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BRIEFING UPDATE

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

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The NSW State Government intends to introduce a range of measures relating to crime and antisocial behaviour in social housing, as announced in the lead-up to the 2015 NSW State Election. The Tenants' Union of NSW issued a briefing paper in March 2015 outlining our concerns with the proposed reforms, based on the information available to us at the time.

After further discussions with Family and Community Services, and the Minister for Social Housing's office, we understand a bill to amend the *Residential Tenancies Act 2010* and the *Housing Act 2001* will be introduced during the next parliamentary session. This means the proposed measures may be introduced as early as August 2015.

We understand a draft of the amendment bill will not be circulated for consultation with key stakeholders. This update summarises the changes we believe will be made to the *Residential Tenancies Act 2010*, based on our discussions with Government and its relevant agencies. We reiterate our concerns.

Proposed changes to the *Residential Tenancies Act 2010*

We understand the bill will make four key changes to the *Residential Tenancies Act 2010*.

1. New provisions allowing one-strike evictions for 'severe illegal behaviour'
2. New provisions allowing three-strike evictions for 'minor and moderate antisocial behaviour'
3. New provisions allowing anonymous 'neighbourhood impact statements'
4. Changes to the Tribunal's discretion when making orders about 'tenant damage' repair costs

We understand the proposed measures also include a policy change to facilitate the introduction of 'probationary tenancies'.

The Tenants' Union of New South Wales continues to hold a number of concerns about the impact of these proposed measures. In particular, one-strike evictions, neighbourhood impact statements,

proposed changes to 'tenant damage' repair costs, and the proposed process for ending probationary tenancies are contrary to fundamental principles of justice.

One-strike evictions for 'severe illegal behaviour'

The issue

New provisions relating to 'severe illegal behaviour' will mandate the immediate termination of Social Housing tenancies in certain cases, and significantly limit the Tribunal's discretion to decline to make termination orders after considering all relevant circumstances in certain other cases.

Under current tenancy law landlords can 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.

This discretion will be removed entirely where a landlord brings these termination proceedings on the basis of three types of offence:

1. Manufacture or distribution of drugs
2. Storage of unlicensed firearms
3. Violence occasioning grievous bodily harm

Where such an offence is proven in the Tribunal, at the civil standard of proof, the Tribunal would be mandatorily required to make orders for immediate termination and possession.

And the discretion will only be available where 'exceptional circumstances' can be found in cases involving the production of child pornography or running an illegal brothel from the premises, and other similar offences.

It remains unclear whether this will apply to all tenancies, or will only be available to social housing landlords.

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.

- Where criminal justice outcomes have already been applied, and justice served. Where an offence has resulted in any kind of sanction from the criminal justice system – whether custodial or non-custodial in nature – the termination of a tenancy amounts to a form of 'double jeopardy'. Because housing assistance is only available to people who are at risk of homelessness, the loss of assistance is a severe outcome. In many cases it would be disproportionate to the likely criminal justice outcome, forcing NCAT to produce results that are more punitive than the criminal justice system would impose. And where a custodial sentence is likely to exceed three months, FACS Housing policies readily allow for the termination of tenancies (see 'acceptable absences', FACS Housing 'Tenancy Policy Supplement').

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, where arrangements for rehabilitation will be disturbed, and where criminal justice outcomes have already been applied. 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.

Some of the injustices that would result from removing the Tribunal's discretion are clearly demonstrated in two recent cases – the first from the Consumer, Trader and Tenancy Tribunal, the second from its successor the New South Wales Civil and Administrative Tribunal.

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. The NSW Court of Appeal overturned that decision (*Cain v New South Wales Land and Housing Corporation* [2014] NSWCA 28), affirming 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.'

Lisa Jones (*NSW Land & Housing Corporation v Jones*) [2014] NCAT (unreported))
The Tribunal considered its discretion and declined to terminate Ms Jones' tenancy, even though she had allowed two members of her extended family to dry a large amount of marijuana at her premises.

In considering the matter, the Tribunal took into account Ms Jones' personal history. A survivor of sexual assault and domestic violence against her as a child and as an adult, she had recently been subject to a violent sexual assault in her home. This was a significant setback to her recovery, and it was in this context that she was asked to allow some marijuana to be dried in her home.

The Tribunal's written reasons indicate that Ms Jones made a regrettable decision that she could not undo, in circumstances where she was vulnerable. She was arrested and sentenced for her part in the matter. Her parole officer said she had cooperated with everything that had been required of her – including rehabilitation and counselling programs, home visits without notice, and random drug testing. The parole officer said evicting Ms Jones would be like "pulling the rug out from under her … Making her homeless would be creating a problem we are trying all the time to fix."

By exercising its discretion and preventing the landlord from evicting her, the Tribunal has allowed Ms Jones to continue along her long process of recovery. And in making this decision the Tribunal considered four previous cases in which the Tribunal did not exercise its discretion, determining that Ms Jones' matter could be distinguished in a number of critical ways. Ms Jones' case demonstrates both the necessity of the Tribunal's discretion, and the caution with which it is applied.

Three-strike evictions for 'minor and moderate antisocial behaviour'

The issue

In addition to existing provision relating to 'antisocial behaviour', new provisions will allow social housing landlords to impose a 'three strikes' policy for less severe antisocial behaviour.

