TENANTS' UNION OF NSW

BRIEFING:

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

September 2015

The *Residential Tenancies and Housing Legislation Amendment (Public Housing - Antisocial Behaviour) Bill 2015* has been passed, with amendments, in the Legislative Assembly. It must now be considered in the Legislative Council.

This Briefing looks at the Bill in detail. It considers the Government's amendments and the Opposition's proposed amendments.

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Summary

The *Residential Tenancies and Housing Legislation Amendment (Public Housing – Antisocial Behaviour) Bill 2015* has passed, with amendments, in the Legislative Assembly. A number of further amendments have been proposed. These must now be considered in the Legislative Council.

The Tenants Union of New South Wales does not support the Bill. It will make unnecessary changes to the law, and will undermine the independence of the NSW Civil and Administrative Tribunal (NCAT).

The Bill should be withdrawn. Instead a genuine process of consultation with tenants, housing advocates, social housing landlords, and other interested stakeholders should be embarked upon to develop and implement strategies to improve cohesion and resilience in neighbourhoods where there are high degrees of disadvantage.

One-strike eviction provisions will remove NCAT's discretion not to terminate a tenancy where to do so would be an unjust outcome, in matters concerning alleged unlawful conduct of tenants and occupants of social housing.

- The Government's amendment will restore NCAT's discretion in a very narrow set of circumstances, such that a tenant may not be liable for the actions of another occupant in some cases.
- The Opposition's proposed amendment would restore NCAT's discretion in a broader set of circumstances, such that a tenant may not be liable for the actions of another occupant if they can demonstrate a lack of knowledge of, or control over, the occupant's behaviour. It would also allow the Tribunal to consider whether the termination of a tenancy would cause undue hardship to other occupants.

Three-strike eviction provisions will allow social housing landlords to issue "strike notices" to tenants to allege a breach of agreement that is not sufficient to terminate a tenancy, and specifically mind NCAT to consider such breaches when deciding any subsequent application for termination on breach of agreement grounds.

- The Government's amendment will increase the minimum time period that a landlord may require a tenant to respond to a strike notice from 14 to 21 days.
- The Opposition's proposed amendment will increase the minimum time period that a landlord may require a tenant to respond to a strike notice from 14 to 28 days, and will clarify that a landlord may give a longer period at their discretion. It will also require NCAT to consider any remedies that have been applied to earlier breaches when considering an application for termination on the grounds of breach.

Evidentiary certificates will limit the nature of evidence NCAT can consider in relation to allegations of breach as outlined in strike notices, and will prevent NCAT from considering evidence from tenants in relation to the reasonable cost of repair work for which they are liable.

- The Government has made no amendment to these provisions.

- The Opposition's proposed amendment would allow NCAT to consider material other than evidentiary certificates where a tenant has a reasonable explanation for not responding to a strike notice in the time required by the landlord.

Neighbourhood impact statements will allow social housing landlords to produce, and submit to NCAT in termination proceedings, anonymous evidence of the impact of a tenant's behaviour on neighbours and others.

- The Government's amendment will make it clear that such statements may only be used to demonstrate the impact on neighbours of a tenant's breach, rather than as substantive evidence of breach.
- The Opposition's proposed amendments would ensure that a tenant is entitled to a copy of a neighbourhood impact statement if submitted in NCAT proceedings against them, and afforded an opportunity to respond.

Orders for possession provisions will remove NCAT's discretion to suspend possession orders for more than 28 days, when making an orders to terminate social housing tenancy agreements.

- The Government has made no amendment to these provisions.
- The Opposition's proposed amendments would limit NCAT's discretion to suspend possession orders to 28 days where termination orders are made on the grounds of a tenant's misconduct, and 60 days in other cases.

Rent subsidy adjustment provisions will overturn a recent NSW Court of Appeal decision and make debts arising from social housing landlords' administrative decisions actionable as rent arrears.

- There are no amendments or proposed amendments to these provisions.

Introduction

The *Residential Tenancies and Housing Legislation Amendment (Public Housing – Antisocial Behaviour) Bill 2015* was introduced into the New South Wales Legislative Assembly, without stakeholder consultation, on August 5th 2015. The Bill attracted a considerable level of debate, with contributions from 41 Members of Parliament in the Legislative Assembly. Both the Government and Opposition tabled amendments to the Bill, and it passed with the Government's amendments on September 17th 2015. It must now be considered in the Legislative Council.

