GOVERNMENT OF WESTERN AUSTRALIA

Equal Opportunity Commission

Our Ref: EOP/10/0152
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CONFIDENTIAL

Hon Adele Farina MLC
Chairman
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Farina

INQUIRY INTO RESIDENTIAL TENANCIES AMENDMENT BILL 2011

Thank you for your letter received 12 September 2011 inviting me to make a submission to the Committee's inquiry into the Residential Tenancies Amendment Bill 2011.

Please find attached my submission.

Yours sincerely

Yvonne Henderson
COMMISSIONER FOR EQUAL OPPORTUNITY

7 October 2011

Att

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INQUIRY INTO RESIDENTIAL TENANCIES AMENDMENT BILL 2011

BACKGROUND

In December 2009, the Government released a discussion paper on its proposed 'Disruptive Behaviour Management Strategy' ("the Strategy"). The Government stated in the paper's introduction that the Strategy, which had been endorsed by Cabinet, *"reflects a revised approach to public housing tenancy management in response to community concerns regarding ongoing disruptive behaviour by a small proportion of public housing tenants."*[1]

The Government referred to what it considered to be legislative and policy deficiencies in the management of disruptive behaviour by tenants, including the limited effectiveness of section 62 of the *Residential Tenancies Act* (RTA) in dealing with repeated incidents of disruptive behaviour. The Government proposed a range of legal measures intended to address these inadequacies, including in the short-term, a greater reliance on section 64 of the RTA, which allows termination of a tenancy without demonstrating grounds, and amending the RTA to enable the Department of Housing to take specific action against disruptive tenants.[2] The Department's legal powers were to be supported by new operational policies, which would provide for differential responses to reported incidents, depending on the severity of the behaviour – minor, serious, and severe.

I made a submission to the Government in February 2010 (Annexure 1), in which I wrote:

> *"It is recognised that social harmony is problematic not only for tenants, but also for the immediate neighbourhood and the local community. The response to disruptive behaviour firstly needs to establish complaints are genuine and not motivated by maliciousness, that there are strategies for early intervention to deal with such discord and or dysfunction. Finally, the legal issues of tenancy need to be clearly separated from other social and or legal issues under civil or criminal proceedings and the penalty of losing one's home is not imposed when the offence has no bearing on the tenancy. My deepest concerns lie with the definitions of disruptive behaviour and their link to tenancy matters and also some of the proposed extended powers of Departmental officers.*

Where it is proposed to provide a legally enforceable means to terminate a tenancy as a result of anti-social behaviour, the EOC believes this needs to be balanced against:

1. *The rights of children and the Department's obligations as a result of the ratification of the Convention on the Rights of the Child by the Federal Government in 1990.*

   The EOC believes it is unconscionable for any government agency to render children homeless as a result of anti-social behaviour of their parents or visitors to their household. Clearly the needs of children need to be addressed before any eviction occurs.

2. *The Department's special position as the houser of last resort.*

   The expenditure of public housing for the least advantaged in the community is premised in part on the unacceptability of families living in the streets, in cars, in the bush in a developed western democracy such as Australia.

   The Department needs to be cognisant of this to ensure that some alternative is always sought before a family or individual is evicted. This may require clearer liaison with non-government bodies which provide housing and other assistance to those in need in part as a result of public funding.

3. *The difficulty faced by women in situations of domestic violence.*

   Where partners are verbally and often physically abusive it may result in complaints of anti-social behaviour. The involvement of the police and possible transfer to alternate housing should be considered here.

4. *Special consideration where anti-social behaviour may be attributable to intellectual disability or mental illness.*

   Families having one or more members with disabilities particularly mental disabilities which result in challenging behaviour are often subject to complaints of anti-social behaviour. The engagement with other specialist agencies is recommended here before any eviction occurs.[3]

Elsewhere in my submission to the Government, I refer to the Commission's active involvement with the work of the Department to oversee the implementation of the 165 recommendations contained in the report of the Commission's inquiry into the Department's management of Aboriginal tenants and applicants, 'Finding a Place' (2004)[4]. Anti-social behaviour was canvassed widely in the report, and issues such as the definition of anti-social behaviour, contributing factors, and strategies to address it are discussed further in my submission to the Government.

The Government published the final version of the Strategy on the Department's website in April 2011 (Attachment 2)[5]. It incorporates the three-tier approach to addressing disruptive behaviour, as originally conceived, based on a 'strike' system. The Residential Tenancies Amendment Bill 2011 ("the Bill"), the subject of this inquiry, represents the legislative component of the Strategy. The 'strike' policy and the RTA amendments are intended to work together.

