

OBJECTIONABLE BEHAVIOUR EVICTIONS IN SOCIAL HOUSING

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I INTRODUCTION

This report is produced by student researchers for Caxton Legal Centre as part of the University of Queensland Pro Bono Centre's Manning Street Project. It seeks to investigate issues arising from Queensland's regulatory framework regarding the termination of social housing tenancies on the grounds of objectionable behaviour. Although it is acknowledged that tenants in properties managed by privately funded public housing providers are also affected by the same framework, the scope of this project's research is limited to the implementation of this framework by the Department of Housing and Public Works (the Department) as a key provider of public housing.

This document will analyse the current legislative framework, internal policies of the Department, and current trends arising from the reported cases. Though a jurisdictional comparison, this report will uncover the shortcomings of Queensland's current position and make a number of recommendations to improve outcomes for highly vulnerable tenants. These recommendations are targeted at lowering the likelihood of eviction for tenants whose objectionable behaviour was involuntary or out of their control. This includes tenants with mental health conditions, disabilities, and Aboriginal and Torres Strait Islander tenants.

II QUEENSLAND

A Current Legislative Position

Under the *Residential Tenancies and Rooming Accommodation Act* (RTRAA),¹ the Department has statutory powers to terminate a tenancy agreement in several circumstances, including in instances of 'objectionable behaviour' or 'serious breaches'.

Section 290A of the RTRAA allows the Department to issue a notice to leave for serious breaches which are defined as:

- a) Illegal activity; or
- b) Intentional or reckless damage to the premises, endangering another person, or significant interference with peace comfort and privacy of another tenant.

Under this section, the lessor may form a reasonable belief that the tenant has engaged in illegal behaviour whether or not anyone has been convicted of an offence in relation to the activity.

Section 297A allows the department to apply to the Queensland Civil and Administrative Tribunal (QCAT) for a termination order to remove the tenant from the premises if there is objectionable behaviour. This is defined under s 297(1) as:

¹ *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld).

- Harassed, intimidated or verbally abused the lessor, or their agent, or persons occupying nearby premises
- Caused a serious nuisance to persons occupying nearby premises
- Intentionally or recklessly endangered another person at the premises
- Interfered with the reasonable peace, comfort or privacy of a person occupying nearby premises

For a termination order to be issued there are two factors which must be established. The onus of proof for which falls on the housing provider (generally, the Department) (s345(1)). First, it must be shown the behaviour was objectionable (s297A(1)). Second, the QCAT member must be satisfied that the behaviour justifies termination of the tenancy agreement (s345A(1)(b)). In this assessment, the tribunal may consider (s345A(2)):

- Whether the behaviour was recurrent
- If it was recurrent, the frequency of the behaviour
- The seriousness of harassment, intimidation or verbal abuse

B Background to the Current Position

Sections 290A, 297A and 345A of the RTRAA came into effect on 7 November 2013. Overall, the amended provisions differ significantly from the equivalent sections applying to private residential tenancies and create more onerous obligations on public housing tenancies. A table comparing the provisions applying to private tenancies and public housing tenancies is set out in **appendix I**.

One of the key rationales for the legislative amendments, was to support the implementation of the Government's new anti-social behaviour policy.² These amendments simplify the process through which the Department may commence proceedings for termination of public housing tenancies, and for QCAT to issue termination orders. The second reading speech indicated the provisions were viewed by government as essential for strengthening the ability of the Department and of community housing providers to respond appropriately to antisocial behaviour and illegal activity taking place in public housing properties.³ The government's position was that QCAT's discretion in termination order proceedings was too broad, and as a result was not terminating tenancy agreements on grounds of anti-social behaviour as frequently as expected by the government⁴. Section 297A was intended to be broader than s 297 to ease the removal of tenants in in

² Explanatory Memorandum, *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (Qld), 1.

³ Queensland, *Parliamentary Debates*, Legislative Assembly, 30 October 2013, 3720 (Honourable TL Mander).

⁴ *Ibid.*

circumstances of anti-social behaviour in public housing properties.⁵ Further, the Department considered that the existing provisions were not able to be used to deal with situations where illegal activity was occurring and the Department had to rely on other avenues.⁶ Section 290A was intended to cover this gap.

The report of the Transport, Housing and Local Government Committee summarised the concerns of a number of interested parties that submitted responses to the Bill.⁷ Their concerns largely centred on how the Bill would affect vulnerable tenants with a disability, mental illness or medical condition. The Tenant Advice and Advocacy Service Inner North submitted that the amendments did not give any additional powers because the existing provisions adequately dealt with illegal activity and it was unjust for there to be a "different form of tenure for social housing tenants to private tenants."⁸ The Tenants Union of Queensland submitted that "adding to social housing tenants' responsibilities by making them accountable for the behaviour of their guests, occupants and visitors is unreasonable."⁹ The Anti-Discrimination Commission Queensland also raised the following concerns:

Some tenants with certain mental health or intellectual disabilities are at higher risk of and more vulnerable to being manipulated or used by unscrupulous individuals who may be involved in illegal activity or engage in other objectionable behaviour. In addition, Aboriginal and Torres Strait Islander persons, and persons who come from cultures where residing within extended families is the norm, may also be unfairly adversely affected by the provisions where the anti-social behaviour or other problems are the behaviours of members of the tenant's extended family.¹⁰

C Departmental Policies

When the amendments were introduced, the internal policy of the Department was the Anti-Social Behaviour Policy (ABS), also known as a three strikes policy. Under this policy,

⁵ Explanatory Memorandum, *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (Qld), 14-15.

⁶ *Ibid.*

⁷ Transport, Housing and Local Government Committee, Queensland Legislative Assembly, *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (2013).

⁸ Transport, Housing and Local Government Committee, Parliament of Queensland, *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (2013) 5.

⁹ Transport, Housing and Local Government Committee, Parliament of Queensland, *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (2013) 11.

¹⁰ Transport, Housing and Local Government Committee, Parliament of Queensland, *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (2013) 11.

action would be taken against the tenant if three strikes of substantiated instances of anti-social behaviour were accumulated within a 12-month period.¹¹

This was replaced by the Fair Expectation of Behaviour policy on the 1st February 2016 which remains in operation today.¹² Under this policy, the Department may take action against a tenant for repeated instances of 'disruptive behaviour'.¹³ Disruptive behaviour is categorised as either minor, serious, or dangerous and severe, with a warning being issued for each confirmed incident.¹⁴ See **Appendix II** for an illustration of the policy's operation. In addition to issuing a warning, the Department will link the tenant with support agencies who can support the tenant to meet their tenancy responsibilities.¹⁵ The tenant may also be required to enter into a Tenancy Management Plan to indicate their understanding of the importance of reducing their disruptive behaviour.¹⁶

D Case Law

The following summaries constitute all reported cases able to be located from the Queensland Civil and Administrative Tribunal (QCAT) and the Queensland Civil and Administrative Tribunal Appeals (QCATA) pertaining to terminations from public housing for objectionable behaviour since the introduction of the 2013 amendments.

*State of Queensland through the Department of Housing and Public Works v Gray*¹⁷

The Department applied for a termination order against Gray on grounds of objectionable behaviour, following a warning notice and notice to remedy breach issued in October 2015 and July 2017 respectively. Complaints were made by five neighbours regarding fighting, males coming and going, yelling, obscene language, domestic disturbances and police attending the residence. Gray's former partner, against whom a Domestic Violence Order (DVO) had been made, had just been released from prison and thus she was concerned for her safety. Some of the disturbances and police call-outs complained of occurred because of Ms Gray's concern about her former partner and other unknown males coming to the premises. It was recognised by the court that Gray was also suffering from several psychological and emotional conditions and that she would suffer financial hardship if forced into the private rental market. However, the Tribunal was satisfied Gray had engaged

¹¹ Andrew Jones et al, 'Review of systemic issues for social housing clients with complex needs- Prepared for the Queensland Mental Health Commission' (Research Report, Institute for Social Science Research, September 2014) 4.

¹² Queensland Government, *Tenant Behaviour* (7 March 2016) Department of Housing and Public Works <<https://www.qld.gov.au/housing/public-community-housing/tenant-behaviour>>.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ [2017] QCAT 475.

in objectionable behaviour and that this behaviour justified termination of the tenancy. Applying the *Simonova* decision, QCAT held objectionable behaviour as a manifestation of mental illness is caught by the scope of the relevant provisions.

