TENANTS' UNION OF NEW SOUTH WALES

Tenants' Union of NSW
Suite 201
55 Holt Street
Surry Hills NSW 2010
ABN 88 984 223 164

P: 02 **8117 3700**
F: 02 8117 3777
E: tunsw@clc.net.au
tenantsunion.org.au
tenants.org.au

Comment

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

11 August 2015

This comment is in addition to the Tenants' Union of NSW's preliminary comment on the *Residential Tenancies and Housing Legislation (Public Housing – Antisocial Behaviour) Bill 2015*. Our preliminary comment was issued on 5 August 2015, after the bill was introduced into the NSW Legislative Assembly without consultation.

Our preliminary comment outlines our concerns that the bill will limit the Tribunal's ability to function by removing its discretion in certain termination proceedings, and restricting its ability to consider evidence in matters concerning social housing tenancies.

This comment provides additional focus on the bill's key provisions.

Changes to the *Residential Tenancies Act 2010*

The bill will amend Part 7 of the *Residential Tenancies Act 2010*, and changes will affect all social housing tenancy agreements. This includes public housing tenancies, as well as social housing tenancy agreements entered into with each of the 133 Community Housing landlords who are registered to operate in New South Wales.

Key changes are as follows:

One strike evictions

Clause 154D will remove or significantly restrict the Tribunal's discretion to decline to make termination orders in cases involving illegal use of social housing premises. Regardless of whether the tenant is involved with, or even aware of the conduct in question, the Tribunal's discretion will be removed in cases where it is satisfied that a high level crime has been committed on or in relation to the premises. The Tribunal's discretion will be limited to considering the 'exceptional circumstances of the case' – circumstances that are one of a kind – where it is satisfied that premises have been used for any other unlawful purpose that justifies termination. This will also apply regardless of whether the tenant was involved in, or even aware of the conduct in question.

In introducing this bill to the Legislative Assembly on 5 August 2015, Minister for Social Housing, the Hon. Brad Hazzard MP, made reference to 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." The bill will not produce this outcome. Quite simply, if the mother in this scenario is taken to the Tribunal because of her son's conduct, her tenancy will be terminated. To avoid the loss of her tenancy, her landlord will have to refrain from taking the matter to the Tribunal. Thus, the bill transfers the question of discretion on termination of tenancies away from the Tribunal, placing it instead in the hands of social housing landlords. This assumes that social housing landlords will not pursue matters that will result in unjust outcomes.

The case of *Aboriginal Housing Office v Corrie*[1] clearly demonstrates that this is not always so. The tenancy manager in the Corrie case was Family and Community Services Housing, and they took Ms Corrie to the Tribunal after her casual boyfriend did several $10-$20 marijuana deals from her social housing property over a period of two weeks. The Tribunal terminated the tenancy, believing it had no discretion to decline to make such an order because of the District Court's decision in *New south Wales Land and Housing Corporation v Cain*[2] (which was subsequently overturned in the NSW Court of Appeal, but not before the Corrie matter was decided). In making its decision, the Tribunal noted that the tenant was not involved in the drug deals, was not charged, had co-operated with police (they sent a letter of support for her to the Tribunal), had no previous trouble with her tenancy, was an Aboriginal single mother with prior experience of domestic violence and mental illness, had no experience of renting privately, and that her four young children were settled in school. The Tribunal made the order, saying: "*if I had discretion whether or not to terminate the tenancy agreement, I would exercise that discretion in favour of the tenant and I would refuse to make the order of termination".*

Given such matters do make their way into the Tribunal from time to time it is important that the Tribunal retains this discretion not to terminate. If it is the intention to transfer that discretion to social housing landlords then some further check on the landlord's decision to apply to the Tribunal for termination orders should be inserted into the legislation. For instance, the social housing landlord could be required to demonstrate, to the Tribunal's satisfaction, that they have investigated and identified whether any children, spouses or other occupants will be unjustly displaced by a termination order, and have taken steps to prevent this, before the Tribunal will hear the substantive case brought before it.

Three strike evictions

Clause 154B, 154C & 156A set up the "three strikes" rule. They provide that a social housing tenancy can be terminated for a series of breaches that, each taken alone, would not be sufficient to justify termination under the existing sections 87 and 152 of the *Residential Tenancies Act 2010*. Critically, **clause 154B** will operate such that a breach of a social housing tenancy agreement that is no longer current will be actionable under an agreement that is current, even where the breach would not have been sufficient to justify ending the first agreement.

Clause 154C will establish a scheme for recording "strikes" against social housing tenants. It will allow, at **subclause (g),** for the landlord to specify how a submission in reply to a strike notice may

[1] [2013] NSWCTTT 650
[2] [2013] NSWDC 68

be made, and the date by which a submission must be made. This gives an extraordinary amount of leeway to a social housing landlord to set the terms on which a tenant may respond to an allegation of breach, and will rely on the landlord's ability to provide natural justice in an effective and consistent way. If such a scheme is to be included in the *Residential Tenancies Act 2010*, the manner in which a tenant may make submissions against a proposed "strike" should be prescribed by the legislation, not left up to landlords.

This is especially important because **clause 156A** will provide that the details in a "strike notice", for which a tenant has failed to properly provide a submission in response, may become conclusive proof of the matters alleged in the notice. Even without the concerns raised above, **clause 156A** will substantially reduce social housing tenants' ability to test allegations of breach that are levelled against them. This is not in the interests of justice.

Debts arising from subsidy variation or cancellation

Clause 154A will overturn the NSW Court of Appeal's decision in *New South Wales Land and Housing Corporation v Diab*[3] by making a debt that arises from a cancellation or variation of a rent rebate actionable as rent arrears. Rent rebates are provided for in the *Housing Act 2001*, which allows for cancellation or variation of a rebate after an investigation of a tenant's weekly household income, as conducted by the landlord.[4] A mechanism to review a landlord's decision to cancel or vary rent rebate currently operates, but its decisions do not bind landlords. If debts arising from such procedures are to be treated as a breach of a social housing tenancy agreement, the *Housing Act* should be amended so that a landlord's investigation and decision to vary or cancel a rebate is reviewable in the New South Wales Civil and Administrative Tribunal.

Recommendation

The Tenants' Union of NSW agrees that a better response to dysfunction in neighbourhoods should be a high priority for Government. We accept the prevalence of dysfunction is a genuine concern for residents in neighbourhoods with high concentrations of social housing tenancies, and areas of relative socio-economic disadvantage. But the schemes set out in the *Residential Tenancies and Housing Legislation Amendment Bill (Public Housing – Antisocial Behaviour) Bill 2015* go too far.

The Tenants' Union does not support the bill. We call upon the NSW Government to withdraw the bill, and embark instead upon a genuine process of consultation with tenants, housing advocates, social housing landlords and other interested parties to develop and implement strategies to improve cohesion and resilience in all neighbourhoods where there are high degrees of disadvantage. By contrast, the bill will only encourage adversarial and punitive responses.

Where criminal and antisocial behaviour cannot be tackled through greater investment in neighbourhood and community cohesion, the *Residential Tenancies Act 2010* already provides adequate avenues for social housing landlords to end tenancies, including on all of the grounds set out in the bill.

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[3] [2015] NSWCA 133

[4] *Housing Act 2001* (NSW) ss 57 & 58