Much of what concerned me about the draft Strategy when I made my original submission to the Government still concerns me now, as the published version is little different in content. Since the Strategy's implementation, the number of race and impairment discrimination complaints lodge with the Commission by Aboriginal tenants against the Department has increased markedly, after a sustained period when the number of such complaints in the five years since 'Finding a Place' had stabilised. Most involve the application of the 'minor disruptive behaviour', or 'three strikes', strategy. I expect the number of complaints to increase again, if and when the Bill is passed and comes into force. It is unfortunate that what has taken years for the Department and the Commission to achieve in terms of improving the relationship between the Department and its Aboriginal tenants is at risk of being undone so quickly.

THE BILL

The provisions of Part V of the RTA deal with the termination of residential tenancy agreements. The Bill inserts a number of new Divisions into Part V. Division 3 is headed 'Special provisions about terminating social housing tenancy agreements.'[6] 'Social housing tenancy agreement' is defined in section 71A as meaning 'a residential

tenancy agreement in respect of social housing premises, but does not include any agreement that is excluded by regulation from the ambit of this definition.'

My focus, however, is on Division 4, 'Orders for termination of residential tenancy agreement.'[7] Previously under Part V, the Department, like any other lessor, was required to issue a notice under either section 62 or section 64, and then apply to the court under section 71 for an order terminating the agreement, if necessary. It was sometimes a complicated and time-consuming process, but one that remains largely intact for tenancies that are not social housing tenancies. The Government's problem with section 62 is that it requires the lessor to give the tenant a period of not less than 14 days before the issue of the termination notice to remedy the breach. If the breach is remedied within that time, then the lessor is unlikely to be successful in obtaining an order for termination from the court. The Bill does not make significant amendments to section 62. Section 64 has been amended to permit the tenant to apply to the court for a further period of 60 days before the tenancy is terminated. The issue, however, for the Government in respect to social housing tenancies is not the length of notice, but the fact that notice is required at all.

To deal with this, the Bill expands the number of grounds under the RTA where a tenancy agreement can be terminated without notice.[8] One of these grounds is for objectionable behaviour by a social housing tenant. It is where the Strategy finds its clearest legislative expression. The Bill inserts into 75A, 'Termination of social housing tenancy agreement due to objectionable behaviour.' The three grounds for terminating an agreement are set out in sub-sections 75A(1) (a) to (c), which provide:

> 'A competent court may, upon application by the lessor under a social housing tenancy agreement, terminate the agreement if it satisfied that the tenant has –
>
> (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,

and that the behaviour justifies terminating the agreement.'

Although expressed differently, sub-section (c) is capable of incorporating behaviour of the kind referred to in the examples under the heading of 'minor disruptive behaviour' in the Strategy, and which typically describe the circumstances underlying complaints lodged with the Commission by Aboriginal tenants against the Department . The Bill's Explanatory Memorandum states:

> 'An interference with the reasonable peace, comfort or privacy of any person who resides in the immediate vicinity of the premises is intended to be less than a nuisance at law, but more than a mere annoyance or inconvenience when viewed objectively. The court must be satisfied the tenant's behaviour justifies terminating the agreement.'[9]

When deciding if the tenant's behaviour justifies terminating the agreement, the court may also have regard to (a) whether the behaviour was recurrent and, if it was, the frequency of the recurrences, and (b) the seriousness of the behaviour.[10] This clearly contemplates the submission of evidence by the Department, in any given case, that a tenant has 'strikes' against his or her name, whether one, two, or three, depending on the nature of the behaviour identified by the Strategy. It is already the Department's practice to use strikes against a tenant to justify an application for a termination order, albeit after first complying with the notice requirements under sections 62 or 64, as the case may be. The Bill removes those statutory notice requirements and replaces them with section 75A. It is then left up to the Department to decide what notice, if any, should be given to an allegedly disruptive tenant, and how. I am concerned that Parliament would be prepared to, in effect, transfer oversight of this power to a government agency.

The combined effect of the Strategy and section 75A means that should social housing tenants, in the Government's opinion, transgress any condition as to disruptive behaviour, they will be denied the statutory protections as to notice that other tenants

covered by the RTA will continue to enjoy. It is, on any view, less favourable treatment of social housing tenants compared to other tenants and, in my opinion, an over-reaction to the behaviour of a "small number of tenants".[11] The threshold for 'minor disruptive behaviour' is relatively low, certainly lower than the concept of nuisance in law. The Department should be able to manage problematic tenants, as it has done previously, without requiring the RTA to be amended. It is a puzzling response given my close involvement with the Department since the release of 'Finding a Place.' Further, I consider the application of the Strategy and section 75A to be arguably inconsistent with the *Equal Opportunity Act*, in respect to discrimination on the grounds of race, impairment, and age, as explained below.