*State of Queensland through the Department of Housing and Public Works v Simonova*¹⁸

The Department applied for a termination order against Simonova on grounds of objectionable behaviour, relying on the tenant's 'noisy behaviour'. The tenant suffered from chronic paranoid schizophrenia and post-traumatic stress disorder. She also suffered from polyps on her vocal chords, causing her voice to have a 'fog-horn like quality'. Medical evidence was given that the tenant was not in voluntary control of the disruptive behaviour subject to the complaints. The termination order was granted, as the Member was satisfied the elements of objectionable behaviour were made out and termination was justified. Objectionable behaviour as a manifestation of mental illness was held to be within the scope of the relevant provisions. Further, it was emphasised that the fact a tenant would likely be rendered homeless is not a bar to making a termination order.

The decision was affirmed on appeal in the QCAT Appeals division,¹⁹ and is currently under appeal to the Queensland Court of Appeal. A stay has been granted to delay the effect of any termination orders until after the appeal has been finalised.²⁰

*State of Queensland through the Department of Housing and Public Works v Boyd*²¹

The Department applied for a termination order against Boyd, an Aboriginal woman, on grounds of the premises being used for 'illegal activity'. Evidence was given of several members of the tenant's family staying at the premises, as well as evidence of drug offences being committed at the property. The Member was satisfied on the evidence that the tenants adult children were permitted to occupy the premises by her. The member was also satisfied that the tenant's adult children had used the premises to engage in illegal activity, namely drug offences. The member found that the termination of the tenancy in the circumstances was justified.

*Department of Housing and Public Works v Roesen*²²

The Department applied to QCAT for a Termination Order against Roesen, on the grounds of 'illegal activity' under s290A. The Department relied on an affidavit from one staff member,

¹⁸ [2017] QCAT 328.

¹⁹ *Simonova v Department of Housing and Public Works* [2018] QCATA 33 (8 March 2018).

²⁰ Application for stay of orders granted: *Simonova v Department of Housing and Public Works* [2018] QCA 60 (27 March 2018).

²¹ [2016] QCAT 79.

²² [2014] QCAT 558.

who stated that Mr Rosen had told her himself that the police executed a 'drug raid' on the property and found 'a kilo of weed'. Further evidence in the form of a neighbour's complaint of 'scary' people coming and going from the unit 'at all hours' 'doing drug', was also relied on. The Queensland Police confirmed raids on the premises in November 2012 and August 2013 where drugs were found. However, in three raids subsequent to August 2013 police did not find any drugs. As, s 290A only took effect from 7 November 2013 and the raid which located drugs occurred in August 2013 the Tribunal refused to grant the Termination Order. The Tribunal held that provision was not intended to have retrospective effect.

*State of Queensland through the Department of Housing and Public Works v Turnbull*²³

The Department applied for a termination order against Turnbull on the grounds of 'illegal activity' under s290A of the Act. The application was based on a letter from the Police, which detailed materials found at the premises which were believed to be used in the manufacture of dangerous drugs. The tenant provided evidence that the items had been left at his property by a third party. The tenant had significant mental health and physical health concerns. He was also noted to have a low IQ. It was accepted by QCAT that the tenant had special needs and complex trauma. According to medical evidence, a secure home was important to managing these symptoms; however, the termination order was granted. It was held the letter from the Police was sufficient to make out the grounds in s290A. The Department is only required to form a reasonable belief that the premises had been used for an illegal activity; a conviction criminal charge is not required.

The tenant applied for leave to appeal the decision and for a stay of the termination order until the appeal was determined. The QCAT appeals tribunal²⁴ refused to grant the state and made orders that because Mr Turnbull had not shown a good arguable case on appeal the appeal would be dismissed unless Mr Turnbull notified the tribunal that he wishes to proceed. No further published decision of the QCAT appeals tribunal could be located.

*Lawler v Department of Housing and Public Works, State of Queensland*²⁵

QCAT had granted a termination order against Lawler on grounds of objectionable behaviour. This decision was appealed on the basis that the Tribunal had erred in finding that the objectionable behaviour complained of justified terminating the tenancy. It was argued the tenant's mental illness was significant contributor to, and explained, the objectionable behaviour. Further, it was argued the termination order would result in homelessness, and lack of assistance to the tenant in dealing with his mental illness. The

²³ [2014] QCAT 442.

²⁴ *Turnbull v State of Queensland through the Department of Housing and Public Works* [2014] QCATA 281

²⁵ [2017] QCATA 21.

QCAT appeals tribunal held no error had been made by QCAT in finding the behaviour justified termination, as it was a matter of discretion to decide what weight to attribute to the consideration of mental illness.

E Current Protections for Vulnerable Tenants

1 Legislation

There are no explicit protections in Queensland legislation for vulnerable tenants facing termination of public housing tenancy agreements on the grounds of objectionable behaviour. There is an indirect protection in that s354A(1)(b) requires that QCAT must be satisfied that the breach justifies termination. However, this discretion is significantly less than what was afforded prior to the 2013 amendments. Furthermore, the reported decisions on termination orders for objectionable behaviour tend to suggest this discretion is not often exercised. A Right to Information (RTI) request to the Department was made by the authors through Caxton Legal Centre requesting data on the frequency of applications for termination orders under s297A of the Act. The entirety of the Department's disclosure is attached in **appendix III**. The data disclosed illustrated that 100 percent of such applications to QCAT in the period of 1 January 2017 to 28 March 2018 were successful.²⁶ This data supports the aforementioned trend evident in the case law. At most, the reported decisions illustrate QCAT will exercise discretion to delay the date at which the termination order would become effective, in order to mitigate hardship upon a tenant.²⁷

2 Departmental Policy

In the same RTI as mentioned above, a disclosure was made of the Department's policy *Disruptive Behaviour- Guidelines for Applying Discretion* (the Guidelines). This is to be read and applied in conjunction with Fair Expectation of Behaviour policy and the 'Fairness Charter' and 'Fairness Principles'. Recognising that some public housing tenants face a number of complex issues, the Guidelines provide that discretion may be applied where an incident of disruptive behaviour is substantiated, but the officer considers that issuing the warning and/or Notice to Leave does not reflect the urgency and/or seriousness of the tenant's mitigating circumstances. On its face, the Guidelines thus illustrate the Department's policies anticipate the need to consider the individual circumstances of tenants facing a form of vulnerability.

²⁶ See appendix III.

²⁷ See, for example, *State of Queensland through the Department of Housing and Public Works v Gray* [2017] QCAT 475.

However, the reported cases in Queensland do not appear to reflect a consistent application of these Guidelines and policies. In almost every case, the tenant had some vulnerability, including incapacities to control the objectionable behaviour in question. However, in all of these cases, the matter had escalated to the point where the Department had applied for a termination of the tenancy. This suggests there are opportunities for improvement in the Department's application of their internal policies.

Furthermore, the Guidelines place emphasis on issues of lack of tenant control over behaviour which may be disruptive. However, this appears mostly to be in the context of mental illness and incapacity to understand the consequences of, and/or prevent, the behaviour in question. The document provides some non-exhaustive examples of anticipated scenarios where discretion over issuing Notices to Leave or warnings may be exercised. However, these are quite narrow in scope. For example, where "...the behaviour is that of a visitor rather than the tenant, and the tenant, *due to having an intellectual disability*, is unable to control the behaviour of the visitor".²⁸ The case law illustrates a tenant may be unable to control behaviour of others on the premises for reasons other than their own mental state. For example, in *Gray* the tenant was unable to control the presence of uninvited persons as she was fearful for her own safety. As such, while the Department's policy does on paper indicate an intention to provide consideration of a tenant's vulnerabilities as mitigating circumstances, this appears to be quite narrow, anticipating application only in quite extreme cases.

F Trends

A previous disclosure of the Department of Housing and Public Works to the Nine Network in March 2016 provided some information regarding the prevalence of evictions and strike notices for objectionable behaviour under the previous 'three-strikes' policy.²⁹ Between 1 July 2013 and 31 December 2015, a total of 4,264 strike notices were issued, with 154 of those being for a third strike. 47 evictions were stated to have occurred on the basis of the three strikes notices for objectionable behaviour during this period.

In the Right to Information request the authors made, data was provided regarding the frequency with which statutory powers to issue Notices to Leave under s290A of the Act and applications to QCAT for Termination Orders under s297A were made.³⁰ Between 1 January 2017 and 28 March 2018, 16 Notices to Leave were issued by the Department under s290A for 'serious breach'. It is unknown what proportion of these were issued in response to anti-

²⁸ See appendix III.

²⁹ See appendix IV.

³⁰ See appendix III.

social behaviour,³¹ and what proportion were issued for property damage,³² or endangering persons on or around the premises.³³ As noted above, all 54 of the Department's applications for Termination Orders were successful. For the same reasons as noted with the Notice to Leave data, it is unclear what proportion of these applications were for 'anti-social behaviour'.³⁴

The fact that 100 percent of applications for Termination Orders made to QCAT in this period were granted is significant, as it illustrates that although the Tribunal members are afforded some discretion in deciding whether the termination is 'justified', this is very rarely exercised. Comparing the two periods of data, 47 evictions were made in the 18-month 2013-2015 period, and 54 terminations were made in the 14-month 2017-2018 period. While this suggests there have been slightly more terminations under the new policy, it is difficult to draw such a conclusion with certainty due to the differing lengths of the two periods.

