

NSW State Government's proposed 'one strike' evictions and other measures relating to crime and anti-social behaviour in public housing

A briefing paper about the TU's concerns

March 2015

The NSW State Coalition Government has announced that it will, if re-elected, introduce a range of measures relating to crime and anti-social behaviour in public housing.

The measures comprise:

- 'one strike' evictions where a person has committed certain serious offences;
- 'three strikes' termination proceedings for other breaches;
- 'neighbour impact statements' that allow anonymous information to be tendered in evidence; and
- probationary periods for some public housing tenancies.

The Tenants' Union holds grave concerns about these proposed measures. We are especially worried about 'one strike' evictions and 'neighbour impact statements', which would involve legislative changes that are contrary to fundamental principles of justice.

This briefing paper sets out what we understand the measures to involve, and the concerns we hold. Our understanding of the measures comes from the media release of Premier Baird and Minister Upton, and briefings given by Minister Upton's office to the TU.

'One strike' evictions for certain offences

The State Government's proposed 'one strike' eviction policy would mandate the immediate termination of a public housing tenancy where certain offences have been proven.

The State's public housing landlord is the NSW Land and Housing Corporation. Like other landlords, it can, under current tenancy law, apply to the NSW Civil and Administrative Tribunal for orders terminating a tenancy on the ground that the premises have been used for an illegal purpose (section 91 of the *Residential Tenancies Act 2010* (NSW) (RT Act); also section 87). Where this is proved, the Tribunal may terminate the tenancy or, at its discretion, decline to terminate, considering the circumstances of the case.

The State Government proposes to remove the Tribunal's discretion where the NSW Land and Housing Corporation brings these termination proceedings on the basis of certain offences. Where the offence is proved, the Tribunal would be mandatorily required to make orders for immediate termination and possession.

The offences are:

- manufacture or distribution of drugs;
- storage of unlicensed firearms;
- violence occasioning grievous bodily harm;
- operation of a brothel;
- motor vehicle rebirthing;
- production of child pornography.

Our concerns

Termination of a tenancy is not a just outcome in all circumstances. The Tribunal's ability to decline to make termination orders is an important safeguard; removing this ability will lead to injustice.

It is especially important and appropriate that the Tribunal have discretion in the following circumstances:

- *Where a person other than the tenant has committed the offence.* Under tenancy law, tenants are liable for the conduct of other persons lawfully on the premises, under either the general provision for vicarious liability (section 54, RT Act) or the specific provisions relating to use of premises for an illegal purpose (sections 51(1)(a) and 91(1)(a) and (b)). This means termination proceedings may be taken

against tenants on the basis of offences committed by other persons (in most cases, a spouse, child or boyfriend), and where the tenant has no involvement in – or even knowledge of – the offence.

- *Where other household members not involved in the offence would also be evicted.* When tenancies are terminated, the whole household loses their housing, not just the offender. Under current social housing policies, household members of a tenant who is gaoled may apply for a tenancy in their own right, but only where they meet tight eligibility criteria for priority assistance.
- *Where criminal justice outcomes allow for the rehabilitation of the offender in their home.* Criminal justice proceedings may result in participation in the MERIT program, a good behaviour bond, home detention or other non-custodial outcomes that allow the offender to remain in their home – often expressly for the purpose of rehabilitation. Termination of the offender’s tenancy may derail these outcomes and their rehabilitative purpose.

The NSW Land and Housing Corporation already takes termination proceedings in all these circumstances – specifically, where tenants have no involvement in the offending, where children will be evicted, and where arrangements for rehabilitation will be disturbed. This leads us to question the quality of decision-making exercised by housing officers where criminal offences are alleged. The Tribunal’s discretion is a check on these decisions; removing it would produce unjust terminations of tenancies and evictions.

The injustice that would result from removing the Tribunal’s discretion is demonstrated by the case of Sarah Corrie (*Aboriginal Housing Office v Corrie* (Social Housing) [2013] NSWCTTT 650). An Aboriginal single mother of four young children, Ms Corrie’s tenancy was terminated after her casual boyfriend did several \$10-\$20 marijuana deals from her premises over a period of two weeks. Ms Corrie 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 Ms Corrie’s 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. That decision was subsequently overturned by the NSW Court of Appeal (*Cain v New South Wales Land and Housing Corporation* [2014] NSWCA 28), which affirmed the Tribunal’s discretion to decline termination; but in the meantime, Ms Corrie’s case was decided. The result was an injustice: as the Member said, ‘If I had a discretion whether or not to terminate the residential tenancy agreement, I would exercise that discretion in favour of the tenant and I would refuse to make an order of termination.’