This briefing looks at the Bill in detail, and considers the impact of the Government's amendments and the Opposition's proposed amendments.

Our recommendation is unchanged

Regardless of any improvements provided or proposed by amendments to date, this Bill proposes to make unnecessary changes to the law. Landlords, and particularly social housing landlords, are already vested with sufficient powers to terminate tenancies on the grounds of unlawful or antisocial behaviour. The Bill should be withdrawn, and instead a genuine process of consultation with tenants, housing advocates, social housing landlords and other interested stakeholders should be embarked upon, to develop and implement strategies to improve cohesion and resilience in neighbourhoods where there are high degrees of disadvantage.

General comment on the Bill

The Bill proposes to amend the *Residential Tenancies Act 2010* to introduce 'one-strike' and 'three strike' eviction schemes for social housing tenancies; allow anonymous statements about neighbours to be provided to social housing landlords; and influence the way evidence is presented and considered in NCAT for matters concerning social housing tenancies.

In practical terms, these changes will remove NCAT's ability to act as the independent dispute resolution forum in cases involving social housing tenancies. If passed, the bill will render NCAT incapable of delivering just outcomes in many cases. Rather than consider and determine social housing tenancy disputes as the independent arbiter, NCAT will be reduced to an administrative tool for social housing landlords.

The Bill will also make debts arising from rental subsidy recalculations actionable as rent arrears. But rental subsidy adjustments cannot be easily reviewed, and social housing tenants will have no practical recourse when landlords seek to end tenancies on the basis of debts resulting from administrative errors.

Current substantive law

The Bill proposes to amend the conditions under which a social housing tenant's behaviour can affect their contractual and proprietary interests. In considering this, it is worth noting how the law operates currently in relation to matters the Bill will affect.

Section 87 of the Act allows a landlord to issue a notice of termination on the grounds that a tenant has breached their residential tenancy agreement. This includes breaches of provisions at section 51, including:

- using the premises for an illegal purpose
- causing or permitting a nuisance
- interfering with the reasonable peace, comfort and privacy of a neighbour
- intentionally or negligently causing damage
- non-payment of rent

Where a tenant does not vacate in accordance with a notice of termination, a landlord may apply to NCAT for termination and possession orders, and in such cases NCAT is directed to consider a range of circumstances to determine whether the breach justifies termination. These include:

- the nature of the tenant's breach
- any previous breaches
- any steps taken by the tenant or landlord to remedy the breach
- the previous history of the tenancy

These provisions apply to all private rental market and social housing tenancies. Social housing tenancies are subject to the further provision at section 152, which sets out a number of additional factors for NCAT to consider. These include:

- the effects of the tenancy on neighbours and others
- whether a failure to terminate the agreement would subject neighbours or others to unreasonable risk
- the history of the tenancy concerned, and any prior tenancy the tenant has had with a social housing landlord

In addition to the above provisions are sections 90, 91 and 92 of the Act. These sections allow a landlord to bypass the breach provisions, including the need for a notice of termination, and apply directly to NCAT for termination orders. These provisions may be used in circumstances where the tenant or an occupant has:

- caused serious damage to property or injury to a neighbour or the landlord
- used the premises for an illegal purpose
- threatened, abused, intimidated or harassed a neighbour or the landlord

These provisions are sufficient for any landlord seeking to end a tenancy on the basis of criminal conduct or antisocial behaviour. Of course, ending tenancies and pursuing eviction is only one remedy available to landlords and neighbours experiencing criminal or antisocial behaviour, and the effect of this remedy as a genuine solution to criminal and antisocial behaviour in social housing neighbourhoods cannot be assumed. Any suggestion that the current law is not functioning properly – or indeed that the solution to neighbourhood dysfunction lies within the powers available to landlords under the *Residential Tenancies Act 2010* – must be considered in this context.

Detailed comments on the Bill

One-strike evictions

Sections 90 and 91 of the Act allow NCAT to consider the circumstances of each case when deciding applications brought under those sections. NCAT may look beyond the conduct that has triggered the application – which will relate to either serious damage or injury being caused to certain property or persons by the tenant or another occupant, or the premises being used for an unlawful purpose by the tenant or another occupant – and decide not to make a termination order if ending the tenancy would be an unjust outcome in the circumstances of the case.