Unfortunately, given the small number of reported judgments, it is very difficult to analyse broad trends over time in the case law. From the information available, the central issue with Queensland's current approach to dealing with termination on the grounds of objectionable behaviour is its failure to protect vulnerable tenants. There are no explicit protections in the legislation, and while provision is made for QCAT to exercise some discretion in making termination orders, the data clearly indicates this is rare. Additionally, while the Department's policies make it clear that their staff should exercise discretion in circumstances where the tenant is facing a vulnerability, this does not appear to be borne out in the case law as in the majority of the reported cases, the tenant was suffering from some form of vulnerability.

Overall, there appear to be two common instances in which tenants are adversely affected by the objectionable behaviour provisions. First, where the tenant's behaviour is not voluntary. This often occurs where the tenant is suffering from a physical disability or mental illness, and the behaviour complained of is a manifestation of this. Second, where the behaviour complained of is out of the control of the tenant. This may arise from unwanted or uninvited guests at the premises, or where socio-cultural obligations mean that it is unreasonable for the tenant to ask another occupant to leave. Aboriginal and Torres Strait Islander tenants are particularly susceptible to the latter circumstances, as familial and kinship obligations extend beyond that of immediate family.

³¹ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), s290A(1)(b)(i).

³² *Ibid*, s290A(b)(1)(i).

³³ *Ibid*, s290A(b)(1)(iii).

³⁴ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s297A(1)(c).

III Jurisdictional Comparison

A tabular summary of the jurisdictional comparison is set out in **appendix V**.

A New South Wales

1 Legislation

Pursuant to s90 of the *Residential Tenancies Act 2010* (NSW) (the NSW Act), the New South Wales Civil and Administrative Appeals Tribunal (NCAT) may make a termination order if it is satisfied that the tenant or another person occupying the premises has intentionally or recklessly permitted:

- a) Serious damage to the premises or neighbouring premises
- b) Injury to the landlord or landlord's agent, employee or contractor of the landlord or his agent, or neighbour

Under s91, the Tribunal may make a termination order if it is satisfied that the tenant or another person occupying the premises has intentionally or recklessly permitted:

- a) a) The use of the premises for the purposes of manufacture, sale, cultivation or supply of a prohibited drug within the meaning of the *Drug Misuse and Trafficking Act 1985*
- b) The use of the premises for any other unlawful purpose

In October 2015, two key amendments were made to the NSW Act, namely the introduction of a three strikes termination scheme, and a mandatory termination scheme that removes the discretion of NCAT to terminate a social housing tenancy in certain circumstances.³⁵ These amendments have been criticised for their significant restrictions on the discretion of NCAT to take into account some of the broader factual circumstances of each case.³⁶ It has been argued by Chris Martin that justice would be more effectively achieved by allowing NCAT sufficient discretion to decide each case on its merit, rather than through such a complex legislative scheme which attempts to pre-empt every situation and the appropriate response.³⁷ The main features of the amendments are set out below.

(a) The Three Strikes Scheme

³⁵ *Residential Tenancies and Housing Legislation Amendment (Public Housing—Antisocial Behaviour) Act 2015*.

³⁶ Chris Martin, 'One Strike, Three Strikes: Crime and Anti-Social Behaviour in NSW Public Housing' *Alternative Law Journal* (2016) 41(4), 262.

³⁷ *Ibid.*

The 'three strikes' scheme under s154C of the NSW Act allows a social housing landlord to issue a 'strike notice' to a tenant where it considers that the tenant is in breach of any term of the tenancy agreement.³⁸ After two 'strikes' have been recorded against a tenant in a 12 month period, the landlord may record a third strike without first giving a strike notice, and may make an application to NCAT for termination of the tenancy.³⁹ The tenant has 21 days to make submissions to dispute the strike notice.⁴⁰ If the tenant does not challenge the strike notice, NCAT, in subsequent proceedings must take the details of the strike notice as conclusive proof of the alleged breach.⁴¹ If the tenant does challenge the strike notice in time, the tenant has the burden of disproving the details in the strike notice.⁴² This framework echoes the strikes policies evident in other states, but is the only jurisdiction to have formally introduced this into legislation. As explained by Martin, such an incorporation evinces a legislative intention to favour social housing landlords.⁴³ This is particularly evident in the evidentiary burden placed on tenants in disputing strike notices, which consequently provides an advantage in any later termination proceedings by limiting the Tribunal's ability to consider contrary evidence.⁴⁴

(b) The Mandatory Termination Scheme

The mandatory termination scheme under s154D of the NSW Act, also known as 'one strike terminations', requires NCAT to make a termination order for certain breaches of the tenancy agreement under ss 90 and 91 of the NSW Act. NCAT must order termination of the tenancy where the tenant or occupant has intentionally and recklessly used the premises for an illegal purpose such as for the manufacture and sale of prohibited drugs or the storing of a firearm without a permit.⁴⁵ NCAT must also terminate the tenancy in instances where a tenant or occupant has caused injury to a landlord, agent or neighbour and that injury amounts to grievous bodily harm.⁴⁶ NCAT is also required to terminate the tenancy where the tenant or occupant has caused serious damage to the property, has caused injury less than grievous bodily harm and has used the premises as brothel or for any other unlawful purpose.⁴⁷ However, such a termination is not mandatory where it would result in undue hardship being suffered by a child, a person with an apprehended violence order or a person with a disability.⁴⁸

³⁸ *Residential Tenancies Act 2010* (Nsw), s 154C(1).

³⁹ *Ibid*, s 154C(9).

⁴⁰ *Ibid*, s 154C(1)(g).

⁴¹ *Residential Tenancies Act 2010* (Nsw), s 156A(3).

⁴² *Ibid*, s 156A(2).

⁴³ Martin, 'One Strike, Three Strikes' *Alternative Law Journal* (2016 41(4), 263.

⁴⁴ *Ibid*.

⁴⁵ see *Residential Tenancies Act 2010* (Nsw), s 154D (1).

⁴⁶ *Ibid*.

⁴⁷ see *Residential Tenancies Act 2010* (Nsw), s 154D (2).

⁴⁸ *Ibid*, s 154D(3)(b).

2 Departmental Policy

In the Antisocial Behaviour Management Policy the Department of Family and Community Services (the NSW Department) defines anti-social behaviour as “behaviour which disturbs the peace, comfort or privacy of other tenants or neighbours or the surrounding community”.⁴⁹ The NSW Department categorises anti-social behaviour in the following way:

- Severe illegal behaviour, which includes criminal behaviour such as the use of the premises for prohibited drugs and other illegal purposes and intentional or reckless damage to the property and injury to neighbour or visitor.
- Serious anti-social behaviour activities such as threats, abuse, intimidation, victimisation and harassment towards neighbours and visitors.
- Minor and moderate anti-social behaviour that includes obscene language, excessive shouting or noise causing nuisance e.g. loud parties.

In response to instances of severe illegal behaviour the NSW Department will apply directly to NCAT for termination of the tenancy. In response to serious antisocial behaviour, the NSW Department will issue a notice of termination followed by an application to NCAT to terminate the tenancy. In relation to minor and moderate anti-social behaviour the Department will firstly issue a warning and for subsequent incidents of anti-social behaviour will follow the three strikes provisions to record strike notices against the tenant for breaches of the tenancy agreement.

3 Protections for Vulnerable People

Under the NSW Department’s policy there are some considerations towards vulnerable tenants. For example, the NSW Department when investigating allegations of antisocial behaviour, where appropriate will facilitate early intervention and referral to support services to minimise the escalation of antisocial behaviour and the need to resolve issues through NCAT. Additionally, when considering whether to apply directly to NCAT for a termination order in response to severe illegal behaviour, the NSW Department will review the impact of mental health conditions or domestic and family violence on the behaviour of the tenant.