‘Three strikes’ for other breaches

The State Government proposes to introduce a policy of ‘three strikes’ in relation to breaches other than those subject to the ‘one strike’ eviction policy. ‘Three strike’ breaches would include causing or permitting a nuisance or annoyance (section 51(1)(b), RT Act) or rent arrears (section 33(1), RT Act).

Under current tenancy law, the NSW Land and Housing Corporation may, like other landlords, give a tenant a termination notice on the ground that the tenant has breached the tenancy agreement and, if the tenant does not vacate, apply to the Tribunal for orders terminating the tenancy. In practice, the NSW Land and Housing Corporation, again like other landlords, often deals with these situations in an informal way first, such as through warning letters.

The State Government proposes that the NSW Land and Housing Corporation will, as a matter of policy, give two written warnings (‘strikes’) then take termination proceedings on the third instance of alleged breach in a 12-month period.

Our concerns

A ‘three strikes’ policy will gear the NSW Land and Housing Corporation’s responses to problems in tenancies even more strongly towards termination.

The NSW Land and Housing Corporation is already a heavy user of termination proceedings, including in relation to interpersonal disputes between tenants. Because all or most of the residents of a public housing building or estate have tenancy agreements with a common landlord, these disputes are apt to be framed as breaches of the obligation not to cause or permit a nuisance or annoyance. In our experience, these disputes and allegations of breach often arise from the alarming or disruptive behaviours associated with mental illness, disability and other factors of disadvantage concentrated in public housing; they also sometimes arise from prejudice, particularly against Aboriginal persons.

A ‘three strikes’ policy will further encourage neighbours to complain, and housing officers to respond to complaints, in terms of breaches of tenancy agreements and racking up three strikes, and detract from other ways of dealing with disputes, such as organising referral to appropriate support services, participation in conciliation, talking informally, or simple tolerance.

‘Neighbour Impact Statements’

The State Government proposes to allow the NSW Land and Housing Corporation to tender ‘confidential Neighbour Impact Statements’ as evidence in termination proceedings.

Where it applies for termination orders on grounds of breach, the NSW Land and Housing Corporation must, like other landlords, prove the alleged breach to the Tribunal. Where the alleged breach relates to a criminal offence, it may be proved by evidence of guilt being proved in the relevant criminal proceedings; alternatively, the NSW Land and Housing Corporation may itself attempt to prove the offence, to the civil standard of proof. The Tribunal gives the respondent tenant an opportunity to test the evidence in cross-examination.

We understand that the proposed Neighbour Impact Statements may be used as evidence of a breach – unlike Neighbour Impact Statements (section 7B, *Criminal Law (Sentencing) Act 1988* (SA)) and Victim Impact Statements (sections 26-30A, *Crimes (Sentencing Procedure) Act 1999* (NSW)), which have a role in criminal proceedings only after guilt is established.

It is not yet clear whether the ‘confidentiality’ of Neighbour Impact Statements means:

- that the statements will be anonymous (and their contents disclosed to the tenant); or
- that the statements will be disclosed to the Tribunal only (and not to the tenant).

Our concerns

Allowing ‘confidential’ evidence is contrary to the principle that a respondent to proceedings is entitled to test the case against them.

This makes the proceedings unfair, and removes a safeguard against the making of false statements. This increases the prospect of proceedings that are based on statements motivated by inter-personal disputes and prejudice, and of bad motivations and false statements going undetected.

Probationary periods

The State Government proposes to make certain classes of public housing tenancy agreements subject to probationary periods.

The current policy of the NSW Land and Housing Corporation is to offer 10-year fixed term tenancy agreements to persons with 'high support needs', and five-year fixed term tenancy agreements to persons with 'support needs' that are likely to continue for that period.

These agreements can be terminated during the fixed term on various grounds, including that the tenant is in breach of the agreement.

The State Government proposes to make these agreements subject to a 12-month probationary period. There is no express provision in current tenancy law for 'probationary periods'. It is not clear whether the State proposes to allow these agreements to be terminated during the probationary period without grounds.

Our concerns

Allowing public housing tenancy agreements to be terminated without grounds is contrary to principles of procedural fairness.

Where the NSW Land and Housing Corporation considers that a public housing tenancy agreement has been breached and should be terminated, it should be prepared to prove the breach and satisfy the Tribunal that termination is justified in the circumstances of the case. The tenant should have the opportunity to respond to the allegation of breach, and speak to the circumstances of the case that support the continuation of their tenancy.

Our recommendation

We call on the NSW State Government not to proceed with its proposals. Instead, it should address concerns about crime and anti-social behaviour by building tolerance, trust, resilience, informal controls and support services through better-resourced community development work in public housing neighbourhoods. It should also commit the NSW Land and Housing Corporation to respecting and supporting rehabilitative outcomes from the criminal justice system.