DISCRIMINATION IN ACCOMMODATION

Nearly 22% of the Department's properties are occupied by Aboriginal tenants and their families.[12] Many of them have chronic diseases and disabilities. Complaints received by the Commission reveal that many Aboriginal tenants are elderly grandmothers, sometimes great-grandmothers, with the care and responsibility for grandchildren and other relatives, who reside with them from time to time, usually out of necessity. The circumstances that have brought about this state of affairs in the Aboriginal community are well known to the public and, I am sure, the Committee.

Under the *Equal Opportunity Act* ("the Act"), it is unlawful for a person, whether as principal or agent, to discriminate against another person on a number of grounds, in the provision of accommodation. Discrimination can be direct or indirect. Direct discrimination occurs when a person ("the discriminator") treats another person less favourably than the discriminator treats or would treat a person who does not possess the characteristics of a prohibited ground, in the same circumstances or in circumstances not materially different. Discrimination is only unlawful in certain areas of public life, for example, employment, education, services, and accommodation.

Indirect discrimination is defined by the Act in the following way:

> 'For the purposes of this Act, a person (in this subsection referred to as "the discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of (race) of the

aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition –

(a) with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply.'

The definition applies to all grounds under the Act. It is intended to capture systemic discrimination that is caused by the application of a seemingly neutral practice or procedure to a particular cohort, made up of individuals who, due to the attributes they possess, have varying abilities to comply. Applying the test of indirect discrimination to the Strategy, in particular, 'minor disruptive behaviour', the relevant 'requirement or condition' is that in order not to get three strikes, the tenant must not do or permit 'activities that could reasonably be expected to occur on occasion in an ordinary suburban household, but which cause a nuisance to neighbours'[13] on more than three reported occasions in a twelve-month period.

As explained previously, in the Commission's experience, the tenants who are, and will be, least able to comply with this requirement are elderly Aboriginal women, often suffering from chronic illnesses. They not only have the care of children or grandchildren who reside with them, but are often called upon to look after members of their extended family. When overcrowding becomes an issue, the likelihood of disruptive behaviour increases. These women have explained to the Commission (and the Department) that they find it extremely difficult to monitor and control the behaviour of every relative or visitor who may be staying temporarily. The consequence is that the strikes are recorded against the tenants, who are not themselves responsible for the disruptive behaviour, but who are unable due to age, disability, and a sense of obligation to do much about it. That is, they are unable to comply with the 'requirement or condition' within the meaning of the Act.

In my view, the requirement or condition is unreasonable for this very reason. The 'minor disruptive behaviour' component of the Strategy might be justified in some instances, but it appears that the people who are punished the most by it are those who are probably the least disruptive of all of those involved. Paradoxically, it is the capability and resolve of older Aboriginal women in managing their tenancies in the face of considerable hardship that leads to them being placed in the situation where they are most at risk of their tenancies being terminated. Unfortunately, the Government has decided to take the easier route of strict compliance, rather than continue with the advances the Department has made in the last few years in managing Aboriginal tenancies, and has sought legislative back up for its position. Given the Strategy's high profile, including the disruptive behaviour hotline and online complaint form, there is a risk that local residents will feel emboldened to complain about alleged disruptive behaviour, however spurious, and the Department will have to put more resources into following them up. I do not believe this is fair, nor do I have confidence that the approach will work in the long term.

Of course, it remains to be seen whether the Strategy and the amendments to the RTA are held to be unlawful under the Act. It is not my role or within my power to make a determination of that kind. However, I am obliged to accept complaints involving the application of the Strategy to social housing tenancies, if I consider they raise an arguable contravention of the Act, and I will continue to resolve them by conciliation, wherever possible. It could be argued that the amendments to the RTA (assuming the Bill is passed) are subsequent to the Act and therefore, as a matter of statutory construction, Parliament intended the amendments to prevail over the Act to the extent of any inconsistency. Maybe so, however, this would not be the case in respect to any inconsistency between the RTA and Commonwealth discrimination law, in particular, the Racial Discrimination Act, the Disability Discrimination Act, and the Age Discrimination Act. Those statutes contain provisions similar to the Act in respect to direct and indirect discrimination, and all apply to the crown in right of the Commonwealth and the States. At the very least, the Government should consider legal advice as to its exposure to claims of discrimination lodged by an aggrieved social housing tenant with the Australian Human Rights Commission and Federal Court.

CONCLUSION

I am opposed to both the Strategy and to the insertion of section 75A into the RTA. I remain concerned that the Department, after an extensive period of consultation with the Commission and other organisations, and during which significant improvements were made in the way that Aboriginal tenancies are managed, should now be adopting the Strategy. I am even more concerned that the Government should think it necessary to introduce a Bill codifying the Strategy in the RTA. The result will be that more of the most vulnerable social housing tenants will be evicted, unfairly in my view, and the Department will become weighed down by an ineffectual policy that will draw significant resources and personnel away from other important programs. I would welcome the opportunity to present further information to the Committee, if it decides to conduct hearings in future.