Section 154D(3)(b) of the NSW Act excludes the operation of ‘one strike’ mandatory termination provisions where such a termination would cause undue hardship to certain groups as outlined above. While it is positive to see legislative protection for vulnerable groups, the Bill’s legislative history suggests this provision was somewhat of an

⁴⁹ Family and Community Services, *Antisocial Behaviour Management Policy* (21 February 2018), <<https://www.facs.nsw.gov.au/housing/policies/antisocial-behaviour-management-policy>>.

afterthought, only included as a result of concerns raised by Tenants' Union NSW, community legal centres and the Law Society regarding the harsh impact of the amendment.⁵⁰

There are no reported decisions in New South Wales which have fully considered and applied the mandatory termination provision for social housing tenancies. As such, it is not yet possible to comment on the effectiveness of the recent amendments in protecting vulnerable tenants. However, the reported decisions prior to the amendments demonstrate that under the previous framework, the exercise of discretion by NCAT was quite effective in striking a balance between sustaining the tenancies of vulnerable tenants, and termination where the interests of others were unjustifiably interfered with. This is illustrated in the cases extracted below:

*NSW Land & Housing Corporation v Martin*⁵¹

NCAT declined to terminate the tenancy, although the tenant Mrs Martin and her son had assaulted two neighbours. NCAT accepted the tenant's submission that she would face difficulties such as financial hardship and possible separation from her three youngest children including her son with an intellectual disability if evicted before the criminal proceedings for affray were dealt with.

*NSW Land Housing Corporation v Ibrahim*⁵²

NCAT declined to terminate the tenancy for illegal use of the premises where the tenant's son had used the premises for the sale of prohibited drugs such as cannabis and methamphetamine. It was accepted that the tenant was unaware the property had been used in this way. Further supporting NCAT's decision was evidence that termination may impact the tenant's mental health, and that her financial security in the private rental market was limited.

*NSW Land and Housing Corporation v Keshishian*⁵³

NCAT terminated the tenancy where the tenant had engaged in objectionable behaviour in the form of verbal abuse, threats, and injury to neighbours and their property. The Tribunal concluded the continuation of the tenancy would have serious adverse effects on neighbours.

*NSW Land & Housing Corporation v Raglione*⁵⁴

The Appeal Panel of NCAT terminated the tenancy on illegal use grounds where the tenant was using the premises for the supply of Methamphetamine and Cannabis. It was concluded

⁵⁰ Martin, 'One Strike, Three Strikes' *Alternative Law Journal* (2016 41(4), 265.

⁵¹ [2017] NSWCATCD 100.

⁵² [2016] NSWCATCD 36.

⁵³ [2015] NSWCATCD 69.

⁵⁴ [2015] NSWCATAP 75.

that seriousness of the breach justified termination as the illegal activities present harmful risks to other occupants, visitors and the community.

B Victoria

1 Legislation

The law regarding evictions of tenants from public housing for objectionable behaviour is governed by the *Residential Tenancies Act 1997* (Vic) (the Victorian Act). Under s 60 of the Victorian Act, tenants have a responsibility to not cause nuisance or interference with the reasonable peace, comfort, and privacy of neighbours. If s 60 is not adhered to, the Director of Housing has power under s 208 to issue tenants with a breach of duty notice. The Director of Housing also has power under s 249, to issue a notice to vacate for breaches of the tenancy agreement, if there have been two previous breaches of the same provision.. Section 344 empowers the Director to apply to the Victorian Civil and Administrative Appeals Tribunal (VCAT) for a possession order if there is non-compliance with the notice to vacate.

2 Departmental Policies

The internal policy for dealing with objectionable behaviour of public housing tenants is centred around the 'Neighbourly Behaviour Statement', which outlines the tenant's obligations and is provided to tenants at the start of the tenancy.⁵⁵ It outlines the power of the Director of Housing to issue breach of duty notices under s 208, and provides explanation of the Victorian Department's 'three strikes policy'. It makes clear that three breaches of the same duty provision will lead to termination of the tenancy, and that the strikes remain valid for 12 months.

3 Protections for Vulnerable People and their Effectiveness

Consistent with the trend identified in Queensland, an examination of recently reported VCAT decisions indicates that tenants impacted by terminations of tenancy agreements on the basis of 'objectionable behaviour' often have another vulnerability. Some examples include children suffering from hearing impairments, tenants with intellectual disabilities, and mental disorders which had contributed to the nuisance behaviours complained of,⁵⁶ and alcohol and marijuana abuse and dependence.⁵⁷

The Victorian Act does not have explicit protections for vulnerable tenants, although s 352 of the Victorian Act may provide some limited benefits. The provision allows VCAT

⁵⁵ Department of Health and Human Services, 'Neighbourly Behaviour Statement' (August 2016).

⁵⁶ *Director of Housing v Hayes (Residential Tenancies)* [2016] VCAT 694.

⁵⁷ *Director of Housing v Dolheguy (Residential Tenancies)* [2013] VCAT 1007.

discretion to postpone the date of enforcement of a possession order to allow time for the tenant to obtain alternative accommodation. While there is evidence in the case law of the provision being used by VCAT members, for example in *Director of Housing v NES*,⁵⁸ they only work to prevent tenants from becoming homeless in the most extreme sense. The operation of the provisions also put further stress on the already under-funded and in-demand emergency accommodation providers.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) also operates indirectly to provide some protections to vulnerable tenants facing termination of their public housing rental agreements. Section 38 of the Charter provides that it is unlawful for a public authority to act incompatibly with, or fail to take consideration of, human rights when making a decision unless a statute requires otherwise. The Victorian case law illustrates this provision is often invoked by tenants defending applications for possession orders. Usually, tenants claim the Possession Order would violate rights contained in s13 which provides the right not to have interference with privacy, family and the home, or correspondence arbitrarily interfered with.

The Human Rights Law Centre compiled a number of cases where the Charter has been invoked to protect vulnerable tenants facing eviction from public housing.⁵⁹ However, in most of the case studies, there is no recorded decision from VCAT as generally, the matter did not proceed to a full determination. It is unclear in some of the case studies on what grounds the possession orders were sought, whether on objectionable behaviour grounds or for some other breach of the tenancy agreement. Hence, while these case studies illustrate the Charter has provided some relief for vulnerable tenants in public housing, its effectiveness in preventing terminations for objectionable behaviour remains unclear.

Recent reported decisions suggest there are limitations in relying on the Charter as a means of protecting vulnerable tenants subject to application to terminate tenancy agreements on the basis of objectionable behaviour.

*Director of Housing v Hayes*⁶⁰

It was held that issuing a possession Order for breaches of s60 of the Act, provided there is sufficient evidence, does not amount to arbitrary interference with the rights in s13 of the Charter. The possession order was granted.

*Director of Housing v Dolheguy*⁶¹

The VCAT member responded to the defendant's submission that there was a duty to interpret provisions of the Victorian Act in a manner compatible with the Charter was given

⁵⁸ *Director of Housing v NES (Residential Tenancies)* [2017] VCAT 989.

⁵⁹ Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action- Case Studies from the First Five Years of Operation* (2012), case studies 47, 50, 68, 83, 84, 86.

⁶⁰ Above n 47.

⁶¹ Above n 48.

very little weight. In a small paragraph at the end of the reasons, the Member briefly stated he was satisfied he had fulfilled this obligation.

*Director of Housing v Ronan*⁶²

The VCAT member rejected attempts to invoke the Charter to prevent the issuing of a possession order. In the reasons, the Member stated, "while the family and in particular children are protected by the Charter, it does not mean that families or children can never be removed from public housing...It would otherwise bring about the absurd situation where public tenants, depending on their circumstances, might never be required to vacate, no matter what has arisen".

A further issue that prevents reliance on the Charter to provide protection to public housing tenants is the fact that it can only be invoked as a collateral challenge and does not create an independent cause of action. This is illustrated by *Director of Housing v Sudi*. At first instance, VCAT found a possession order to remove Sudi from a public housing property was invalidly made as it breached the obligation in s 38 of the Charter.⁶³ The eviction was held to be serious interference with the rights under s 13,⁶⁴ which was not justified, as required by s 7(2) of the Charter. However, on appeal, the Victorian Court of Appeal quashed the VCAT finding.⁶⁵ It was held that unlawfulness arising from s 38 did not automatically confer jurisdiction on VCAT to grant relief, as the Charter did not confer a collateral review power on VCAT to examine the validity of the Director of Housing to apply for a possession order.⁶⁶ This case illustrates the importance of any potential Human Rights Act in Queensland including an independent cause of action to remedy human rights contraventions by public authorities.

C Western Australia

1 Legislation

Under section 75A of the *Residential Tenancies Act 1987* (WA) (the WA Act), the Department of Housing (the Department) will usually apply to the local Magistrates Court to terminate a social housing tenancy on grounds of objectionable behaviour. The Department is required to prove the incident occurred and they will have to bring witnesses to court. A

⁶² *Director of Housing v Ronan (Residential Tenancies)* [2013] VCAT 2050.

⁶³ *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328, [152].

⁶⁴ s13 of the Charter sets out rights to privacy and reputation, including the right not to have one's family unlawfully or arbitrarily interfered with.

⁶⁵ *Director of Housing v Sudi* (2011) 33 VR 559.

⁶⁶ *Ibid* [43], [48], [62], [63], [284].

