Response to the review of ss. 154D & 154G of the *Residential Tenancies Act 2010* (NSW)

Nov 2019

Eastern Area Tenants Service

The Eastern Area Tenants Service (EATS) has provided information, advice and advocacy to renters across Sydney's Randwick, Woollahra and Waverley LGAs for 19 years. Our service is committed to providing a comprehensive service particularly to low income and disadvantaged tenants including the provision of information, advice and advocacy for individual tenants and community education.

We believe that every renter deserves to live in a home where they feel safe, and appreciate that the majority of tenants do not want to be exposed to criminal activities. We acknowledge that antisocial behaviour is a concern for renters, but as a service that assists both private and social housing tenants, we know that antisocial behaviour, including illegal activities, are not specifically contained to the social housing sector.[1]

EATS has experience advocating for social housing tenants who are being evicted under s 154D and 154G of the Residential Tenancies Act 2010. Prior to the introduction of these provisions, we advocated for social housing residents subject to applications for termination under ss 90 and 91. Having this scope of experience, we welcome the opportunity to respond to the statutory review of sections 154D and 154G of the *Residential Tenancies Act 2010 (the RTA).*

We are happy to answer any questions about this submission. Please address all questions to Hayley Stone, Executive Officer, on (02) 9386 9145 or h.stone@eats.org.au.

[1] Of the 138 recorded renters who contacted our service between 2015 and 2019 identifying as having a neighbourhood disputes, 39% of callers identified as social housing residents. The remaining 61% were private renters. In most instances where private tenants were experiencing neighbourhood disputes, they had contemplated terminating their tenancy as a way to end the dispute.

Recommendations

1. Sections 154D and 154G should be repealed;
2. The eligible grounds for tenant-initiated transfers should be expanded to make transfer to alternative premises easier;
3. Specialist client service officers (CSOs) working with tenants who are identified as anti-social should be trained social workers;
4. Resources should invested in providing early intervention services (such as alternative dispute resolution) to tenants in social housing;
5. The Government should commit to investing in additional social housing stock to allow greater flexibility in terms of housing allocation

1. Repeal s154D and 154G

We submit that sections 154D and 154G should both be repealed.

There are a number of reasons for this.

Concerns with s 154D

The primary issue with s 154D is that it holds some of the most vulnerable people in society to a higher standard than all other renters. These sections place greater scrutiny on social housing tenants who breach s 90 and s 91 than other tenants. Social housing tenants must provide more evidence as to why termination should not be granted, and the threshold they must meet in order for the Tribunal to decline to terminate– *exceptional circumstances* – is higher.

We note that prior to the introduction of s 154D, s 90 of the RTA already provided a mechanism for any landlord, public or private to apply to terminate the tenancy of any tenant or occupant who seriously damaged their premises or any neighbouring property, or caused injury to a landlord, their agents or a neighbour.

Likewise, s 91, permitted a landlord to apply to terminate on the basis that the tenant had caused or permitted the premises to be used for illegal purposes, including the manufacture, sale, cultivation or supply of prohibited drugs. Tribunal members had the discretion to decide whether it was appropriate to terminate a tenancy based on a range of factors, but was specifically directed to consider the nature of the unlawful use, the history of the tenancy and any prior unlawful uses.[2]

[2] s. 91(2) *Residential tenancies Act 2010* (NSW).

Practically, ss 90 and 91 of the RTA gave the Tribunal the capacity to consider various factors when determining whether termination was appropriate. We know through our experience assisting tenants in such applications prior to s 154D, that circumstances that issues such as limited social housing stock, the effect of illegal use on neighbours, the history of the tenancy, and the tenants willingness to seek external support to address any issues they might have that were contributing to the actions were considered as relevant issues in determining whether to terminate the tenancy.

The intention of s.154D was to limit the Tribunal's discretion to order termination of social housing tenants for specific types of anti-social behaviours, but we note that the Tribunal is still exercising discretion for cases brought under s 90 and s 91, primarily through reliance on 154(3) (c) which allows the Tribunal to decline to terminate when there are exceptional circumstances. We also note that there are additional exemptions under s 154D (3), including instances where there is disability or where hardship may be caused to a child.

We submit that discretion should always be available to the Tribunal in instances where an application has been made to terminate any tenant as a basic principle of social justice, and it is appropriate that s154D contain exemptions such as those described above. We would submit that s.154D intended purpose has not been met, and given that the RTA already had a useable mechanism for dealing with severe anti-social acts of tenants, there is no reason to retain the section – in fact, to do so may increase antisocial behaviours.