Endnotes

[1] 'Disruptive Behaviour Management Strategy Discussion Paper', Department of Housing, December 2009, at 1.
[2] Discussion Paper, at 4.
[3] Commissioner for Equal Opportunity Submission to the Minister for Housing on Disruptive Behaviour Management Strategy, at 1-2
[4] 'Finding a Place', Equal Opportunity Commission, 2004 and 'Finding a Place: Final Report' Equal Opportunity Commission 2011 - eoc.wa.gov.au/publications/reviewsandreports
[5] 'Disruptive Behaviour Management Strategy' Department of Housing, 2011
[6] Bill, Clause 92
[7] Bill, Clause 69
[8] Bill, Clause 94 – section 73A inserted
[9] Explanatory Memorandum, at 64
[10] Bill, Clause 95, section 75A(3)
[11] 'Disruptive Behaviour Management Strategy', at 2
[12] 'Finding a Place: Final Report', at 27
[13] 'Disruptive Behaviour Management Strategy', at 6

Commissioner for Equal Opportunity
Submission to the Minister for Housing on
Disruptive Behaviour Management Strategy

Overview

As the WA Commissioner for Equal Opportunity, one of my statutory responsibilities under the *Equal Opportunity Act 1984* is to attempt to eliminate unlawful discrimination in the area of accommodation. Unlawful discrimination in this area can be on the basis of sex, race, impairment age, religious or political conviction, pregnancy, marital status gender history or sexual orientation and by either or both direct and indirect means. I have conducted two inquiries into issues of discrimination associated with accommodation because of the fundamental place it occupies in relation to human rights.

The instigation of the inquiry into the public housing system in 2002 was a response to the disproportionate number of complaints received by the Equal Opportunity Commission (EOC) from or on behalf of Aboriginal applicants for public housing and tenants.

The Commission has maintained an active involvement with the work of the Department to oversee the implementation of the 165 recommendations of the report of the inquiry, Finding a Place (2004). Many of these recommendations deal with the identified issues from a substantive equality basis by attempting to ensure policies and processes do not inadvertently preclude Aboriginal people from housing nor disproportionately adversely affect them once they gain a tenancy. Over recent years there has continued to be complaints against the Department however the numbers, until recently, have been significantly fewer. I believe this is partly attributable to the cooperative work which has been done between the Department and the Commission in implementing the recommendations of the Report.

Whilst a significant number of recent complaints arise from the issue of length of time on the waiting list; there have remained a reasonable number of complaints arising from evictions, where anti-social behaviour has been cited as the breach of the tenancy agreement. The cases brought to the Commission are in circumstances where the tenancy seems to invariably have multi layers of disadvantage and many compounding problems. The issues facing these families in terms of their life circumstances do not seem to have changed significantly from the time of the Report.

It is recognised that social disharmony is problematic not only for tenants, but also for the immediate neighbourhood and the local community. The response to disruptive behaviour firstly needs to establish complaints are genuine and not motivated by maliciousness, that there are strategies for early intervention to deal with such discord and or dysfunction. Finally the legal issues of tenancy need to be clearly separated from other social and or legal issues under civil or criminal proceedings and the penalty of losing one's home is not

imposed when the offence has no bearing on the tenancy. In reviewing the paper as a whole I would support the proposed intervention strategies which are outlined and further in this response add comment about the manner in how this is provided. My deepest concerns lie with the definitions of disruptive behaviour and their link to tenancy matters and also some of the proposed extended powers of Departmental officers.

Where it is proposed to provide a legally enforceable means to terminate a tenancy as a result of anti-social behaviour the EOC believes this needs to be balanced against:

1. The rights of children and the Department's obligations as a result of the ratification of the *Convention on the Rights of the Child* by the Federal Government in 1990.

The EOC believes it is unconscionable for any government agency to render children homeless as a result of anti-social behaviour of their parents or visitors to their household. Clearly the needs of children need to be addressed before any eviction occurs.

2. The Department's special position as the houser of last resort.

The expenditure of public housing for the least advantaged in the community is premised in part on the unacceptability of families living in the streets, in cars, in the bush in a developed western democracy such as Australia.

The Department needs to be cognizant of this to ensure that some alternative is always sought before a family or individual is evicted. This may require clearer liaison with non-government bodies which provide housing and other assistance to those in need in part as a result of public funding.

3. The difficulty faced by women in situations of domestic violence.

Where partners are verbally and often physically abusive it may result in complaints of anti-social behaviour. The involvement of the police and possible transfer to alternate housing should be considered here.

