



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:GUgl:1085946

1 February 2016

Statutory Review of Residential Tenancies Act 2010
Fair Trading Policy
PO Box 972
Parramatta NSW 2124

By email: policy@finance.nsw.gov.au

Dear Sirs,

Statutory Review of the Residential Tenancies Act 2010

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper, "Statutory Review of the *Residential Tenancies Act 2010*", issued by NSW Fair Trading.

Overview

Subject to the comments below, the *Residential Tenancies Act 2010* ("Act") generally appears to be working effectively and the Law Society does not perceive a need for substantial changes to be made.

The Law Society notes that in applying the legislation or in considering any future changes to legislation, it is important to maintain the balance between the competing interests of tenants and landlords. The right of a tenant to occupy the premises is as important as the landlord's right to receive rent payments when due. It is also important for the continued growth of stock available for rent that the residential tenancy property market is an attractive investment for landlords.

Responses to the specific questions contained in the Discussion Paper are set out in the table attached at "A".

Recent public housing and antisocial behaviour reform

The Law Society takes this opportunity to note that it has serious reservations about the recent reforms to Part 7 of the Act, in respect of public and social housing tenancies. The Law Society's primary concerns are that the amendments to limit the discretion of the NSW Civil and Administrative Tribunal in relation to termination decisions in certain circumstances are not consistent with the rule of law and procedural fairness. The Law Society is concerned also that the measures are inconsistent with the goals of Closing the Gap, as they may result in long-term and potentially permanent homelessness for the social and public housing tenants evicted under the reforms.

Attached at "B" are submissions made in 2015 in respect of the Residential Tenancies and Housing Legislation Amendment (Public Housing – Antisocial Behaviour) Bill 2015 (as it was). The amending legislation passed on 15 October 2015 and came into effect on 18 December 2015.

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au

Noting that the Law Society does not support these reforms, it submits that, in the process of implementing the "three strikes" and "one strike" reforms, the Department of Family and Community Services ("FACS") should provide information to affected social housing tenants on services that can provide assistance. The information provided should be appropriate to ensure that tenants can access the assistance they require. In particular, tenants should be made aware of their rights to appeal each "strike" to the Housing Appeals Committee (noting however, that the Housing Appeals Committee is only able to make recommendations rather than issue binding decisions).

The Law Society submits that NSW Fair Trading, as an independent body, may consider inviting the relevant legal and community stakeholders to provide it with information and feedback on the implementation process on an ad hoc and ongoing basis. This feedback may then form the basis of reviewing and reporting on the operation of these measures in preparation for the next statutory review process, and more generally.

The Law Society further submits that FACS should establish a transparent system for monitoring and evaluating the effect of the reforms, including collecting information on the demographics of tenants subject to strikes and evictions. This monitoring system should specifically require communication with, and feedback to the relevant stakeholders, including the Tenants' Union, community legal centres, the Aboriginal Legal Service, Legal Aid NSW and the Law Society of NSW.

Should you have any queries about this letter, please contact Gabrielle Lea, Policy Lawyer, on 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Gary Ulman', with a long horizontal flourish extending to the right.

Gary Ulman
President

Statutory Review of the *Residential Tenancies Act 2010*

Attachment A to the submission by the Law Society of NSW

No.	Questions	Comments
The current regulatory framework		
1.	Are the aims and objectives of the Act, outlined above, still valid?	In the Law Society's view, the aims and objectives of the Act as outlined in the Discussion Paper are still valid.
Inquiry into the regulation of accommodation services in the sharing economy		
2.	How can the regulation of residential tenancies in NSW adapt to effectively support the changing profile of the rental market into the future?	The Law Society defers to the expertise of other stakeholders.
3.	Are there any types of occupancy arrangements which should be included or excluded from the Act?	No change is necessary as the Law Society regards the current scope of occupancy arrangements that are regulated by the Act as appropriate.
Condition Reports		
4.	Are there any provisions of the standard tenancy agreement or condition report which can be improved or updated (see Appendix A and C)?	The Law Society defers to the expertise of other stakeholders.
5.	Should there be any additional prohibited terms beyond those listed in section 19 of the Act?	In the Law Society's members' experience, no additional prohibited terms beyond those listed in section 19 of the Act are required.
6.	Is the 'New Tenant Checklist' a useful resource (see Appendix B)? Are there any other	<ul style="list-style-type: none"> • The Law Society regards the New Tenant Checklist as a useful resource, especially for first time tenants.