Research has shown a strong link between attitudes to a social housing community and the health and strength of that community.[3] The higher bar that s. 154D imposes on social housing tenants as a class of renter plays into societal prejudices about people who are socio-economically disadvantaged.

Encouraging negative attitudes to social housing has the capacity to erode community within social housing estates and may in fact contribute to anti-social behaviours, rather than deterring them. We would argue that there needs to be a dialogue shift in how anti-social behaviours are managed within social housing. This submission makes a number of recommendations to this effect below.

Concerns with s 154G

Section 154G sets a benchmark of 28 days for tenants to return possession of a social housing premises to the social housing provider once the tenancy is terminated.

Again, we note that a specified time limit is particular to social housing tenants. The only other instance where the Tribunal is directed to apply a time frame in relation to repossession of premises is in the case of long term renters (20+ years). In this instance, the Tribunal is directed to order a date of repossession that is no less than 90 days, it is assumed that this is to account for the fact that they have lived in the premises for a substantial period of time, are likely to have significant possessions, are more likely to be older and for a range of reasons, may find it more difficult to find alternative accommodation.

We consider that the general limitation of 28 days to vacate when a social housing tenancy is terminated prescribed under s154G is unreasonably harsh. The reality is that many tenants who are terminated cannot easily find accommodation in the private market for a range of factors, such as

[3] See here, for instance, Jacobs, K., Easthope, H., et al*, A review of housing management tenant incentive schemes*, AHURI final report no. 96, August 2006 < https://www.ahuri.edu.au/__data/assets/pdf_file/0012/2154/AHURI_Final_Report_No96_A_review_housing_management_tenant_incentive_schemes.pdf> accessed 2 December 2019.

limited financial resources, disabilities and discrimination. We note that the grounds under which they are terminated would preclude them from getting a statement to say that they are a 'former satisfactory tenant' – this would be another limiting factor in their ability to access the private market.

We note that the discussion paper states that tenants who are terminated may be able to access Private Rental Assistance (PRA) in the private market. This is suggested as a way that former social housing tenants may be able to sustain tenancies within the private market and is presumably a response to concerns that tenants who meet the threshold for social housing are unable to sustain tenancies in the private market.

We would submit that the process of applying for, and being approved for PRA often requires the involvement of multiple support services and the collation of numerous pieces of supporting evidence. Being familiar with working with social housing tenants, our experience is that it would be extremely difficult, if not impossible to coordinate services to be able to organise for PRA on top of the practical process of moving out of a property within 28 days.

In practice the Tribunal is already validly exercising discretion on the date of possession to account for the fact that 28 days is wholly inadequate as a benchmark. It is our experience that this would be the situation in a majority of cases. Whilst we appreciate that there is limited housing stock, and high waitlists we do not believe that former tenants should be forced to vacate into homelessness. The solution to the problem of high demand is to invest in more social and affordable housing.

As with s 154D, we have grave concerns about s 154G singling out social housing tenants from private renters and holding them to a higher standard on account of the fact that they reside in social housing. Whilst we appreciate that social housing is a limited government asset which is in high demand, this should not detract from the Government's responsibility to ensure that people are appropriately housed. It is also important to maintain a separation here –the role of the Tribunal is not to be used as a vehicle to punish tenants who are already answerable under the Criminal Law system.

No evidence of effectiveness

In addition to the points we have raised above, we note that there is no evidence that ss 154D and 154G have reduced instances of anti-social behaviour in social housing. DJC does not have the capacity to monitor the effectiveness of the provisions.

It is our experience that we have not seen a reduction of social housing matters concerning breaches under s. 90 or s.91 since the introduction of the provisions – it appears that the provisions are not having any deterrent effect on tenants.

Given ss 154D and 154G are both unjust and ineffective, the sections should be repealed.

Early intervention strategies to reduce ss. 90 & 91 breaches

We also submit that the focus of social housing providers should be on early engagement and intervention to reduce the likelihood of tenants committing serious anti-social acts which constitute breaches under ss. 90 and 91.