4. Special consideration where anti-social behaviour may be attributable to intellectual disability or mental illness.

Families having one or more members with disabilities particularly mental disabilities which result in challenging behaviour are often subject to complaints of anti-social behaviour. The engagement with other specialist agencies is recommended here before any eviction occurs.

Anti-social Behaviour and Finding A Place

The issue of anti-social behaviour was canvassed widely in Finding a Place.

Some of the interviews and submissions made to the Finding A Place inquiry went to the issue of how Aboriginal tenants felt that they were dealt with in relation to allegations of anti-social behaviour. Examples of where people felt that they were unfairly treated was that:

- Neighbours would report trivial matters such as children running across lawns
- The neighbours position was always believed over that of the Aboriginal tenant
- Many matters were reported to the Department where this would not occur if the tenant was in a private rental.
- Neighbours often complained just because of the number of visitors which did not necessarily mean anti-social behaviour was occurring.

A number of recommendations were consequently made to deal with these issues.

102. That the DH definition of "anti social behaviour" be amended so that it that does not include trivial matters, for example, numbers of visitors at a property where this does not unduly impact upon the neighbour and would not normally be investigated by a landlord in the private sector. It is noted that some issues that have been described as anti social should not fall within this definition, for example, the tidiness or cleanliness of a tenants own house where this is not a public health issue.
103. That DH consider transfer before eviction.
104. The DH is to be cognisant of the rights of the tenant to the quiet enjoyment of their property free from constant enquiries from the DH in relation to trivial complaints
105. The DH to discourage and not record trivial complaints from neighbours regarding issues such as children running across verges and cutting corners, balls thrown over fences, loud music, etc. The DH to refer these complaints to appropriate bodies, for example, excessive noise to the local authority; disputes in relation to children's behaviour to appropriate local mediation services etc.
106. The DH not to offer advice that could be construed as encouragement to a neighbour wishing to complain about a tenants behaviour, for example, as to whether that person should go to the Police, should gather a petition against the tenant, approach a local Member of Parliament etc.
107. Where a complaint is of a sufficiently serious nature as to require investigation, the DH is to conduct a complete investigation, including seeking the response of the tenant to the allegations.
108. The DH to remove from a tenant's file any reference to anti social behaviour claims that were not found to be substantiated after investigation by the appropriate authority, or in any event after three years.
109. The DH is to engage independent mediators to assist in disputes between neighbours.

110. That a specialised independent mediation service with trained mediators be established to deal with socially based disputes between neighbours to prevent the escalation of these matters. The availability of this service is to be widely publicised amongst DH tenants.
111. The DH to ensure that all officers receive training to sensitise them to cultural difficulties, for example, preferred socialising etc, which could result in a better understanding of situations that are culturally influenced that could give rise to complaints from neighbours, and that Homeswest use this knowledge to respond to complaints.

An audit of the recommendations show that the Department has given its support for and or partially implemented, recommendations 102, 104 105,106, and 107.

Understanding the issues and the extent of these

The proposed strategy as stated is a response to the "community concerns regarding ongoing disruptive behaviour by a small proportion of public housing tenants".

Part of the difficulty at the time of the inquiry leading to Finding A Place was ascertaining the extent to which anti-social issues lead to breach notices, eviction orders and actual evictions. This problem remains as the Department does not seem to keep information or even statistics on the reason for evictions. Further as pointed out in submissions to FAP, the Department only records bailiff evictions as actual evictions, and no record of even the number of section 62 or 64 of the RTA orders which are sought and granted each year. It is understood that in the case of section 62 orders, these are often "waived" as the Department negotiates with the tenant strategies to sustain the tenancy.

Whilst the Department has figures on actual bailiff evictions, it seems that different officers within the Department have a different sense as to the major cause leading to evictions. Some will state that debt, either through arrears or tenant liability is the major reason.

The study "Evictions and Housing Management" (2006) led by Andrew Beer, found:

> Very few evictions (7 per cent, n=10) are the result of bailiff or police action and only four percent (n=6) result from formal magistrate court or residential tenancy tribunal orders.
>
> • Thirty-two per cent (n=47) of tenants reported they left their tenancy prior to any formal action by their landlords due to dispute and expected eviction.
>
> • Forty-four per cent (n=64) of tenants reported that they left their tenancy on receipt of a formal request to vacate.
>
> The main reason for eviction, common to private and public tenancies, is 'rent arrears' (45 per cent, n=103 of evictions). 'Complaints from neighbours' (15 per cent, n=35 of evictions) and 'property not maintained' (13 per cent, n=29 of evictions) are less prevalent reasons. (Beer 2006)

(The research did not include Western Australia however its samples were from three other states. It also included case studies from the private rental market.)

To be clear about the numbers of tenants who are subject to the process of breaches for anti-social behaviour would assist to analyse the major causes and the best approach to dealing with the issues. The information guiding the process presently is a reaction to particular cases and not informed by the overall picture.

