subject to termination orders even if they have no knowledge of unlawful use by an occupant. It appears that this would continue to be the case under the proposed measures, as is particularly demonstrated by proposed ss 154D(2)(b)(ii). It is likely that an occupant (for example, the son of elderly parents who are the tenants) engaged in the dissemination of child abuse material would be doing so without the knowledge of his parents.

2.5. Committees' submission in respect of proposed s 154D

The Committees submit that the NCAT must retain the discretion to review termination decisions particularly in respect of tenants who are not the perpetrator. As drafted, proposed s 154D is so broad that it could result in the eviction of innocent tenants.

³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 August 2015, 20 (Bradley Hazzard), [emphasis added]

⁴ Tenants' Union briefing note available online: http://intranet.tenants.org.au/print/policy-papers/TU_Onestrike.pdf (accessed 10 August 2015).

3. Strike notices (proposed s 154C)

The Committees note that proposed s 154C provides a scheme for social housing landlords to issue strike notices against tenants for breaches where the circumstances of the breach alone would not justify termination of the tenancy (proposed s 154C(1)).

If two strikes are recorded against the tenant within the previous 12 months, and the landlord is satisfied that the tenant has breached the tenancy agreement, the landlord may record a further strike without issuing a strike notice, and give a termination notice under s 87 of the *Residential Tenancies Act 2010* (proposed s 154C(9)).

The tenant may apply for a review of the strike notice within 14 days (proposed s 154C(4)(b)).

Further, proposed s 156A provides that the landlord may submit a certificate certifying the issuing of a strike notice to the tenant, the details of the alleged breach of the agreement, whether the tenant made submissions in response to the strike notice, and whether the tenant made an application for review of the strike notice (proposed s 156A(1)).

Proposed s 156A(2) provides that the certificate of proof issued by the landlord constitutes proof, in the absence of proof to the contrary, of the matters certified. Proposed s 156A(3) provides that if the Tribunal was satisfied that the strike notice was issued and that the tenant did not make submissions within the 14 days of when the strike notice was issued, the certificate constitutes "conclusive proof" of the matters certified.

The Committees are concerned about the effect of proposed ss 154C and 156A. The Committees note that given proposed section 156A, strike notices must be challenged at the time they are issued as there is no opportunity to challenge them in the NCAT.

Fourteen days is a very short time frame in which to respond to a strike notice, particularly as many social housing tenants are vulnerable and are unlikely to have easy access to legal assistance, are likely to have low literacy skills, speak English as a second or third language, have poor mental health and may be themselves victims of violence. From a practice perspective, the Committees note that these provisions are also likely to result in increased workloads for Legal Aid, community legal centres and client service officers in the Department of Housing. From a policy perspective, the Committees are concerned about the certification process, noting that it is unusual, and potentially problematic, for non-government bodies to issue statutory certificates.

3.1. The Committees' submissions in respect of strike notices

The Committees submit that the NCAT should retain discretion to take into account the tenant's evidence in relation to alleged breaches of the tenancy agreement that form the basis of the strike notices. Further strike notices should contain information about where tenants can seek legal assistance.

4. Cost of Work certificates (proposed s 156B)

The Committees note that the social housing landlord may determine the "reasonable cost" of work by producing a certificate that the NCAT must take as conclusive proof (proposed section 156B).



The Committees note that this assumes that competitive rates are charged by contractors, but in the Committees' experience, this is not always the case. Indeed, the Committees believe that it is unreasonable for a party in a civil matter to certify expenses in their own cause and for there to be no mechanism for those expenses to be justified or verified. Presumably, where costs are reasonably incurred there will be invoices and other records to establish that matter, and if that is the case, then those matters can be put before NCAT.

4.1. The Committees submissions in respect of evidentiary certificates

The Committees submit that NCAT should retain the discretion to take into account the tenant's evidence in respect the reasonable cost of work.

5. Confidential neighbourhood impact statements (proposed section 154F)

Proposed section 154F provides that the NCAT has to take into account a "neighbourhood impact statement" submitted by the landlord. These statements do not identify the sources of information and their identity is not to be disclosed without their consent.

The Committees are concerned that tenants will not have the opportunity to know who is making the complaint against them, and will not have the opportunity to test the evidence being used against them. The Committees submit that this would not be consistent with procedural fairness requirements.

5.1. The Committees submissions in respect of neighbourhood impact statements

The Committees are of the view that at minimum the substance of any statement would be disclosed to a tenant to enable them to respond.

Thank you for your consideration of the Committees' concerns. Any further questions may be referred to Vicky Kuek, policy lawyer for the Committees, on 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



John F Eades
President