This view is based on our observations that social housing residents subject to ss 90 and 91 breaches who contact our service often present with a similar range of issues including:

- A history of conflict in their tenancies that may extend for years;

- A feeling of isolation and victimisation within their communities;
- The belief that they are not treated impartially by social housing providers when matters are investigated;
- A desire to be relocated to another property;
- The belief that they are not supported to resolve issues at early stages;
- A lack of insight into how their behaviours may be viewed as anti-social;
- Mental health issues;
- A history of trauma;
- A lack of trust in government bodies such as NSW Police as a mechanism for resolving issues;
- Limited knowledge of services available to assist them prior to being issued with termination notices

We have a number of recommendations as to early intervention strategies as an alternative to termination.

2. The eligible grounds for tenant-initiated transfers should be expanded to make transfer to alternative premises easier

Our observation is that many private tenants who have conflicts with neighbours will opt to end their tenancies as a way of resolving the conflicts. In the case of a fixed term agreement, a tenant taking this option will either accept a break fee, or apply to terminate the agreement on the basis of breach of s 50(3) by a landlord or hardship.

They can opt to disclose the details of the conflict, or not. Having the capacity to move appears to have a major effect in reducing the severity of anti-social incidents overall.

Currently a social housing tenant can only apply to transfer to move away from neighbours on the basis that they are 'at risk' – that is, the personal safety and/or mental health of a tenant or a household member is at risk.[4] They must demonstrate that the risk is serious and ongoing, that the risk means they cannot remain in the current dwelling and/or location beyond a medium length of time, that the property and/or location significantly increases the risk and reduces their safety, that apart from transferring, there are no practical steps that can be taken by the tenant's household to lower or remove the risk and that moving will help or resolve the situation and remove or significantly decrease the risk.[5] It is expected that the tenant will also provide current supporting documentation from outside services, such as an AVO, letter from a social worker or a report from Community Services.[6]

Realistically, many residents do not seek AVOs, or assistance from external services such as police until matters have escalated significantly. It is usually a last resort as they often fear reprisal. Residents report that even in cases where they are threatened or intimidated, they are not necessarily able to secure an AVO.

> *Tenant A has recently moved into his social housing premises. He has since had numerous complaints from a neighbour about various different things. Tenant A has been warned by other residents that the neighbour has made life hard for others in the block. Tenant A actively spoke to his CSO and discussed his concerns. The CSO arranged a meeting between him, the neighbour and the neighbour's representative. This meeting failed to resolve the issues.*

[4] https://www.facs.nsw.gov.au/housing/policies/transfer-policy
[5] Ibid.
[6] Ibid.

Tenant A just wants to transfer. He does not see that his situation will improve and worries that it will get worse. While he is not at risk at this point, he is extremely uncomfortable living there and considers that it will only be a matter of time before the situation escalates.

We would submit that transfers should be incorporated as an early resolution strategy if the tenant can demonstrate that there is a dispute, the tenant has made genuine attempts to resolve the dispute (e.g. mediation) where it is appropriate to do so and it is reasonable to assume that moving the tenant will resolve the conflict.

Such a provision requires a tenant to make a serious attempt at resolving the dispute in good faith, if this is reasonable in the circumstances, and demonstrate that this attempt was unsuccessful.

Evidence could include a letter from an external mediation service, or a written acknowledgement by the tenant's CSO who has a knowledge of the situation. Costs of relocation would generally be payable by the tenant, with the possibility of obtaining an interest-free loan similar to the Rentstart Bond Loan. It is anticipated that such an approach would:

- Save time associated with managing anti-social behaviour within housing blocks;
- Would not set up one resident as the ''victim" and the other as the "perpetrator";
- Encourage residents to make attempts to resolve problems in the first instance;
- Allow tenants to take assertive action to relocate early – reducing the opportunity for matters to escalate to the point of violence;
- Lessen instances of anti-social behaviour;
- Lessen the need to utilise strike notices;
- Lead to less s.154D applications, less SPOs and less eviction of residents

We would also recommend that resources be channelled into expanding the 'Mutual Exchange' program, under which tenants are given autonomy to swap premises with other tenants. We believe that much could be done to promote this option more broadly to tenants and to resource tenants to be able to utilise this program.

3. CSOs working with tenants who are identified as anti-social should be trained to respond to complex needs clients and provide appropriate referrals;

It is our experience that tenants who engage in anti-social activities often have complex needs. They may have mental health issues, a history of trauma or may have issues with substance abuse. We have observed that tenants with such issues often do not have the insight to be able to understand their responsibilities, to appreciate that their behaviours are inappropriate in the context of living within a community or to connect with appropriate support services without assistance.