What Constitutes Anti-social behaviour and when is it associated with the tenancy?

The Office of Crime Prevention in WA has provided the following definition

> Anti-social behaviour means different things to different people – it ranges across behaviours such as drunken 'yob' groups in public, litter and graffiti, abandoned cars, noisy neighbours, threatening and intimidating language or actions, and behaviour which is often dismissed as youthful stupidity, such as rock throwing and abusive language.
>
> ***Office of Crime Prevention, Government of WA***
> *http://www.crimeprevention.wa.gov.au/CrimePrevention/AntiSocialBehaviour/tabid/502/Default.aspx*

Whilst many of the behaviours outlined in pages six and seven of the paper could be reasonably described as anti-social behaviour, the key question which needs to be considered for this strategy, is such behaviour associated with the tenancy arrangement and as such does it breach the tenancy agreement?

Research led by Dr Daphne Habibis into "How can demanding behaviour in public housing be managed effectively?" makes this distinction:

> "Demanding behaviour by tenants is often displayed through socially intrusive practices such as excessive noise and verbal abuse which disturb the peace and disrupt the lives of other residents but fall short of requiring a statutory response."

At page seven, the strategy correctly identifies that other agencies such police and/or local government may actually have responsibility for dealing with the particular behaviour complained of. I strongly agree with this point and believe that this is the correct legal and social manner in which to deal with such issues.

Two issues arise in relation to penalties for anti-social behaviour. Firstly it is my view that as a matter of natural justice if a person has a penalty imposed upon them for breach of either a criminal or civil matter, then there needs to be examination as to whether there should also be the additional penalty of loss of the tenancy. An additional penalty may amount to a double jeopardy. Potentially the first penalty imposed may actually rectify the matter. This does not include the circumstance where the actual premises have been used for illegal conduct and all members of the tenancy were involved in that activity. I note with

relief that the strategy does now identify that there will be consideration of the status of the tenancy where not all members of the household have been involved in the criminal activity and not automatic eviction.

Secondly serious consideration has to be given to whether the complained of behaviour can be reasonably associated with the tenancy. It is noted that the *Residential Tenancies Act 1987* at section 39 obliges the tenant not to cause a nuisance. As noted in the paper, part of the difficulty in dealing with the matters is the lack of prescription regarding this clause. What constitutes a nuisance and to whom? For example "hoon" car behaviour where the person does burnouts in the far end of the residential street in which they live. Can this behaviour be reasonably associated with the tenancy? Using this same example on the first issue, if the burnouts are done closer to the house of residence so more closely associated with the tenancy, would the impounding of the car by the police not be the appropriate and usual penalty?

Understanding Contributing Factors

This strategy gives consideration to the changing demographic of people requiring access to public housing and to the issue of multi-layers of disadvantage and the contribution these issues may have on the behaviour of some tenants.

Many of the complaints received in this Commission against the Department allege a combination of race and impairment discrimination. Our research shows there is a strong overlay of these two characteristics. Whilst many of the impairments cited are chronic physical conditions, there is also a significant level of mental health issues.

The 2009 summary report of "Overcoming Indigenous Disadvantage" produced by the Steering Committee for the Review of Government Service Provision cite:

> " 'Life stress events' have been identified as the factor most strongly associated with a high risk of clinically significant emotional or behavioural difficulties in Aboriginal children. In WA, in 2000-01 more than one in five Aboriginal children aged 0-17 years were living in families that had been exposed to 7 to 14 major life stress events such as death, incarceration, violence and severe hardship, in the previous 12 months." (p.41)

It is the Commission's experience that often the behaviour forming the basis of breach notices and sometimes eviction can be attributed to intellectual, psychiatric or psychological dysfunction. Whilst it can be appreciated that the cause of the behaviour does not mitigate the impact on the recipients, the response to dealing with such matters would need to be modified.

Research led by Dr Daphne Habibis into "How can demanding behaviour in public housing be managed effectively?"

> "Perpetrators of demanding behaviour may be threatened by the retaliatory actions of neighbours and other members of the community. In these circumstances the question of who is the problem becomes complicated as the line between victim and perpetrator blurs. This is especially problematic where the demanding behaviour is associated with a disability or some other form of vulnerability. (2007 p1)."

If these factors are duly recognised then some of proposed courses of action such as the tenancy behaviour conditions could disproportionately affect those who are struggling to meet what may be considered normalised tenant behaviour.

It is also recognised that the "behaviour" issues arising from various tenants in the above categories would be well beyond the scope of the skills and duties of officers of the Department to deal with. It therefore becomes even more important that there is the capacity for a range of government services to be resourced to work in a coordinated fashion with these tenants. While there may be expected additional costs, the benefit of reducing homelessness and the social disconnection associated with that would provide an overall government service and social cost benefit.