No.	Questions	Comments
	important matters which should be covered in the checklist?	<ul style="list-style-type: none"> The Law Society does not have any suggestions as to content.
7.	Should the 'New Tenant Checklist' include, or be accompanied by, specific information on required safety features eg smoke detectors, electrical safety switches, pool fencing etc?	No, a number of these issues are covered in the condition report, such as smoke alarms.
8.	Should any other information be required to be disclosed by landlords at the time of entering into an agreement?	Not in the Law Society's view.
Length of tenancy agreements		
9.	What incentives would encourage the use of longer term leases?	The Law Society defers to the expertise of other stakeholders.
10.	What are the key challenges for landlords in offering longer term leases? How could longer term leases be managed?	The Law Society defers to the expertise of other stakeholders.
Rental Bonds		
11.	Is the maximum bond amount of 4 weeks' rent appropriate?	The Law Society defers to the expertise of other stakeholders.
12.	Should a portion of the interest on rental bonds continue to be paid to tenants, or should this portion also be used to fund services for tenants?	Generally interest on the bond should be paid to the parties, however the Law Society notes the public interest purposes to which this interest is put.
13.	Does the process for refunding bonds and resolving bond disputes work well? What could be improved?	<ul style="list-style-type: none"> The process for refunding bonds works reasonably well. In relation to the resolution of bond disputes, the Law Society suggests that consideration should be given to better ensuring that members of the NSW Civil and

No.	Questions	Comments
		Administrative Tribunal ("NCAT") adjudicating such disputes are properly versed in the relevant legislation, particularly when they are not able to access the assistance of qualified legal representatives.
Rent and other charges		
14.	Are the current notice periods for rent increases appropriate?	The Law Society defers to the expertise of other stakeholders.
15.	Do the existing provisions governing excessive rent increases strike the right balance between the interests of landlords and tenants? If not, how could they be improved?	The Law Society defers to the expertise of other stakeholders.
Rental arrears		
16.	Do the Act's provisions governing termination for rental arrears strike the right balance between the interests of landlord and tenant?	<ul style="list-style-type: none"> • The Law Society suggests that the provisions of the Act governing termination for rental arrears could be improved by providing a definition of "frequently failed" as referred to in section 89(5) of the Act. This would provide certainty to both landlords and tenants. • In applying the provisions, it is important that tenants are protected against landlords acting unfairly but equally, a tenant should not be given an unfettered right to continue occupation where it has not met the fundamental obligation to pay rent. The receipt of rent by the landlord is as fundamentally important to the landlord as is the right of occupation to the tenant.
17.	Should the introduction of late fees for rent owing be considered? Please give reasons.	The Law Society suggests this could be further explored, but at a practical level if the tenant is having difficulty in paying rent due, the tenant may similarly be unable to pay a late fee.
Water and utilities		
18.	How can the 'split incentive' issue be	In the Law Society's view, a landlord should not be required to implement any improvements to the property that an owner occupier is not also required to implement.

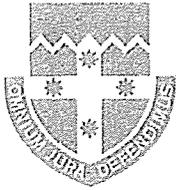
No.	Questions	Comments
	addressed in the residential tenancy market?	
19.	What incentives might encourage landlords or tenants to improve energy and water efficiency?	See the answer to question 18.
Rights/obligations of landlords and tenants		
20.	Is there an appropriate balance between the general rights and obligations of landlords and tenants under the Act?	The current balance is appropriate. The Act should be guided by the principle that the receipt of rent by the landlord is as fundamentally important to the landlord as is the right of occupation to the tenant.
21.	Is further guidance required in relation to whose responsibility it is to repair the premises and when the repairs must be carried out?	Not in the Law Society's view.
22.	Are the current provisions regarding making alterations to a rental property appropriate?	The current provisions are appropriate.
23.	Are there other types of work a landlord should be able to refuse permission for a tenant to undertake?	The current provisions are appropriate.
Inspections and the right to privacy		
24.	Are the notice periods for carrying out inspections appropriate?	The current provisions are appropriate.
25.	Should the number of inspections allowed per year be reduced for long term tenants? If so, how long should a tenant have continuously occupied the same premises to be classified	<ul style="list-style-type: none"> • In the Law Society's view, this could be the subject of further consideration. • The Law Society suggests that any definition of long term tenant should be a tenant who has occupied the same premises for a period of no less than three years.