Tenant B lives in social housing. He has a history of trauma, including domestic violence and abuse. He lives in a block that predominately houses older residents. Tenant A listens to loud heavy metal music when he is 'triggered'. This has resulted in numerous noise complaints. Tenant A now thinks that everyone in the block 'hates him'. This resulted in him assaulting a neighbour who he believed was driving the complaints.

Employing appropriately trained workers as CSOs, or upskilling existing workers, would equip these workers with a range of skills and expertise to identify clients that may be experiencing a mental health issue and to appropriately refer these clients so as to address the underlying issues driving anti-social behaviours. by tenants and ''address the cause, not just the symptom". We note that DCJ has already committed to a process not dissimilar to this via the *Housing and Mental Health*

Agreement (August 2011). The key objectives of that agreement are for DCJ to work with a range of NGOs to:

> • Promote good practice in service delivery when responding to people with mental health support needs;
> • Deliver coordinated client-focused services which are flexible and meet the diverse needs of people with mental health problems and disorders;
> • Implement early intervention and prevention initiatives wherever possible;
> • Strengthen transition planning to prevent homelessness for people moving to or from health services or other relevant facilities; and
> • Ensure people with mental health problems and disorders receive a consistent response when they access mental health and/or housing services.[7]

We anticipate having appropriately trained CSOs who could appropriately refer tenants would:

- enable residents engaging in anti-social activities to be appropriately assessed and managed by appropriate external support services;
- Reduce conflicts between CSOs and clients;
- Make residents more comfortable to reach out to CSOs in the early stages of conflicts;
- Equip CSOs with the skills to engage with complex needs clients in a productive way

4. Resources should be invested in providing early intervention services (such as alternative dispute resolution) to tenants in social housing – these services should be independent to the social housing provider

We understand that CSOs will often try to investigate anti-social behaviour, meeting with the tenant who is alleged to have acted anti-socially, obtaining statements from neighbours and other witnesses and advising the resident of their responsibilities under their agreement. There does not appear to be any prescribed approach to the process, as the way that this is done varies between CSOs. Sometimes if there is a conflict between neighbours, efforts are made to bring the parties together to discuss the issues.

Tenants usually find these processes nerve wracking. For example, we have assisted a number of residents who have received letters from their housing providers requesting that they attend a meeting to discuss allegations.

All residents we have assisted have found this experience to be highly distressing, irrespective of whether the allegations were sustained or determined to be unsubstantiated.

> *"the tenant was convinced that he was going to be terminated on the basis of the letter he had received. This just made him angry at [HNSW]. He wanted to sue [HNSW] on account of the stress he was experiencing thinking about the meeting. He could not understand that it was a standard letter and that [HNSW] hadn't made a decision either way"* - account of a Tenants' Advocate assisting a HNSW who was alleged to have breached his agreement under s. 90.

It is our submission that investigations by CSOs may serve to erode communities and further entrench hostilities if not managed with consideration towards fair process and the avoidance of perceived bias. Seeking statements from other residents is seen, by tenants, as being particularly

[7] Housing and Mental Health Agreement, August 2011 at <https://www.facs.nsw.gov.au/download?file=326166> accessed 30 November 2019

divisive. The reality is, tenants are aware that housing providers can order termination. Residents often feel obligated to participate in these processes, but also feel forced. This is counter productive to resolving issues.

> *'I was asked by my CSO to go to a meeting [about a dispute with a neighbour] I went to this meeting in the block and the neighbour was there. I didn't know that the neighbour was going to be there. I felt like I was ambushed. I was angry. I didn't think I could leave though'.*

In all cases where tenants contact us in relation to neighbourhood disputes, we refer them to mediation via a Community Justice Centres (CJCs). Tenants often seem reluctant to use this service, and we speculate that this may be because it is seen as being too formal, complicated or legalistic. Tenants' advocates on the whole do not intervene in tenant-on-tenant disputes because they are not trained mediators, and the guidelines around advocacy are very tight in terms of avoiding situations where there may be conflict.

We would submit that housing providers, as landlords with the power to take action against tenants, are not appropriate to resolve disputes between tenants. We would propose that an external service be developed specifically to provide mediation for tenants as an early resolution strategy similar to the mediation services currently offered by NSW Fair Trading in the private rental space.[8]

The service would be focused on providing the disputing parties with the relevant information in order to assist them to come to an agreement on issues in dispute in the first instance, and could extend to formal mediation, depending on the model.