Comment on other issues within proposed strategy

Specialised Teams

The research into similar strategies in public housing authorities strongly supports this approach. A key factor however is that such teams if established need to be resourced accordingly. This includes the recruitment and the appropriate remuneration of suitably qualified staff into the intervention teams. To attempt to do this on a cost neutral basis, I suggest, would not only have the effect of not being effective, it will lead to high levels of staff stress and turnover.

As correctly identified, many neighbourhood issues may commence with relatively low level issues and if dealt with quickly and effectively, the often cited escalation may not occur. At this point intervention by staff who have the routine role of Housing Services Officer will be critical. These staff members as we understand it are already required to deal with the investigation of complaints of neighbours and attempt to resolve the matter. The requirement however is one which requires considerable level of interpersonal and dispute settling skills. It is noted that **mediation services** are advocated within the strategy as an external facility: This was also a specific recommendation of FAP. It could be considered however that if designated staff within the Department were trained in mediation skills and if they could be readily available to deal with neighbour disputes in the early stages (with the consent of the parties to the dispute) then ongoing issues may be averted.

Section 64 notices

The termination of tenancy arrangements under section 64 of the RTA was a practice used by the Department in the period leading to the inquiry into public housing. The Report found that the provision had been used in a very arbitrary way and due to its very nature of not having to provide a reason for the termination of the lease, did not allow the tenant any capacity to contest the eviction, irrespective of how unfair it may have been. The report contained a specific recommendation that it should not be used by the public housing authority, and to our knowledge has only been used in very few cases over the past five years.

In light of the above I would therefore strongly oppose the reintroduction of the use of this section of the RTA to terminate tenancies.

Prohibition of visitors/Move on Orders

There is an understanding of the rationale for this aspect of the strategy, I consider however that such provisions could be applied disproportionately to Aboriginal tenants. In a large number of the complaints brought to the Commission where anti-social behaviour has been cited as the rationale for the termination of the tenancy, overcrowding with a minimum of two family units staying at the house is common. Quite regularly one of the families is on the priority waitlist for Departmental housing. Therefore there are not many options for those who may be the recipients of the move on orders.

This issue was common in the cases brought before *Finding a Place*, and it was specifically recommended that in such tenancies consideration needed to be given to the fact that the additional number of people in the house will have higher volumes of noise and comings and goings. There may be an assumption that anti-social behaviour is occurring simply because of the large number of people in the household. It would be expected that there is increased noise, however this does not necessarily translate to disruptive behaviour. It is imperative that officers dealing with these matters to be able to ascertain whether the complained of behaviour is actually anti-social.

I would also add that the nature of what is proposed is quasi-policing and the expectation of Departmental staff to be able to issue such notices not only places an added burden to them, the impact is potentially so significant it is inappropriate for Departmental staff to have that authority.

Probationary Tenancies

Whilst the intention behind this recommendation is understood, I would recommend a number of provisions need to be built into the process.

Firstly a further probationary tenancy should not be imposed on a tenant who has been subject to a supported tenancy program with a community housing provider.

For those who are granted a probationary tenancy, it will need to be borne in mind there is a strong likelihood the tenant will be not have been in stable housing for sometime. Whilst it is imperative that the preconditions of a successful tenancy are clearly outlined to the tenants, there needs to be adjustment time and guidance for the tenant who may have been institutionalised or homeless.

As with probationary periods in employment, the tenant needs to be informed throughout the designated time, whether there are issues of concern and what course of action may be required to rectify the situation.

References.

Beer, A et al "Evictions and Housing Management" (AHURI 2006)

Commissioner for Equal Opportunity - Finding a Place - Inquiry into the Existence of Discriminatory Practices in relation to the Provision of Public Housing and Related Services to Aboriginal People: (2004)

Convention on the Rights of the Child
http://www2.ohchr.org/english/law/crc.htm

Habibis, D et al into "How can demanding behaviour in public housing be managed effectively?" (AHURI 2007)

Jacobs K and Arthurson, K "Can effective housing management policies address anti-social behaviour?" (AHURI 2004)

Office of Crime Prevention, Government of WA website

Residential Tenancies Act 1987

Steering Committee for the Review of Government Service Provision: Summary report of "Overcoming Indigenous Disadvantage" 2009

The Equal Opportunity Act 1984

Government of Western Australia
Department of Housing

Disruptive Behaviour Management Strategy

To report disruptive behaviour call

1800 59[illegible]

or online at

www.housing.wa.gov.au

The Government has introduced a new Disruptive Behaviour Management Strategy to address public concern about antisocial behaviour in public housing.

The Department of Housing has a responsibility to provide housing for society's most vulnerable but will not tolerate instances of disruptive behaviour in its tenanted properties.