This discretion provides an important check against landlords pursuing evictions without full regard to the facts. In previous cases where NCAT's discretion has been exercised in favour of retaining a tenancy it has prevented the eviction of:

- tenants who were not aware of or were unable to control the behaviour of another occupant
- other household members, such as a tenant's spouse and children, who were not responsible for or aware of the behaviour of the tenant (who was removed from the premises by a custodial sentence)
- tenants for whom a criminal court had determined rehabilitation in the home was a suitable and just outcome

- tenants for whom a criminal court had applied some other sanction, where the loss of a social housing tenancy would be disproportionate to that outcome

The Bill will add new provisions to the Act (at clause 154D) that will remove or substantially restrict NCAT's discretion when deciding matters under sections 90 and 91, where social housing tenancies are concerned. Termination orders will become mandatory in such matters, despite any circumstances that NCAT might be otherwise minded to consider.

When introducing the Bill to the Legislative Assembly, the Minister for Social Housing, the Hon. Brad Hazzard MP, cited 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."*

But the Bill will not produce this outcome. The applications that can be made under sections 90 and 91 of the Act are triggered by acts or omissions of either the tenant or "another person who although not a tenant is occupying or jointly occupying the premises". If NCAT may no longer exercise the discretion provided at sections 90 and 91 for social housing tenancies, it will have no choice but to terminate the mother's tenancy because of the conduct of her son, even if she was not aware of his conduct, or unable to control it.

Several Members of the Legislative Assembly who spoke in favour of the Bill gave assurances that Family and Community Services (FACS) would look after vulnerable people, and ensure any innocent parties caught up in a "one strike eviction" would be rehoused. It is worth considering the complexity that is inherent in this undertaking, as a recent example from a Tenants' Advice and Advocacy Service demonstrates:

> *"A young Aboriginal woman had lived in her property for more than a decade, before a disagreement broke out between her and her neighbour. An incident occurred, for which there are differing accounts, and she ended up with an assault charge against her. Her four children were removed from her care. Her tenancy was terminated by an NCAT order. She sought and received assistance to have the NCAT decision set aside, and FACS agreed not to enforce the termination order. FACS are now asking her to relocate from the four bedroom home that accommodated her and her children, to a one bedroom home. Throughout all of this, she is trying to have the care of her children restored to her."*

Government amendment

In response to concerns raised by a number of stakeholders the Government amended clause 154D of the Bill before it was passed in the Legislative Assembly. The amendment means that NCAT will retain its discretion not to terminate a tenancy when an application is made on the basis of injury or damage caused by a person other than the tenant (section 90), but not where a person other than the tenant has used the premises for an illegal purpose (section 91). The

hypothetical mother living with a deceitful or controlling drug-dealing son, such as the Minister raised in his introductory remarks, will still be unable to ask NCAT to consider the circumstances of the case and decline to terminate the tenancy.

Opposition amendment

The Opposition has proposed an amendment to clause 154D that will go some way further towards protecting the hypothetical 'mother with a wayward son' from an unjust eviction. The Opposition's proposed amendment would mean the parts of clause 154D that remove NCAT's discretion under sections 90 and 91 do not apply in situations where an application for a termination order is triggered by the conduct of an occupant who is not a tenant, unless NCAT is satisfied the tenant could or should have been aware of the conduct, and was complicit or did not try to prevent or report it.

The Opposition's proposed amendment would also ensure NCAT retains discretion to consider the circumstances of the case where it believes a termination order made under section 90 or 91 would lead to undue hardship being suffered by certain other household members. This could include a tenant's spouse or children who are not responsible for or aware of the tenant's behaviour that results in an application for termination orders.

Three-strike evictions

The Act currently provides a mechanism – at sections 87 and 152, discussed above – by which a number of minor or moderate breaches of agreement, over the course of one or more social housing tenancies, could lead NCAT to decide that terminating a tenancy is justified. For example, social housing landlords may apply to NCAT for termination orders on the basis of a minor or moderate breach of a tenancy agreement, and seek to demonstrate that the breach forms part of a pattern of behaviour, that the pattern has had a serious adverse effect on neighbours or other persons, and that the failure to terminate the tenancy would subject neighbours or property to unreasonable risk.

Essentially, this is a matter of evidence. But it is also a matter of policy for social housing landlords, as to how and when they will put tenants on notice of an alleged breach of agreement; and how and when they will issue a notice of termination and, if necessary, apply to NCAT for a termination order.

