

Inquiry into Tenancy Management in Social Housing

**Legal Aid NSW submission
to the Public Accounts Committee**

May 2014

Legal Aid NSW welcomes the opportunity to respond to the terms of reference to the Legislative Council Inquiry into social, public and affordable housing currently being conducted by the Social, public and affordable housing Committee.

Legal Aid NSW is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Our civil law solicitors advise clients living in social and public housing, with a particular focus on clients experiencing, or at risk of, eviction or homelessness. Where appropriate, we litigate on behalf of our clients. This practical experience provides a strong base from which to provide comment to the inquiry.

Cost effectiveness of current tenancy management arrangements in public housing

The management of public housing tenancies has become an increasingly complex task over the last decade as allocations of housing have been more effectively targeted towards people with the greatest need. It is our experience that social housing tenants typically suffer high levels of disadvantage for reasons including unemployment, poor health, disability, domestic violence, substance abuse and family breakdown. They can also be particularly vulnerable in their experience of legal, health and social issues.

Given this context, the management of public housing tenancies rightfully focuses on supporting tenants and sustaining tenancies. This is consistent with the role of a social housing provider, which is to prevent homelessness, provide opportunities to engage tenants and promote social inclusion.

Housing NSW is uniquely placed to perform these functions. It has the resources of government, can access relationships with other government and non-government agencies and has mechanisms to facilitate input from the community.

It is difficult to envisage the private sector being able to perform these functions. A social housing tenancy is inherently different to a private residential tenancy, and the private sector would be ill equipped to deliver the same or similar outcomes, and to be able to adequately respond to an emerging need in a timely and flexible manner when the key drivers are not market forces.

There is a widely-held view that community housing is more responsive to tenants and generally achieves better outcomes. We refer the Committee to the recent report by the Australian Housing and Urban Research Institute, *'Public housing transfers: past, present and prospective'*,¹ which found an absence of direct qualitative evidence that community housing providers were better at delivering tenancy services, and further, that the proposition that community housing is more cost-effective than public housing should be viewed with caution.

Range and effectiveness of support services provided to tenants in social housing

It is essential that tenants in need of support are provided with services at the earliest possible opportunity so as to sustain their tenancies. Housing NSW currently attempts to link people with appropriate support at the beginning of their tenancies. Targeted programs which do this have met with considerable success, most notably the Housing and Support Initiative, which aimed to assist adults with a mental health diagnosis to access clinical services and accommodation support.

However, too frequently Legal Aid NSW encounters clients who are at the brink of losing their public housing tenancy and becoming homeless because they have had inadequate support. We frequently assist public housing clients in circumstances of unpaid rent, property damage or neighbourhood disturbance. These issues are often manifestations of deeper problems such as mental illness or family breakdown or violence. These problems may have arisen after the tenancy commenced, or there may have been present from the outset but not supported because they were not identified or supports were not considered necessary at that stage.

Our concern is that at times, Housing NSW does not commit appropriate resources to providing primary intervention support services to tenants. This can result in problematic behaviour escalating and Housing NSW taking action to evict. The process of eviction can further exacerbate adverse health, social or legal outcomes, as indeed can the resultant homelessness which increases need, disadvantage and vulnerability, and constitutes a further barrier to accessing appropriate support. Eviction from public housing places further, and often more acute demands and stresses elsewhere in the system. Resources should be allocated to focus on early intervention and prevention to support tenants to remain in social housing.

¹ AHURI Final Report 215, Melbourne, 2013

Outcomes for tenants from current tenancy management arrangements and possible measures to improve tenancy management services

Many public housing tenants report positive outcomes from their living arrangements – they have secure and affordable housing, there are opportunities to engage with their community and there is a strong support network among tenants. However, we have identified a number of recurrent issues through our advice and casework that we have highlighted below.

Repairs

Problems in having adequate repairs done in a timely fashion is, in our experience, the most widespread problem in public housing over the last few years. There are often lengthy delays in having repairs done, and then they can be substandard or otherwise fail to resolve the problem, requiring the repair person to be called back, resulting in further delay. Many tenants need to apply to the NSW Civil and Administrative Tribunal (NCAT), formerly the Consumer, Trader and Tenancy Tribunal (CTTT) (the Tribunal), to obtain orders for repairs to be done, and even then, the orders are not always complied with. For example, Legal Aid NSW acted in one matter where a tenant had a number of items in her property in need of repair. With our assistance, she obtained Tribunal orders in 2012 to have the repair done. However, the repair was not completed until July 2014 following three further applications to the Tribunal.