No.	Questions	Comments
	as a 'long term tenant'?	
26.	Are any additional protections needed for tenants and landlords regarding inspections and privacy?	See the answer to question 27.
Advertising tenanted properties and privacy concerns		
27.	Should there be specific provisions in the Act that deal with the use of photographs or videos showing a tenant's personal property to advertise premises for sale or lease?	In the Law Society's view, the approach taken in Queensland and Tasmania could be explored. The Law Society notes that it is not the taking of the photographs that is prohibited but rather the use of the advertising images without consent.
Shared Tenancies		
28.	Does the Act adequately protect the interests of sub-tenants/co-tenants and landlords in shared tenancy arrangements?	The Law Society notes section 75 of the Act and considers that the Act adequately protects the interests of sub-tenants and or co-tenants and landlords in shared tenancy arrangements
Rental housing standards		
29.	Do the existing provisions in the Act and other legislation in relation to the standard of rental properties strike the right balance between the need to protect tenants and the need to contain costs for landlords?	The Law Society considers that the correct balance is struck, having regard to s 63 of the Act and other legislation, such as section 121B of the <i>Environmental Planning and Assessment Act 1979</i> , which allows the local council to make certain orders, such as for the repair of dilapidated buildings.
30.	Are there alternative ways to improve the standard of rental properties?	The Law Society does not support the introduction of a minimum standard for the condition of rental properties.
Rights of long term tenants		
31.	Are the provisions applying to long term	In the Law Society's view, the provisions applying to long term tenancies are

No.	Questions	Comments
	tenancies appropriate?	appropriate. If, however, long term tenancies became more prevalent, further consideration of these provisions may be warranted.
Terminations		
32.	Are the current termination notice periods appropriate?	Yes, in the Law Society's members' experience the current termination notice periods are appropriate.
33.	Should landlords be required to provide a reason for terminating a tenancy? If so, what types of reasons should be considered?	Landlords should not be required to provide a reason for terminating a tenancy, provided the landlord complies with the requirements for notice; the landlord should be entitled to deal with the property as the landlord sees fit.
Breaking a lease early		
34.	Should the Act require all residential tenancy agreements to have provisions imposing break fees?	The Law Society does not support the mandatory imposition of break fees in all residential tenancy agreements. The guiding principle should be that of reasonable compensation for loss and under no circumstances should a landlord make a windfall from the tenant breaking the lease early.
35.	Should there be any additional grounds on which a tenant can terminate a residential tenancy agreement without compensation?	The Law Society does not consider any additional grounds are necessary.
Tribunal possession orders		
36.	Is the notice period for mortgagee repossession appropriate?	Yes, in the Law Society's members' experience.
37.	Are additional protections needed for tenants in cases of mortgagee repossession?	No, the existing provisions appropriately deal with the competing interests of tenants in repossessed premises and the duty that the mortgagee in possession owes to the mortgagor and the mortgagee's shareholders.
38.	Are there any other termination issues that the Act could better address?	<ul style="list-style-type: none"> • The Law Society would prefer that the tenant is obliged to notify the landlord or its agent as to the actual date upon which it vacates the premises, to enable the

No.	Questions	Comments
		<p>landlord to secure the premises and begin the re-letting process.</p> <ul style="list-style-type: none"> The Law Society considers that clarity and ease of process in the timely termination of a residential tenancy agreement for breach is important in maintaining the attractiveness of renting as an investment to a landlord and the supply of housing stock for rent.
Resolving Disputes		
39.	Do the current information, advice and dispute resolution services operate effectively?	According to the figures in the Discussion Paper, the information, advice and dispute resolution services appear to operate well.
40.	Do you have any other suggestions to encourage the early resolution of tenancy disputes and reduce the number of tenancy disputes?	<ul style="list-style-type: none"> The Law Society notes the figures at page 29 of the Discussion Paper, that as at 30 June 2015, 95% of tenancy complaints received by Fair Trading's tenancy dispute resolution service were resolved. It appears that existing dispute resolution services are working well. The Law Society notes that solicitors can only appear at NCAT for matters under the Act with consent. While the Law Society appreciates that NCAT is designed to enable applicants to represent themselves if they so choose, this should not restrict applicants from obtaining legal representation if they wish to do so. It is not the case that restricting representation automatically saves time and money. The absence of legal representation can result in more protracted hearings, with more assistance needed to guide an unrepresented person through unfamiliar processes. The early involvement of solicitors can shorten proceedings by eliminating irrelevant issues or misunderstandings of the applicable law.
Other key issues – Residential Tenancy Databases		
41.	Do you have any suggestions for improving the current provisions relating to residential tenancy databases?	The Law Society defers to the expertise of other stakeholders.