The Bill will amend this mechanism. It will require NCAT to consider more specifically the possibility that an alleged minor or moderate breach forms part of a pattern of behaviour; and it will introduce "strike notices" to facilitate the process by which evidence of a tenant's behaviour is produced, while putting a tenant on notice that the social housing landlord considers the subject behaviour to be in breach of their tenancy agreement.

Strike notices will be issued to tenants who are alleged to have breached their tenancy agreement. Clause 154C of the Bill sets out a process by which tenants may respond to and appeal against strike notices, but on the third strike within a twelve month period the landlord will be able to record a strike without notice, and issue a section 87 notice of termination to the tenant. If the tenant does not vacate in accordance with the notice, the landlord may apply to NCAT for a termination order. Clause 154C of the Bill will require NCAT to consider any breaches of a prior social housing tenancy agreement with the same or different landlord; and whether a series of breaches justifies termination where each

breach in isolation would not; as well as the current considerations at section 152, which will be removed to clause 154E.

Several Members of the Legislative Assembly who spoke in favour of the proposed "three strike evictions" referred to similar schemes that have been established in other Australian jurisdictions. Reference was made to Queensland and Western Australia where it is said that in cases where a first strike notice is issued, more than 80 per cent do not proceed to a third strike. But reports into these schemes by the University of Queensland's Institute for Social Science Research and the Western Australian Equal Opportunity Commission have said that, without any comparative data to measure the effect of the policies and practices these three strike schemes have replaced, it is difficult to conclude whether they have had any effect on tenants' behaviour. It is also difficult to know whether the 20% of first strike recipients who went on to receive a third strike did so because they did not modify their behaviour, or because they lacked the capacity or wherewithal to successfully contest the grounds upon which the strike notices were issued.

FACS circulated data relating to the Western Australian scheme shortly after the New South Wales Bill was introduced. These suggest the incidence of antisocial behaviour has not reduced, whereas complaints about antisocial behaviour did increase marginally – from 12,988 in 2011-12 to 13,324 in 2013-14. The number of strikes recorded against tenants over the period has also increased:

- 906 compared to 1,340 first strikes
- 382 compared to 507 second strikes
- 110 compared to 171 third strikes

Government amendment

In response to concerns that the proposed process for responding to or appealing a strike notice would create an administrative burden for tenants – that would be particularly onerous for anyone with low literacy skills, limited support networks, poor mental health, or otherwise hindered from responding to a notice within the timeframe required by a landlord – the Government amended the relevant clauses 154C(2)(g) and 154C(4)(b). These amendments will require landlords to give tenants at least 21 days to respond to or appeal a strike notice, rather than 14 days.

Opposition amendment

The Opposition's proposed amendment would also increase the minimum timeframe in which a social housing landlord could require a tenant to respond to or appeal a strike notice, from 14 days to 28 days. Additionally, the Opposition's proposed amendment would make it clear that 28 days is a minimum timeframe, and that the a social housing landlord would be at liberty to allow a longer timeframe.

The Opposition has also proposed to amend clause 154B, to require NCAT to consider any steps taken by the tenant to remedy a breach of a previous tenancy agreement, or a series of breaches that would not be sufficient to justify termination if each were taken on its own. This would be an important safeguard for tenants facing termination for a series of minor or moderate breaches, particularly where they have modified their behaviour following a previous strike notice.

Evidentiary certificates

The Bill will introduce two new "evidentiary certificates" to allow social housing landlords to certify that certain evidence is conclusive proof of relevant matters. It will do this in relation to applications for termination where a tenant has accrued three strikes against them, and for compensation for the cost of repairs to damaged property.

In relation to strikes, clause 156A will introduce an evidentiary certificate allowing social housing landlords to certify that the details contained in a strike notice are conclusive proof of the breach alleged in the notice, as long as the Tribunal is satisfied that the tenant did not respond to or appeal the notice within the time required by the landlord. Where an evidentiary certificate applies, tenants will be limited in how they may respond, and may be prevented from presenting evidence that hasn't already been considered by the landlord. This presents a particular problem for tenants who are unable to respond to or appeal a strike notice because they lack capacity, or are otherwise hindered from engaging in the process. This could lead to NCAT being denied the opportunity to consider all relevant matters when making a decision to terminate a tenancy.