These problems are caused by failures in communication and accountability between Housing NSW, which manages the properties, the Repairs and Maintenance Hotline where the faults are recorded, the NSW Land and Housing Corporation, which controls the property assets, and the contracting firms who are engaged to perform the work. This system needs to be reviewed and reformed to ensure that repairs can be conducted in a timely and efficient manner.

Need for early intervention and greater collaboration

Our clients often contact us when they are on the brink of losing their public housing tenancy. The assistance that we are required to provide is normally intensive and urgent, and is a drain on both our service and the resources of Housing NSW.

Many of these cases could be resolved at a much earlier stage through the provision of timely, appropriate and integrated support. Outcomes for tenants could be improved if Housing NSW reviewed its referral processes and put in place systems to identify underlying issues, including legal and health issues, as early as possible and referred clients to relevant agencies and services for support.

Need for regular inspections

Under the *Residential Tenancies Act 2010*, a landlord is entitled to inspect a property up to 4 times a year. However, inspections are very rarely carried out in public housing, if at all. Resources should be directed to conducting regular inspections once or twice a year. This would serve to identify repair issues in a timely and cost effective manner, as well as giving Housing NSW an opportunity to engage with individual tenants and communities to identify any issues and needs.

Use of evictions and the eviction process

In most cases, the eviction process starts with the issuing of a notice of termination by the landlord. This is a letter that states that a tenant is required to vacate the property by a certain date. Understandably, the receipt of such a notice is very stressful for a tenant.

In our experience, the issue of a notice of termination could have been avoided on many occasions if some preliminary inquiries were made by Housing NSW. For example, one of our clients was issued with a notice of termination twice in a five month period because the Housing NSW computer system didn't recognise a repayment plan that had been sanctioned by the Tribunal. Approval to issue a notice of termination should be obtained from senior management and all records, including Tribunal outcomes, should be reviewed before a notice is issued.

A further issue is that Housing NSW often attempts to evict those tenants who have incurred a debt to Housing NSW because they received a rental subsidy for which they were later found to be ineligible. In our view, there is no sound policy rationale for depriving a person of their entitlement to public housing in these circumstances. There are provisions in the *Housing Act 2001* that create offences for making false statements or representations to obtain a benefit, or to fail to disclose any material change of circumstances, and these offences carry penalties including a maximum of 3 months imprisonment or a fine of \$2,200, or both. This is a reasonable and sufficient sanction. A similar situation exists in social security. A person may be prosecuted for wilfully obtaining a benefit or payment that he or she was not entitled to. However, this does not bar that person from rightfully obtaining a benefit or payment in future. Housing NSW policies could be significantly improved by clarifying that a debt owed to Housing NSW is not an appropriate basis on which to take action to evict tenants.

Internal decision-making and review

Housing NSW is charged with the management of the state's public housing stock. As a government agency, there is an expectation that it will not only be efficient and effective in its administration, but also fair, equitable, accountable and transparent. These characteristics are the embodiment of good governance. It is therefore important for Housing NSW to ensure that:

- Policies and legislation are correctly applied
- It is clear what factors are taken into account in a decision
- Decisions are made in a timely manner
- Adequate reasons are given for decisions
- Decisions are consistent across Housing NSW
- Discretion is exercised in appropriate cases

We have found that where these practices are not followed, problems can be exacerbated by a confusing arrangement of policies and the absence of a proper system of review. Presently, a person aggrieved by a decision of Housing NSW may apply to the Housing Appeals Committee (HAC). The HAC has no basis in legislation and is only able to make a recommendation that may or may not be implemented by Housing NSW. Housing NSW's own policies provide no guidance about the circumstances in which a HAC recommendation might be implemented.

Further, after the HAC stage there is no further mechanism for merit review of decisions nor any easily accessible forum for judicial review. The sole recourse available is to seek judicial review in the Supreme Court. Legal Aid NSW currently has conducted a number of these cases, and they are prohibitively expensive for both the applicant and Housing NSW. It is recourse that would be beyond the means of most, and especially economically and socially disadvantaged people who typically interact with Housing NSW.