Magistrate in may only exercise the power to terminate the tenancy if they are satisfied that the tenant:

- (a) used the social housing premises, or caused or permitted the social housing premises to be used, for an illegal purpose; or
- (b) caused or permitted a nuisance by the use of the social housing premises; or
- (c) interfered, or caused or permitted any interference, with the reasonable peace, comfort or privacy of any person who resides in the immediate vicinity of the premises.

The court must also be satisfied that the behaviour actually justifies terminating the agreement. Additionally, s 73A states that, an application made under s75A does not require a notice of termination to be given to the tenant.

2 Departmental Policies

Western Australia has a three strikes policy (Destructive Behaviour Management Policy (DBMS))⁶⁷ in effect since May 2009. In 2011, the Minister for Housing announced that the DBMS would be more strictly adhered to in the future following a review which found there 'was too much scope for discretion' and a new strengthened policy would commence from 3 May 2011.⁶⁸ Section 75A was introduced on 14 December 2014 to complement the three strikes policy.

The Department categorises three types of behaviour that may result in action being taken.⁶⁹

1. **Dangerous Behaviour**: Activities that pose a demonstrable risk to the safety or security of residents or property will result in the Department pursuing an immediate termination of the tenancy under s 75A.
2. **Serious Disruptive Behaviour**: Activities that intentionally or recklessly cause serious disturbance to persons in the immediate vicinity of the premises will result in a first and final strike being issued. A subsequent incident of similar severity within twelve months will result in the department pursuing a termination for tenancy under s 75A.
3. **Disruptive Behaviour**: Activities that cause a nuisance, or unreasonably interfere with the peace, privacy or comfort, of persons in the immediate vicinity of the premises

⁶⁷ Government of Western Australia Housing Authority, *Disruptive Behaviour Management* Housing Western Australia

<http://www.housing.wa.gov.au/HousingDocuments/Disruptive_Behaviour_Management_brochure.pdf>.

⁶⁸ Welfare Rights And Advocacy Service, *S75A and Disruptive Behaviour Management Unit (DBMU) Fact Sheet* (July 2015) <<http://www.wraswa.org.au/wp-content/uploads/2015/08/S75a-and-DBMU-Fact-Sheetv8.pdf>>.

⁶⁹ Government of Western Australia Housing Authority, *Housing Rental Policy Manual* (April 2018) <http://www.housing.wa.gov.au/HousingDocuments/Rental_Policy_Manual.pdf>

will each result in a strike being issued. A third strike is served together with the notice of termination under s 75A.

Strike notices will be issued against tenants where the Housing Authority is satisfied that disruptive behaviour occurred. Complaints are investigated by case managers from the Department of Housing Disruptive Behaviour Management Unit, and tenants are invited to a 'natural justice' interview prior to the issuing of a strike where they can refute the allegations or plead mitigating circumstances.⁷⁰

3 Protections for Vulnerable People and Their Effectiveness

As outlined above, Magistrates have discretion to take into account any relevant factors when deciding if the grounds justify a termination order. The tenant having some form of vulnerability, for example an untreated mental illness now being treated, is generally treated as a mitigating factor.

While the policy's proponents argue it has caused a decrease in anti-social behaviour, "...it is difficult to extrapolate from statistics of this nature a clear and direct link between policy and its deterrent effect, especially in the absence of any comparison data of the frequency of incidents of disruptive behaviour before the policy was implemented".⁷¹ In addition, trends evident in case law cannot be easily analysed as Magistrates Court decisions are not published.

Key stakeholders in Western Australia have criticised the current disruptive behaviour management policies. For example, the Western Australian Equal Opportunity Commission (EOC report) has argued that a three-strikes policy caused an increase in systematic discrimination towards several disadvantaged groups.⁷² For one, it was asserted Indigenous Australians are at a heightened risk of receiving racially-motivated complaints against their tenancy.⁷³ Further, Indigenous tenants may feel reluctant to fulfil cultural obligations such as accommodating extended family members for fear of receiving noise-related strikes stemming from increased occupants.⁷⁴ Additionally, it was asserted tenants with mental health conditions, women experiencing domestic violence, and elderly people are at risk of

⁷⁰ Welfare Rights And Advocacy Service, *S75A and Disruptive Behaviour Management Unit (DBMU) Fact Sheet* (July 2015) <<http://www.wraswa.org.au/wp-content/uploads/2015/08/S75a-and-DBMU-Fact-Sheetv8.pdf>>.

⁷¹ Memmott P et al, *Australian Indigenous House Crowding* (Australian Housing and Urban Research Institute, Final Report No. 194, 2012)

⁷² Equal Opportunity Commission, *A Better Way* (June 2013) <<http://vivid.blob.core.windows.net/eoc-sitefinity/publications/a-better-way-report.pdf?sfvrsn=2>>.

⁷³ *Ibid* 51-53.

⁷⁴ *Ibid* 51-53.

receiving complaints and strikes for behaviour over which they have no control due to their vulnerability.⁷⁵

The Australian Indigenous House Crowding Report⁷⁶ corroborated the conclusions of the EOC Report regarding the policy's impact on Indigenous tenants. A case study of the district of Swan illustrated that the three strikes policy contributed to overcrowding. It was described how evicted tenants often move in with extended family also in public housing as a form of emergency accommodation, which in turn led the tensions outlined in the EOC report regarding noise-related complaints and 'strikes' against the tenant.⁷⁷

D Northern Territory

1 *Legislation*

Under s 28C of the *Housing Act 1982* (NT) (the NT Act), the Chief Executive Officer of Housing may, by written notice, require the tenant to enter in to an Acceptable Behaviour Agreement (ABA) there is a reasonable belief that a public housing tenant or recognised occupant is likely to engage in anti-social behaviour. An ABA is an undertaking made by a tenant to not engage in anti-social behaviour on, or within 50m of, the premises.⁷⁸ Anti-social behaviour is defined as:

- a) abusive or violent behaviour directed to a person,
- b) behaviour that creates alarm or fear or annoyance to neighbours or others in the vicinity, or
- c) involves graffiti, littering or vandalism.⁷⁹

In forming the requisite belief that the tenant or occupant is likely to engage in anti-social behaviour, the history of the tenancy or a former tenancy involving the tenant; the history of another tenancy involving a recognised occupier of the tenant; or any other matter the CEO considers relevant may be considered.⁸⁰ Under s 99A of the *Residential Tenancies Act*,⁸¹ (NT Tenancy Act) a tenancy may be terminated by the Northern Territory Civil and Administrative Tribunal (NCAT) for a failure by a tenant to comply with an acceptable behaviour agreement. The CEO may only apply to NTCAT for termination of the lease if the

⁷⁵ Ibid 53-56.

⁷⁶ Memmott, P, Birdsall-Jones, C, and Greenop, K, *Australian Indigenous house crowding* (30 October (2012) Australian Housing and Urban Research Institute Limited <<https://www.ahuri.edu.au/research/final-reports/194>>.

⁷⁷ Ibid 141.

⁷⁸ *Housing Act 1982* (NT), s28B.

⁷⁹ *Housing Act 1982* (NT) s28A

⁸⁰ *Housing Act 1982* (NT) s28C (3).

⁸¹ *Residential Tenancies Act 1999* (NT).

tenant fails or refuses to enter into the agreement or seriously or repeatedly breached the terms of the agreement.

2 Departmental policies

The housing department employs a 'red card' policy with respect to anti-social behaviour.⁸² The red card policy scores the type and seriousness of antisocial behaviour in terms of demerit points. Minor antisocial behaviour receives one demerit point and is classed as conduct that causes annoyance-. Moderate anti-social behaviour attracts two demerit points and is defined as abusive behaviour directed to a person or behaviour that causes fear or alarm to neighbours in the vicinity of the premises. Serious anti-social behaviour receives three demerit points and is classed as violent behaviour caused or permitted by the tenant towards a person, neighbours or others in the vicinity of the premises. If a tenancy receives 6 demerits points, the Department may seek a termination order. If after 12 months from date of the last incident, provided no other substantiated incidents of anti-social behaviour have occurred, all points accrued will expire.

3 Protections for Vulnerable People and Their Effectiveness

There are no explicit protections for vulnerable persons in the legislation or the departmental policies. Under s 99A of the NT Tenancy Act, the NTCAT does not have discretion to decide if in the circumstances it is appropriate to terminate the tenancy. If the Member is satisfied that a tenant refused to enter into an ABA or seriously or repeatedly breached the Agreement, the tenancy must be terminated.