In relation to the cost of repairs to damaged property, clause 156B will allow a social housing landlord to determine the reasonable cost of work by producing a certificate that the Tribunal must take as conclusive proof. This assumes that social housing landlords' are charged commercially competitive rates by their repairs and maintenance contractors, but this is not always the case. The NSW Land and Housing Corporation has identified this as an issue, and intends to change the pricing structures within its contracts to address it. But not all social housing landlords have adopted the Land and Housing Corporation's contracting structures, nor do they enjoy the same economies of scale. It cannot be assumed that all social housing landlords are able to achieve the best price for repairs and maintenance simply because they are social housing landlords.

Further, the bill provides no restrictions or limitations to this provision, or any indication as to who will be delegated to produce such certificates. It will be open to misuse.

Opposition amendment

The Opposition has proposed an additional clause 156A(4), that would go some way to resolving the issue of a tenant who lacks capacity or is otherwise hindered from engaging in the process around a strike notice, by allowing NCAT to consider material other than evidentiary certificates where a tenant provides a reasonable explanation for failing to respond to or appeal a strike notice in the time required by the landlord.

Neighbourhood impact statements

The Bill will introduce "neighbourhood impact statements" to allow social housing landlords to produce, and submit to NCAT in termination proceedings, anonymous evidence of the impact of a tenant's behaviour on neighbours and others. The purpose of such a statement would be to persuade NCAT to terminate a tenancy once it finds a tenant to be in breach, in cases where it has discretion not to terminate.

It is difficult to see how neighbourhood impact statements will be of any value to social housing landlords, or to tenants who wish to offer anonymous evidence

against their neighbours. In matters where NCAT's discretion on termination is to be removed, they will simply serve no purpose. And in matters where NCAT retains its discretion, the production of evidence that has been provided to the applicant in confidence, and cannot be tested by either the respondent or the Tribunal, should carry little weight in any proceedings.

Government amendment

In response to concerns that social housing landlords may seek to use neighbourhood impact statements to establish a tenants' breach of an agreement, rather than to demonstrate the impact of a breach on neighbours, the Government has amended clause 154F(1) of the Bill. This amendment will ensure that a neighbourhood impact statement may only be submitted to NCAT after it has made a finding of breach.

Opposition amendment

The Opposition's proposed amendment will add a new clause 154F(3), which would ensure that a tenant who is a respondent in termination proceedings for breach is entitled to a copy of a neighbourhood impact statement submitted by the applicant, and given an opportunity to respond.

Orders for possession

Section 83 of the current Act provides that where NCAT makes an order terminating a residential tenancy agreement it must also make an order specifying the day on which possession of the property is to be returned to the landlord. Section 114 of the Act allows NCAT to suspend the operation of a possession order for a "specified period", taking into account the relative hardship such a suspension might cause the landlord or tenant. NCAT does not exercise its current power to suspend a possession order for an extended period, unless it is in the interests of justice to do so.

The Bill proposes, at clause 154G, to limit the suspension of possession orders to a maximum of 28 days for social housing tenancy agreements that are terminated by an NCAT order.

Opposition amendment

The Opposition has proposed an amendment that would allow NCAT to distinguish between agreements that are terminated as a result of a tenant's serious misconduct and those that are terminated for other reasons. This would mean that where a tenancy is terminated on the grounds of serious misconduct, NCAT would be required to limit the suspension of a possession order to no more than 28 days. In all other cases, NCAT would be required to limit the suspension of a possession order to no more than 60 days.

Rent subsidy adjustments

The Bill will overturn the NSW Court of Appeal's decision in *New South Wales Land and Housing Corporation v Diab* [2015] NSWCA 133 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. A mechanism to review a landlord's decision to cancel or vary a 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, Part 7 of the *Housing*

Act 2001 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.

Conclusion

This *Residential Tenancies and Housing Legislation Amendment (Public Housing – Antisocial Behaviour) Bill 2105* proposes to make unnecessary changes to the law, and is unnecessarily punitive. Landlords, and particularly social housing landlords, are already vested with sufficient powers to terminate tenancies on the grounds of unlawful or antisocial behaviour. By removing NCAT's discretion not to terminate tenancies in cases where it would be unjust to do so, and restricting NCAT's ability to consider all the available evidence in cases concerning social housing tenancies, this Bill will enhance those powers to the point that NCAT may no longer function as a forum for independent dispute resolution.

The Bill should be withdrawn. Instead a genuine process of consultation with tenants, housing advocates, social housing landlords, and other interested stakeholders should be embarked upon to develop and implement strategies to improve cohesion and resilience in neighbourhoods where there are high degrees of disadvantage.