Other key issues – Innovation through technology		
42.	Should email or SMS be accepted as methods of giving written notice? What safeguards would be needed to reduce any potential disputes?	No, because in matters that require written notice under the Act, receipt of the notice may often be disputed. An acceptable method of proving service, such as exists for current methods of service, is also critical to efficiently dealing with disputes.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/IIC/JFEvk:1043509

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).

cd

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).

df

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

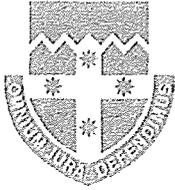
The Committees are of the view that at minimum the substance of any statement would be disclosed to a tenant to enable them to respond.

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



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/IIC/JFEvk:1055477

12 October 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 and 11 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 passed the Legislative Assembly and is due to be debated in the Legislative Council.

The Committees note that the Bill passed with amendments and commend the Government for undertaking further consultations and taking stakeholder concerns into account. The Committees support the Government's amendments to proposed s 154F(1), which provide that a neighbourhood impact statement is only to be submitted if the NSW Civil and Administrative Tribunal ("NCAT") finds that the tenant has breached the tenancy agreement (amendments to proposed s 154F(1)).

However, the Committees continue to have concerns about other aspects of the Bill. The Committees' view is that the Government's amendments do not go far enough in respect of the matters set out in more detail in this submission.

The Committees' concerns are underpinned by rule of law concerns as it affects social housing tenants.¹ The Committees note that many social housing tenants are likely to be vulnerable, may not speak English, may have a disability, may be elderly, may have mental health concerns and may be victims of violence.

¹ In particular, the Human Rights Committee (HRC) notes that the Bill would change the law relating to evictions only for social housing tenants. This appears to be breach of the principle of equality before the law in Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR). The HRC notes also that Article 14 of the ICCPR requires a fair hearing in civil as well as criminal matters. Given that the Bill would remove the NCAT's discretion in relation to certain factual findings, the HRC's view is that the Bill is likely to be a breach of the requirements of Article 14.

Given that this Bill may potentially have a significant impact on housing and homelessness, the outstanding issues of concern may benefit from further consultation, and the Committees would support the referral of this Bill to the appropriate NSW Parliamentary Committee for inquiry and public consultation.

1. One strike evictions

The Committees are of the view that the Government's amendments to proposed s 154D do not go far enough to protect tenants from eviction in circumstances where the offending conduct was caused by an occupant.

As amended, under proposed s154D tenants can still be evicted under proposed under s 154D even if they are not the perpetrator of the offences to which ss 154D(1) and 154D(2) are directed.

The only circumstance in which a tenant would be protected from the "one strike" scheme if an occupant is responsible for the offending conduct is in relation to grievous bodily harm caused to the landlord or agent; an employee/contractor of the landlord or landlord's agent; or another occupier or person on neighbouring property.

In every other respect, the Committees' concerns about the eviction of innocent tenants set out in their submission of 11 August 2015 ([attached](#) for your information) still stand.

The Committees submit that the NCAT must retain the discretion to review termination decisions, particularly in respect of tenants who are not perpetrators.

2. Scheme for strike notices

The Committees note that the Government's amendments would extend the timeframe for tenants to make submissions in respect of strike notices (proposed s 154C(g)), and to make applications for review of a strike notice (proposed s 154C(4)(b)) from 14 days to 21 days.

The Committees support the Government's amendment to extend the time period in these circumstances. However, the Committees note that the new time period allows is only 21 days. The Committees are of the view that the period of time for response should be at least 28 days given that many social housing tenants are likely to require assistance.

The Committees note also that the concerns set out in their submission of 11 August 2015 in relation to:

- The scheme for certificates of proof in respect of strike notices and the alleged breaches by tenants (proposed ss 156A(1), 156A(2) and 156A(3)); and
- the lack of opportunity to challenge strike notices in the NCAT (proposed ss 154C and 156A),

have not been addressed.

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.

3. Cost of work certificates

The Committees note their concerns raised in the submission of 11 August 2015 in relation to the cost of work certificates (proposed s 156B) still stand.

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

Thank you for your consideration of these issues. The Committees would be pleased to discuss this submission further. Any questions may be referred to Vicky Kuek, policy lawyer for the Committees, on 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



Michael Tidball
Chief Executive Officer