It would be logical that such a service could be managed by the Tenants Advice and Advocacy Services, as a separate to the information, advice and advocacy services provided under the Tenancy Advice and Advocacy Program. In NSW, TAAS are the logical option to take on such a service since:

- TAAS are recognised as being pro-tenant with a focus on keeping tenants in housing as a first principle;
- have an in-depth knowledge of the social housing space, including legislation and policies;
- Are often already embedded within social housing communities;
- Have experience working with complex needs tenants;
- Have contacts within the local area for referrals, if needed;
- Are small and nimble enough to work flexibly, for instance, they can facilitate meetings on site at properties.

We would anticipate that offering such a service would:

- Resolve a number of disputes at the early stages resulting in less ss 90 and 91 applications;
- Improve social cohesion within blocks;
- Reduce resources otherwise spent by CSOs in trying to informally manage conflicts;
- Reduce the reliance that social housing residents who experience anti-social behaviour at the hands of other residents currently have on social housing providers;
- Reduce tribunal resources by placing less emphasis on the Tribunal as a way of resolving disputes

[8] NSW Fair Trading <https://www.fairtrading.nsw.gov.au/about-fair-trading/our-services/resolving-issues/residential-tenancy-complaints> accessed 2 December 2019.

5. The Government should commit to investing in additional social housing stock to allow greater flexibility in terms of housing allocation

We note that as of 30 June 2019, there were 46,530 applicants on the general social housing wait list and 4,484 applicants listed as priority.[9] Wait times within CS02, our service catchment area, are 10+ years on all types of accommodation.[10]

Additional social housing stock is essential both to provide housing to people who are unable to sustain tenancies within the private market, but also to provide greater flexibility in terms of allocating tenants appropriately to avoid factors that may lead to anti-social behaviour including behaviours under ss 90 and 91. This applies both when tenants are originally offered a premises and if a tenant is approved for transfer.

As an example, it is not unusual for tenants with a history of substance abuse to express concerns that living in certain neighbourhoods may increase their risk of relapse. Currently, we have observed that social housing providers have limited ability to work with these concerns when offering properties to tenants, as there is insufficient stock to provide any real options. It is often our experience that tenants often have reasonable concerns about certain areas and locations, and that these concerns can even openly be acknowledged as being reasonable by CSOs, however tenants will often take properties, despite serious concerns, as they are aware that there are severe shortages in stock and their current living situation is unsustainable as an alternative. We would also hypothesise that additional social housing stock would lead to a greater level of diversity within social housing communities as extensive waitlists over subsequent years has led to higher concentrations of complex needs residents as a percentage of the overall social housing population.

Increased social housing stock would also result in less pressure to regain possession of housing stock after termination had been granted.

In summation, ss 154D and 154G as a tool to resolve anti-social behaviours, was, to our minds flawed as an approach to begin with. The reality is, that these provisions are divisive and play into damaging rhetoric that already exists in relation to social housing tenants. Research has shown a strong link between attitudes to a social housing community and the health and strength of that community, and may in fact create more problems with anti-social behaviour.[11]

We appreciate that social housing providers have a responsibility to ensure that all social housing residents are able to live in places where they are safe without fearing their neighbours, however there is no evidence to indicate that ss 154D or s154G have reduced anti-social behaviours and the NSW Civil and Administrative Tribunal as a whole, appears reluctant to apply s154G, which we would argue is an appropriate and responsible approach when dealing with a group of people who would be at inherent risk of homelessness if an order for possession is made.

Sections 154D and 154G should be repealed and a greater emphasis should be placed on increasing social housing stock overall and early resolution processes to prevent matters escalating to a point where it is necessary to seek termination under ss 90 or 91. Increased social housing stock to facilitate more opportunities for transfers, mutual exchange and increase community diversity, appropriately trained CSOs who can productively work with residents who are identified as anti-

[9] Department of Communities and Justice, < https://www.facs.nsw.gov.au/housing/help/applying-assistance/expected-waiting-times> accessed 2 December 2019.
[10] Ibid.
[11] Jacobs, K., Easthope, H., et al, op cit, 3.

social, increased ability to refer such residents to external support services and the development of a mechanism by which residents can access mediation are preferred mechanisms for social housing providers to meet their responsibilities to *all* those who reside in social housing.