Under current tenancy law, landlords may give a tenant a termination notice on the ground that the tenant has breached the tenancy agreement, including causing or permitting a nuisance or

annoyance (section 51(1)(b), RT Act). If the tenant does not vacate, landlords may apply to the Tribunal for orders terminating the tenancy. In cases where a tenant has threatened, abused, intimidated or harassed another person landlords may apply directly to the Tribunal without the need for a notice of termination (section 92, RT Act).

Social housing landlords currently deal with such situations by investigating complaints about antisocial behaviour. Where complaints are found to be valid, and cannot be resolved in an informal way, social housing landlords take the steps outlined above, as is appropriate.

The bill will allow current practice to continue for 'severe antisocial behaviour', and will introduce a new response to 'minor and moderate antisocial behaviour'. Social housing landlords will be able to issue written warnings ('strikes'), as a matter of policy, after investigating a complaint about antisocial behaviour. Presumably, such warnings would be used in cases where the behaviour is not so severe that the matter should be taken directly to the Tribunal, or where there is not enough evidence to do so.

If a tenant receives three 'strikes' within a 12-month period, the social housing landlord will be able to commence termination proceedings in the Tribunal. When deciding such matters, the extent to which the Tribunal must consider the behaviour on which the third strike is based, rather than the mere fact that a tenant has received three strikes within twelve months, remains unclear.

Our concerns

A 'three strikes' policy will gear social housing landlords' responses to problems in tenancies even more strongly towards termination.

Social housing landlords are already heavy users of termination proceedings, including in relation to interpersonal disputes between tenants. Because all or most of the residents of a social housing building or estate have tenancy agreements with a common landlord, these disputes are apt to 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 social housing landlords to respond to complaints, in terms of breaches of tenancy agreements and racking up three strikes. It will detract from other ways of dealing with disputes, such as organising referral to appropriate support services, participation in conciliation, talking informally, or simple tolerance.

Anonymous 'neighbourhood impact statements'

The issue

New provisions will allow social housing landlords to produce 'neighbourhood impact statements' allowing tenants to give anonymous evidence against neighbours who they accuse of criminal or antisocial behaviour. We understand these will be used as evidence in the Tribunal.

But the Tribunal will not be able to consider neighbourhood impact statements until after questions of breach have been determined – that is, neighbours on whose evidence landlords rely to establish that antisocial behaviour has occurred will not be able to present that evidence in this way. Instead, the Tribunal will consider neighbourhood impact statements when deciding what remedy should apply to a breach, once a breach has been proven. Neighbourhood impact statements could be used to persuade the Tribunal not to exercise its discretion on termination – where available – because of the alleged impact of a tenant's behaviour on neighbours who may remain anonymous.

Our concerns

Neighbourhood impact statements will offer very little to social housing landlords and tenants who wish to tackle crime and antisocial behaviour, but may be used for purposes other than intended in the bill.

They may induce feuding neighbours to make bold statements about one another under cover of anonymity, rather than encouraging the resolution of disputes. And where such statements uncover genuine instances of criminal or antisocial behaviour – that would have not have been discovered otherwise – they may simply lead to frustration. Neighbours who provide statements, but are not prepared to participate in Tribunal proceedings, will continue to find their information to be of limited value; and social housing landlords will still have to find other evidence to rely on to prove allegations against criminal and antisocial tenants.

Where other evidence can be used to establish a breach, anonymous neighbourhood impact statements will add no value to proceedings. If the Tribunal's discretion is removed, as is proposed for cases of severe illegal behaviour, they will simply not be required. And in cases where discretion is retained the Tribunal should give no weight to claims contained in a neighbourhood impact statement that are significant enough to sway it, but are disputed by a tenant and cannot be tested.

Tribunal orders about 'tenant damage' repair costs

The issue

New provisions will prevent the Tribunal from considering evidence, other than that produced by social housing landlords, to establish any costs arising from property damage caused by tenants. As we understand it, the Tribunal will no longer be able to consider evidence that a social housing landlord could have achieved a repair at a rate cheaper than they have obtained.

Our concerns

The proposed changes will overturn a long established common law principle: a wronged party has a duty to mitigate loss when claiming damages for a breach of contract. Put another way, there is no entitlement to be compensated for expenses that can be reasonably avoided. This proposal will change this. Social housing tenants will have to pay whatever their landlords' say their contractors charge for repairs, with no regard for competition.

Probationary tenancies

The issue

Certain social housing tenancy agreements will be subject to probationary periods that can be terminated without grounds.

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 proposed reforms will make these agreements subject to a 12-month probationary period. Eligible tenants – ie those with 'high support needs' and 'support needs' that are likely to continue – will be given 12-month fixed term agreements initially. If, during the course of this initial period, a tenant's conduct is called into question, their tenancy will be reviewed. And if, as a result of that review, a tenancy manager is of the opinion that the tenancy should not continue, a notice will be issued to terminate the tenancy at the end of the fixed-term, without grounds (section 84, RT Act).

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.

Further comment

The Tenants' Union of New South Wales will issue a further comment, addressing the details of the Government's antisocial behaviour reforms bill, if it is introduced into Parliament.