While the majority of public housing tenants are considerate neighbours and respect the community in which they live, the behaviour of a small number of tenants can disturb the peace and safety of the neighbourhood.

The Department of Housing views this as a serious matter. Under this new strategy, the Department is taking stronger action for repeated instances of disruption, including evicting tenants who disregard intervention efforts and formal warnings.

REPORTING COMPLAINTS

The Department has streamlined the way it manages complaints and has put in place several measures to ensure the improvement of the recording, actioning and tracking of complaints of disruptive behaviour.

A Disruptive Behaviour Reporting Line has been established to make it easier for people to raise concerns about disruptive tenants. The Disruptive Behaviour Reporting Line can be reached on **1300 597 076**. An online complaints form is also available on the Department of Housing's web site at **www.housing.wa.gov.au**.

DISRUPTIVE BEHAVIOUR UNIT

The Disruptive Behaviour Unit has been established to complement the Reporting Line.

Complaints made about the disruptive behaviour of tenants, other members of the household or visitors to the property will be thoroughly investigated by an officer from the local Department of Housing office or the Disruptive Behaviour Unit.

Upon receipt of a complaint, the Department will:

- Obtain as much detail as possible and, where appropriate, seek independent verification of the incident from Police, neighbours and witnesses
- Contact the tenant to discuss the complaint and to hear their version of the incident
- Assess the tenant's response against the complaint, considering all evidence available
- Determine whether the complaint can be substantiated and whether the behaviour is a breach of the Tenancy Agreement.

While a complaint is being investigated the confidentiality of the complainant and tenant will be maintained. However, before an investigation is finalised and action is taken under the *Residential Tenancies Act 1987*, the Department will need complainants' details to allow their complaint to be submitted as evidence in court.

WHAT IS DISRUPTIVE BEHAVIOUR?

The Department of Housing has defined three levels of disruptive behaviour (Dangerous, Serious and Minor) and will respond in a fair and reasonable manner to all complaints.

DANGEROUS BEHAVIOUR

Dangerous behaviour is characterised by activities that pose a risk to the safety or security of residents or property; or have resulted in injury to neighbouring residents and subsequent Police charges or conviction.

Examples:

- Acts of violence towards neighbours
- Extensive, deliberate damage to property other than the rented premises
- Arson

Response:

Immediate legal action will be taken to terminate the tenancy. The Department will seek an urgent court hearing under Section 73 of the *Residential Tenancies Act 1987* (or other relevant section).

SERIOUS DISRUPTIVE BEHAVIOUR

Serious disruptive behaviour is defined as activities that intentionally or recklessly cause disturbance to neighbours, or which could reasonably be expected to cause concern for the safety or security of a neighbour or their property.

Examples:

- Threats to the health or safety of a person
- Abusive language directed at neighbours, including vilification based on race, religion, gender, sexual orientation and other forms of harassment
- Physical assault to and violence towards householders or visitors to the tenancy
- Vandalism to property other than the rented premises (including graffiti)
- Drunken behaviour (which impacts on other residents)
- Car burnouts, dangerous driving, hoon behaviour

Response:

A strike as a first and final warning of eviction will be issued following one proven incident. Legal action to terminate the tenancy will proceed if one subsequent incident (of similar severity) occurs within a period of 12 months.

MINOR DISRUPTIVE BEHAVIOUR

Minor disruptive behaviour is defined as activities that could reasonably be expected to occur on occasion in an ordinary suburban household, but which cause a nuisance to neighbours.

Examples:

- Nuisance from children, associated with loud noise, but short of misdemeanours such as property damage
- Excessive noise from household items, such as TVs, stereos, vehicle and bike engines
- Loud parties resulting in Police attendance
- Communal property disputes such as disagreements over laundries, car parking bays etc resulting in Police attendance
- Property condition that impacts on other residents
- Unwanted entry into neighbouring properties
- Domestic disputes which cause disturbance to neighbours

Response:

A strike will be issued for each proven incident. Legal action to terminate the tenancy will proceed if three strikes are issued within a period of 12 months.

LEGAL PROCEEDINGS

The Department of Housing is applying the strategy within current provisions of the *Residential Tenancies Act 1987*. Members of the community are entitled to the quiet enjoyment of their own homes and as such, consistent disruptive behaviour in public housing will not be tolerated.

If a tenant fails to vacate a property following receipt of an eviction notice the Department will seek a Court Order from the Magistrates Court and initiate a Bailiff eviction.

TO REPORT DISRUPTIVE BEHAVIOUR

Call **1300 597 076** or online at
www.housing.wa.gov.au

This publication is available in alternative formats.
Contact us through the National Relay Service (NRS):
1800 555 677 (TTY) or 1800 555 727 (Speak & Listen)

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Merredin 6415
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