Reports from key stakeholders indicate the Northern Territory's laws and departmental policies have a significant detrimental impact on vulnerable tenants. A 2016 report published by the North Australian Aboriginal Justice Agency (NAAJA) highlighted the fact that the regulatory framework appeared to be more of a punitive approach, rather than a supportive one.⁸³ It was asserted that where a strike is issued or a termination application is brought, it is rarely because the tenant is showing an unwillingness to change their behaviour. In the NAAJA's experience with clients, disability and mental illness, the actions of visitors, domestic violence, substance addictions or other social factors are more often the reason for a difficulty with a tenancy.⁸⁴ The issuing of a strike, which remains valid for 1

⁸² Department of Housing and Community Development, *Red Card* (23 November 2016) Department of Housing and Community Development <https://dhcd.nt.gov.au/__data/assets/pdf_file/0004/266134/Red-Card-policy-RELEASED-23-11-2016.pdf>.

⁸³ Northern Australia Aboriginal Justice Agency, Submission to Northern Territory Government, *Review of Housing*, February 2016.

⁸⁴ *Ibid* 65.

year, is argued to be a significant psychological burden on the tenant, given that a critical shortage of public housing in rural and remote Northern Territory makes it likely that termination of a tenancy will result in homelessness.⁸⁵ The report also highlights that the restriction on applying for public housing for two years after a termination exacerbates this issue.⁸⁶

E Tasmania

1 Legislation

Evictions from public housing are governed by s 42 of the *Residential Tenancies Act 1997* (Tas) (the Tas Act). The Department of Health and Human Services (the Department) has authority to issue a Notice to Vacate for any breach of the residential tenancy agreement (s42(1)(a)), including causing a 'substantial nuisance' (s42(1)(g)). This provision is very similar to Queensland's s 290A. Further, the Department may apply to the court for an order for vacant possession, which may be issued if it is satisfied of a number of factors set out in s 45.

2 Departmental Policies

Tasmania, as in New South Wales,⁸⁷ Western Australia and South Australia, has a 3 strikes policy to responding to behaviour breaching social housing tenancy agreements.⁸⁸ First, a verbal warning may be given for a first or rare occurrence of nuisance behaviour. Then, a first then second strike may be issued to inform the tenants of the reasons for breach and set a notice period for the tenant to rectify the issue. A third strike results in an immediate issuing of a notice to vacate.

3 Protections for Vulnerable People and Their Effectiveness

Under s 45(3) of the Tas Act, the court only has discretion to issue an order for vacant possession if they are satisfied vacation would not result in "...unreasonable financial disadvantage, or unreasonable social disadvantage, to the tenant". This provides one

⁸⁵ Ibid 6, 8.

⁸⁶ Ibid 17.

⁸⁷ Although note the 'three strikes' is set out in the *Residential Tenancies Act 2010* (NSW), rather than in departmental policies.

⁸⁸ Department of Health and Human Services, 'Behaviour in Housing Tasmania Properties' (Policy P2012/0179-054, 1 February 2015) 6-7.

explicit means of protecting vulnerable tenants from being evicted in unjust circumstances. These amendments were made to the Tas Act in 2013.⁸⁹ They accompanied a range of other amendments to allow orders for vacant possession to be made in social housing contexts where income and asset thresholds were exceeded, or if the family was not requiring all rooms or the special facilities in modified premises.

Generally speaking, the legislative focus of the Tasmanian government does not appear to be on managing anti-social or nuisance behaviours of public housing tenants. Instead, there is greater concern with addressing the issue of long waiting-lists and having insufficient properties to meet demand for housing. The protection provided in s45(3) thus aims to soften the operation of means tests, and the corresponding powers to evict if these are not satisfied, rather than managing objectionable behaviour.⁹⁰

The departmental policy also illustrates some protections for vulnerable tenants. The policy provides that a breach resulting from a serious mental illness requires tenancy managers to respond sensitively and in conjunction with support providers.⁹¹ If other support needs are identified, the tenancy managers are also required to assist the tenant by referring them to Housing Connect for support.⁹²

There is very little case law published in Tasmania applications for vacant possession. All such matters are heard by the Magistrates Court in its Civil Division, and few decisions are published. One decision in the Magistrates Court regarding the issuing of an order for vacant possession was located⁹³ and one on similar grounds in the Supreme Court.⁹⁴ A further decision was recorded in the Supreme Court for an order made on grounds of refusal to leave after non-renewal of a lease.⁹⁵ All of these decisions did not involve the 2013 amendments and were not on grounds of 'substantial nuisance'. As such, the effectiveness of the legislative and policy measures outlined above in protecting vulnerable tenants is unclear.

⁸⁹ *Residential Tenancy Amendment Act 2013* (Tas), s24.

⁹⁰ See Tasmanian Auditor-General, 'Provision of Social Housing' (No. 8 of 2015-16, Tasmanian Audit Office, 25 February 2016);

⁹¹ Department of Health and Human Services, 'Behaviour in Housing Tasmania Properties' (Policy P2012/0179-054, 1 February 2015) 6.

⁹² *Ibid.*

⁹³ *Appelby v Schnell* [2011] TASMC 8.

⁹⁴ *Logan v Director of Housing* (2014) 13 Tas R 324.

⁹⁵ *King v Director of Housing* (2013) 23 Tas R 353.

F South Australia

1 Legislation

Under s87 of the *Residential Tenancies Act 1995* (SA) (the SA Act), the South Australian Civil and Administrative Appeals Tribunal (SACAT) may, on application by a landlord, terminate a social housing tenancy if the tenant or another person permitted by the tenant has intentionally or recklessly caused or permitted serious damage to the premises or personal injury to a landlord, agent or neighbour.⁹⁶

s90 of the SA Act enables SACAT to terminate the tenancy if the tenant's conduct is unacceptable. Under this section SACAT may terminate the tenancy if it is satisfied that the tenant has used the premises for an illegal purpose, caused a nuisance or interfered with the reasonable, peace, comfort or privacy of neighbours. An application under this section can be made by an 'interested person' and not just the Department of Housing.⁹⁷ This particular Section is a unique feature of the South Australian law. The term 'interested person' has been defined very broadly and includes the landlord, an adversely affected neighbour and even a police officer:⁹⁸

4 Departmental Policy

South Australia introduced the Disruptive Behaviour Policy in October 2013. The Policy is aimed at resolving complaints about disruptive tenants quickly and effectively. The Minister for Social Housing at the time, Tony Piccolo, explained that:

"This policy is about respecting those tenants who do the right thing and their neighbours, while sending the message that disruptive and inappropriate behaviour will not be tolerated".⁹⁹

The Policy identifies disruptive behaviour as including behaviour that is threatening and intimidating towards others, that interferes with the peace, comfort or privacy of other neighbours, that causes serious property damage.¹⁰⁰ The disruptive behaviour can be

⁹⁶ *Residential Tenancies Act 1995* (SA), s 87(2).

⁹⁷ *Ibid*, s 90(1).

⁹⁸ *Ibid*, s 90(3).

⁹⁹ Government of South Australia: Department of Human Services, *New Disruptive Tenants Policy Getting Results* (27th November 2013), <<http://www.dcsi.sa.gov.au/latest-news/media-releases/new-disruptive-tenants-policy-getting-results>>.

¹⁰⁰ Government of South Australia: Department of Human Services, *Disruptive Behaviour Policy* (30th March 2016), <<http://dcsi.sa.gov.au/services/housing-sa/housing-trust-policies/managing-tenancies/disruptive-behaviour-policy>>.

categorised as serious including extensive property damage and injury to others, moderate including verbal abuse and intimidation and minor including loud music and parking disputes.

In managing the disruptive behaviour, as a first step Housing SA will issue disruptive tenants a verbal warning if the disruption is minor and is not occurring on a frequent basis. The Department will then give tenants a written warning, essentially a strike notice, if the disruption is more serious or is moderate and minor but is occurring rather frequently. If a tenant has received three written warnings Housing SA will then take further action to terminate the tenancy.

5 Protections for Vulnerable People and Their Effectiveness

The legislation does not include any explicit protections for vulnerable people. However, under the policy there is some level of support for vulnerable tenants. For example, Housing SA when investigating a disruptive behaviour complaint will also refer tenants to mediation or support services where it is appropriate to do so. Upon determining the seriousness of the behaviour, Housing SA will consider whether the behaviour was the direct result of issues of the tenant that require support. Housing SA under the Policy will also facilitate the transfer of less disruptive tenants. The transfer will be approved, provided that the tenant signs an acceptable behaviour agreement and engages with the appropriate supports that are in place.

The reported decisions from the South Australian case law demonstrate that the SACAT takes anti-social behaviour in social housing very seriously. The Tribunal has routinely exercised their discretion to terminate tenancies for disruptive behaviour, including where the tenant was suffering from a form of vulnerability.