Legal Aid NSW recently had carriage of *Twaddell v New South Wales Land and Housing Corporation* [2014] NSWSC 7. A copy of the judgment is **attached** to this submission. That case concerned the decision to cancel a tenant's rent subsidy following an allegation that her former partner resided in the property. The subsidy was cancelled by the tenant's local Housing NSW office despite internal advice from the Tenant Fraud Unit to not do so (see paragraph 26). Our client sought review at the HAC, which recommended the subsidy be reinstated. This recommendation was not implemented by Housing NSW, which then took steps to terminate our client's tenancy. With the assistance of Legal Aid NSW, the tenant was able to have the decision of Housing NSW set aside. The NSW Land and Housing Corporation has since filed a Notice of Intention to Appeal in the Court of Appeal.

This case illustrates the action and resources currently required to correct decisions of Housing NSW. But for the intervention of Legal Aid NSW, the tenant and her children would have lost their public housing tenancy.

Instead of having to take action of this magnitude, review of Housing NSW decisions should be available in the Administrative and Equal Opportunity Division of NCAT. This is the forum of review for many government decisions and the Division has the expertise to efficiently deal with these matters. Representation at the NCAT is not required and its processes are geared towards accessibility for non-represented parties.

Having recourse to accessible review encourages a culture of good decision-making within an agency and can lead to substantial improvements to processes and practice. It would also promote good governance by enhancing public perceptions of the fairness of Housing NSW decision-making.

In relation to community housing, a request for review may be made to the HAC, but beyond that stage, the role of the Courts to oversee the administrative decisions of a community housing provider is unclear, even though the provider may be exercising functions of a public nature. This uncertainty gives community housing tenants fewer and less effective rights of review than the tenants of Housing NSW.

Better drafted policies

Policies are the tools of discourse between Housing NSW on the one hand and its clients and their advocates on the other. They are the external measure by which Housing NSW is accountable to the public, and its conduct can be assessed by the Housing Appeals Committee, the Ombudsman and the Courts.

Policies about eligibility and allocation are found on the internet at *Housing Pathways*, and all other policies are on the Housing NSW site. These policies are a labyrinth to the uninitiated. They are difficult to navigate and are sometimes inconsistent. Often there are many different policies within the one document.

Greater accountability can be achieved by having Housing NSW policies drafted in a more consistent, accessible and integrated manner. Policies should be clearly named and numbered. Guidelines should also be issued to provide guidance to the decision-makers, the public and their advisers.

In relation to community housing providers, there are often stark differences in the policies from one provider to the next. This presents difficulties for tenants and their advisers, especially where policies cannot be accessed easily. Many providers have policies on their websites, but this is not always the case.

Conclusion

While public housing provides a range of positive outcomes to tenants, there is scope to further enhance outcomes for tenants by:

- Introducing systems to identify and address issues which may compromise a tenancy at a primary, rather than a tertiary stage
- Allocating appropriate resources to early intervention initiatives that support tenants to remain in social housing
- Collaborating with other agencies, including Legal Aid NSW, to address any underlying issues impacting upon a tenancy
- Ensuring that eviction is only pursued as a measure of last resort
- Clarifying that a debt owed to Housing NSW is not a bar to a social housing tenancy
- Reviewing systems to ensure that repairs are carried out in a timely manner, and where necessary, in accordance with Tribunal orders
- Conducting regular property inspections
- Enabling Housing NSW decisions to be reviewed in the Administrative and Equal Opportunity Division of the NCAT
- Reviewing and amending Housing NSW policies to ensure that they are set out in an accessible and integrated manner

We encourage the Committee to exercise caution if considering the appropriateness of outsourcing social housing tenancy management to private service providers. Any cost assessment should consider the integral importance of social support services when managing social housing tenancies, the importance and value of cross-agency collaboration and the significant costs incurred by government if a social housing tenant becomes homeless and then requires a range of more acute government services.

Legal Aid NSW appreciates the opportunity to provide these submissions. For further information, please contact Damien Hennessy on (02) 4629 2753 or by email at damien.hennessy@legalaid.nsw.gov.au.