*South Australia Housing Trust v Raco*¹⁰¹

SACAT terminated the tenancy under s90 of the SA Act due to the disruptive behaviour of the tenant, including threatening and abusive behaviour towards neighbours that interfered with their reasonable peace, comfort and privacy. SACAT accepted that the tenant was a person with mental incapacity under the Guardianship and Administration Act, but concluded that there was no option but to terminate the tenancy given her continued escalating behaviour towards neighbours and those trying to support her.

*Dawson v Housing SA*¹⁰²

Using their discretion, SACAT declined to terminate Mr Dawson's tenancy for disruptive behaviour. The disruptive behaviour concerned an incident where the tenant banged on the neighbour's door with great force and shouted obscenities and racial insults. The tenant was

¹⁰¹ [2013] SARTT 7091

¹⁰² [2015] SACAT 20.

indigenous and submitted that his behaviour was affected by his mental illness. SACAT acknowledged this and concluded that he should receive treatment for his mental health issues. SACAT ultimately determined that the matter should be adjourned for a period of six months during which time Housing SA would be permitted to apply for an urgent hearing, should there be further significant complaints about the tenant's conduct.

*South Australian Housing Trust v Vincent*¹⁰³

SACAT terminated a tenancy on disruptive behaviour grounds. The tenant routinely swore, threatened and abused his neighbours and also during one incident threw a petrol bomb into the house of a neighbour. SACAT determined the tenant to be an unstable, unpredictable and frightening neighbour.

*South Australian Housing Trust v Milera*¹⁰⁴

SACAT terminated the tenancy under s90 due to the disruptive behaviour of the tenant's family members including constant swearing, yelling, and alcohol-induced fighting and door slamming. The tenant submitted that he tried to get his unwelcome family members to leave but they always refused to do so. SACAT acknowledged the tenant could be subjected to retaliatory behaviour from his family if he and his partner were to lose their tenancy and become homeless. However, the tenancy was terminated as SACAT concluded that he had failed to take adequate steps to deal with the disruptive behaviour of his visitors.

*Osborne v South Australian Housing Trust*¹⁰⁵

SACAT, on appeal, upheld the decision to terminate Mr Osborne's tenancy on illegal use grounds. The police located 6 cannabis plants and equipment for the cultivation of the cannabis on the tenant's property. SACAT held that despite Mr Osborne's good record as a tenant, it could not accept that he was unaware that his property had been used for this illegal purpose.

¹⁰³ [2015] SACAT 10.

¹⁰⁴ [2016] SACAT 32.

¹⁰⁵ [2016] SACAT 30.

IV Recommendations

Recommendation 1: Legislative Reform

1.1 *Repeal s290A and s297A of the RTRAA to remove unfair obligations placed on social housing tenants*

The amended provisions s290A and s297A of the RTRAA impose more stringent obligations on social housing tenants, in comparison to residential tenants generally. The fundamental issue with ss290A and 297A is that they enable termination for serious breach and objectionable behaviour that is caused by an occupant or guest of the tenant. On the other hand, termination for private residential tenancies is only the result of the behaviour of the tenant.¹⁰⁶ Furthermore, there is no equivalent section to s290A which applies to private residential tenancies. This provision allows a termination notice to be issued for serious breaches of the social housing tenancy agreement, establishing a legislative standard that targets social housing tenants. In addition, s297A establishes a further category of objectionable behaviour only applicable to social housing tenants, that being interference with the reasonable peace, comfort or privacy of a person occupying nearby premises.¹⁰⁷ As with s290, the inclusion this additional category places more onerous obligations on social housing tenants, despite the fact that due to the common presence of social and health-related issues, such tenants are more likely to struggle in meeting such obligations than private residential tenants.

The case law considering s290A and 297A illustrates the higher standard of conduct to which social housing tenants are held. In the case of *Simonova*¹⁰⁸ the tenancy was terminated for objectionable behaviour caused by mental illness. However, QCAT would not have terminated a private residential tenancy for this same reason. In *Boyd*¹⁰⁹, QCAT terminated the tenancy for illegal activity of the tenant's adult daughters. In contrast, private residential tenants would not have their tenancy terminated due to the illegal behaviour of others.

It is therefore submitted that Sections 290A and 297A should be repealed as they unfairly impose a higher standard on social housing tenants compared to those living in private rental accommodation.

1.2 *Amend s345A of the RTRAA to restore QCAT's discretion in termination proceedings*

¹⁰⁶ See appendix I.

¹⁰⁷ *Ibid*, s 297A(1)(c).

¹⁰⁸ *Simonova v Department of Housing and Public Works* [2018] QCATA 33 (8 March 2018).

¹⁰⁹ *State of Queensland through the Department of Housing and Public Works v Boyd* (2016) QCAT 79.

It is recommended the wording of s345A be amended to provide greater clarity in regard to tribunal discretion. Currently, under s345A(2), QCAT *may* consider whether the objectionable behaviour was recurrent and the frequency of the recurrences and the seriousness of the objectionable behaviours. The inclusion of the word ‘may’ provides QCAT ultimate discretion as to whether to include these considerations, and what weight should be attached to each. In contrast, under s345A(3) the Tribunal *must* have regard to the serious or adverse effects on the neighbours because of the objectionable behaviour, evidence of the tenants history and the Department’s responsibility to other tenants. This subsection requires QCAT to give greater weight to these considerations when deciding applications for termination of the tenancy. As indicated by the data set out in the Queensland Trends section above, this mandated consideration adversely impacts vulnerable tenants as it causes QCAT to be less likely to refuse an application for termination on objectionable behaviour grounds. QCAT’s discretion should not be limited in this manner; QCAT should determine how much weight it places on each of the considerations under this provision in each case.

The examples of New South Wales (prior to the recent amendments) and Western Australia as outlined in previous sections illustrate some of the benefits of conferring greater discretion on decision-makers in this context. In order to provide QCAT wider discretion in termination order proceedings on objectionable behaviour grounds, the wording of Section 345A(3) should be amended to remove ‘must’ and replace it with ‘may’. This amendment will enable QCAT to give equal weight to the considerations set out in s345.

Recommendation 2: Amend the Department's approach to Minor Disruptive Behaviour

2.1 Give highly vulnerable tenants explicit protections in the Departmental Guidelines

Under the Fair Expectation of Behaviour policy, minor disruptive behaviour is defined as “activities that could reasonably happen occasionally in a household, but which disturb the peace, comfort or privacy of other tenants or neighbours.”¹¹⁰ The Department has discretion to investigate, monitor and respond to incidents of alleged unacceptable and/or disruptive tenant behaviour. There are two issues with the inclusion of the minor category as behaviour for which a warning may be issued.

First, the policy does not take into account the vulnerabilities of a tenant that may be the cause of a minor breach. It can be observed from the Queensland case law that it is

¹¹⁰ Department of Housing and Public Works, *Tenant Behaviour* (07 March 2017) Queensland Government <<https://www.qld.gov.au/housing/public-community-housing/tenant-behaviour>>.

common for an instance of minor disruptive behaviour to be the result of a tenant's vulnerability. Most often, the behaviour that resulted in a breach is not voluntary, either because the tenant is unable to control their own actions or the actions of another person on the property. For example, in *Gray*,¹¹¹ the tenant was under the protection of a Domestic Violence Order. Five neighbours made complaints about fighting and yelling on the premises and unknown males coming and going at night. Her former partner along with other unknown males came on to the premises numerous times without her permission. This was enough for QCAT to find objectionable behaviour. This kind of behaviour appears to fall into the minor category as it disturbed the peace, comfort or privacy of neighbours; however, Ms Gray was unable to control the behaviour. Other examples include loud disturbances being an involuntary manifestation of the tenant's mental health illness or disability, such as in *Simonova*.¹¹²

Recommendation 2.1 seeks to remedy this issue by introducing explicit protections for vulnerable tenants into the department policy. It is submitted that the department should be required to take into account a tenant's vulnerability, specifically whether the vulnerability was involuntary and a direct cause of the behaviour, as a mitigating circumstance when exercising their discretion to investigate instances of minor disruptive behaviour.

2.2 Implement a more moderated and flexible approach to minor disruptive behaviour

The second issue identified with the departmental policy is that it holds public housing tenants to a higher standard than tenants in the private market. The definition of minor disruptive behaviour is very broad and can catch types of behaviour that can generally result from household activity. For example, loud parties or loud music commonly occur in many private residences. The difference is they do not attract a punishment or warning that can lead to eviction. In this way, public housing tenants are being held to a higher standard than private rental tenants. This is also inconsistent with the Department's own Fairness Principles, which state the Department should "place no greater obligation on social housing tenants than private rental tenants (except where housing shortages exist)".¹¹³

Recommendation 2.2 seeks to remedy this issue. It is submitted the Department should take a more flexible and moderated approach to minor disruptive behaviour. The Western Australian Equal Opportunity Commission Report¹¹⁴ recommended that the Department reformulate its approach to minor disruptive behaviour. Western Australia operates under a three strikes policy under which a tenant may be evicted for three instances of moderate

¹¹¹ *State of Queensland through the Department of Housing and Public Works v Gray* [2017] QCAT 475.

¹¹² *Simonova v Department of Housing and Public Works* [2018] QCATA 33 (8 March 2018).

¹¹³ Department of Housing and Public Works, *Fairness Principles* Queensland Government <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/FairnessPrinciples.PDF>>.

¹¹⁴ Equal Opportunity Commission, *A Better Way* (June 2013), 68 <<http://vivid.blob.core.windows.net/eoc-sitefinity/publications/a-better-way-report.pdf?sfvrsn=2>>.

disruptive behaviour or serious disruptive behaviour. The Report recommended that the Department should provide flexible options such as verbal and written warnings and offering the tenant the opportunity to enter into an Acceptable Behaviour Agreement instead of only issuing a formal strike. This same logic can be applied to Queensland, even though we no longer have a three strikes policy. An instance of minor disruptive behaviour should not attract a formal warning, unless the tenant has been provided with the necessary support services or the opportunity to enter into a Tenancy Management Plan. By issuing a lower-level response which is more supportive than a punishment, the type of behaviour can be addressed at its root cause.

Interestingly under Queensland's old three strikes policy, warnings could be issued instead of formal strikes for some low level or minor anti-social behaviours. This gave the Housing Service Centre staff ability to use their discretion when issuing strikes and warnings in cases where the anti-social behaviour could be attributed to a person's mental health illness or disability.¹¹⁵ This recommendation aims to restore that discretion.

Recommendation 3: A 'three-strikes' policy should not be re-introduced in Queensland

While many states have incorporated a variety of a 'three-strikes' approaches in either legislation³⁶ or departmental policy³⁷ regarding anti-social behaviour in public housing, it is submitted that Queensland should not revert to such a policy.

'Three-strikes' policies are a purely coercive 'disciplinary strategy' of managing anti-social behaviour. Disciplinary strategies require tenants to '...conform to normative standards of behaviour or lose their security of tenure'.¹¹⁶ This is problematic as such a policy does not address the underlying issues which are causing the behaviour, instead only punishing their manifestation. As Tim Walter argues, evictions on the basis of a three-strike policy "...will only move the problem tenants elsewhere into the community where such behaviour will probably continue and result in new complaints".¹¹⁷ While it is accepted that some coercive measures are a necessary part of the Departmental framework for managing anti-social behaviour, and balancing the rights of tenants and lessees, it is essential that these work in tandem with 'supportive strategies'. The Western Australian Equal Opportunity Commission Report provide examples of 'supportive strategies', including preventative actions, early intervention, support to tenants, negotiation, and appropriate staff training¹¹⁸

¹¹⁵ Transport, Housing and Local Government Committee, Parliament of Queensland, *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (2013) 19.

¹¹⁶ Western Australia Equal Opportunity Commission, *A Better Way- A report into the Department of Housing's disruptive behaviour strategy & more effective methods for dealing with tenants*, (2013) 47.

¹¹⁷ Tim Walter, 'Three Strikes Coming for Tasmanian Public Housing Tenants' (2014) 27(4) *Parity* 32, 33-34.

¹¹⁸ Western Australia Equal Opportunity Commission, above n (?), 47.

It is recognised that the current Fair Expectation of Behaviour policy of the Department of Housing and Public Works attempts to draw these two approaches together. In particular, the commitments outlined in the 'Fairness Charter',¹¹⁹ 'Fairness Principles'¹²⁰ to link tenants with support agencies illustrates a recognition of the value of supportive strategies in addressing anti-social behaviour in public housing. The internal policy document "Disruptive Behaviour- Guidelines for Applying Discretion" also appears to demonstrate a Departmental commitment to the use of discretion to support tenants in sustaining their tenancies, for example, through the use of discretion to consider whether the issuing of a Notice to Leave or warning reflects the tenant's mitigating circumstances.¹²¹ As such, it is submitted the Department's current policies are a more constructive approach to managing anti-social behaviour than the previous three-strikes policy.

Recommendation 4: Amendment of the 'Disruptive Behaviour- Guidelines for Applying Discretion'

Despite the positive emphasis on supportive strategies and discretion in the Department's policy regarding public housing decision-making, the trends evident from recent Queensland case law are in conflict with the official policy stance. From the discussion of trends above, there appears to be an inconsistent application of the Department's policies and guidelines. It is submitted greater clarity is required within the Department's policy documents as to when discretion over the issue of warnings and/or notices to leave can or should be exercised.

To achieve this, it is recommended the Department amend the *Disruptive Behaviour- Guidelines for Applying Discretion* policy by including a longer list of examples of circumstances where officers should consider exercising their discretion. The list should be non-exhaustive, but encompass a broader range of circumstances or tenant vulnerabilities which would warrant the exercise of the officer's discretion.

Recommendation 5: Introduce a guiding principle into the Social Housing Tenancy Management Policy that termination of tenancies should only occur as a last resort

It is recommended that the guiding principle for the implementation of Departmental policy be that termination of social housing tenancies should be a last resort. The current policy, as

¹¹⁹ Department of Housing and Public Works, 'Our Fairness Charter' (August 2016) Queensland Government < <http://www.hpw.qld.gov.au/SiteCollectionDocuments/FairnessCharter.PDF>>.

¹²⁰ Department of Housing and Public Works, 'Fairness Principles- Putting People First' Queensland Government < <http://www.hpw.qld.gov.au/SiteCollectionDocuments/FairnessPrinciples.PDF>>.

¹²¹ See appendix III.

discussed above, does place an emphasis on supporting tenants to sustain their tenancy, through referrals to support agencies and mediation. However, the prevailing trend in the case law suggests in reality, these policies are not always applied in a uniform manner. As such, it is submitted the introduction of such a guiding principle would re-focus the application of the Departmental policies to ensure the human rights of tenants are better protected.

Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises “...the right of everyone to an adequate standard of living...including adequate food, clothing and housing”.¹²² Evictions from public housing have been recognised in Victoria as interfering with such rights under the Charter of Human Rights and Responsibilities,¹²³ and have very real effects on tenants who often require access to emergency and temporary accommodation after being evicted. Although Queensland does not currently have explicit human rights protections, it appears the introduction of a Human Rights Act is imminent.¹²⁴ Such an Act could have real impacts on the application of the RTRAA for vulnerable tenants. As illustrated by the experience of Victoria outlined above, to best protect vulnerable tenants from unjust terminations from public housing, it is important the Act includes an independent cause of action to allow those aggrieved by decisions of public authorities to enforce their human rights.

The introduction of this guiding policy of terminations as an option of last resort is in the best interests of government. As stated in the Victorian ‘Making Social Housing Work’ report, when evicted from public housing:

*...tenants face crisis, extreme stress and homelessness, and governments will ultimately pay the costs through the homelessness, health and justice systems. Taking positive action to sustain tenancies and prevent homelessness is an ideal scenario for government and individuals alike.*¹²⁵

As highlighted by Tenancy WA, there is a well-established link between homelessness and incarceration, particularly amongst Indigenous populations.¹²⁶ Furthermore, where children become homeless, including as a result of public housing evictions, there is a real potential this will contribute to higher incarceration rates for now, and higher rates of homelessness

¹²² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1967), art 11.

¹²³ *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328, [34].

¹²⁴ Felicity Caldwell, 'Human Rights Act set to be enshrined in a Queensland Act', *Brisbane Times* (online), 6 February 2018 <<https://www.brisbanetimes.com.au/politics/queensland/human-rights-set-to-be-enshrined-in-a-queensland-act-20180205-p4yzgc.html>>.

¹²⁵ Tenants Union of Victoria, *Making Social Housing Work- Better Homes for Low-Income Victorians*, (2014) 28.

¹²⁶ Tenancy WA, Submission No (32) to “Senate Finance and Public Administration References Committee”, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*” May 2015, 3.

and incarceration as they become adults.¹²⁷ This illustrates that not only are terminations of public housing tenancies detrimental to the tenant involved, they also create problems in the future which government will have to address and fund. As such, it is in the government's interests to introduce a broad guiding principle for the implementation of Departmental policy that termination of public housing tenancies should only occur as a last resort.

V Conclusion

This submission makes five recommendations to that should be adopted to reform legislation and the Department of Housing's internal policies in order to produce fairer outcomes for highly vulnerable tenants. These recommendations centre around giving QCAT and the Department of Housing more discretion to assess the situation of vulnerable tenants and arrive at a solution that is more beneficial to both the tenant and the Department than an eviction.

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¹²⁷ Ibid 4-6.