ONE STRIKE, THREE STRIKES: CRIME AND ANTI-SOCIAL BEHAVIOUR IN NSW PUBLIC HOUSING

CHRIS MARTIN

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Crime and anti-social behaviour in NSW public housing

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In October 2015, following an election promise by the NSW Coalition government to crack down on crime and anti-social behaviour in public housing, the NSW Parliament passed the *Residential Tenancies and Housing Legislation Amendment (Public Housing – Antisocial Behaviour) Act 2015* (NSW) ('the PHAB amendments'). The main purpose of the PHAB amendments is to effect schemes for terminating social housing tenancies upon 'three strikes' (three instances of breach of the tenant's obligations under their tenancy agreement) or 'one strike' (a single instance of serious criminal offending).[1]

The 'one strike' and 'three strikes' schemes echo developments in public housing policy in other Australian states and territories,[2] and overseas.[3] These developments are themselves echoes of changes in criminal justice that emphasise individual responsibility and limit discretion in judicial decision-making: mandatory sentencing in Australia, and 'three strikes' sentencing laws in the US.

The PHAB amendments are unusual in that they incorporate strike schemes in legislation; by contrast, the 'three strikes' schemes in other Australian jurisdictions are merely policies to guide the use by public housing landlords of termination proceedings under existing law. Instead, the PHAB amendments operate on the NSW Civil and Administrative Tribunal, which hears and determines termination proceedings under the *Residential Tenancies Act 2010* (NSW) ('the RT Act'), by restricting the Tribunal from considering certain factors and, in certain circumstances, mandatorily requiring it to make termination orders.

However, while 'one strike' and 'three strikes' slogans indicate a simplistic concept of justice, the schemes introduced by the PHAB amendments are complex. A review of the details of each scheme and past cases indicates that justice would be better done by allowing the Tribunal the discretion to treat each case according to its merits, than by devising complicated schemes that attempt to pre-empt and prescribe every response.

Existing law and practice

The PHAB amendments create 'one strike' and 'three strikes' schemes by adapting existing provisions of the RT Act relating to termination of tenancies in connection with criminal offending and anti-social behaviour. Before considering the new schemes in detail, it is useful to review the existing provisions and how they work without the adaptions made by the PHAB amendments. Under those provisions, social housing landlords have two main ways of proceeding:[4]

On a termination notice for breach of a term of the tenancy agreement (s 87; for present purposes, the most relevant terms are those relating to use of premises for an illegal purpose (s 51(1)(a)) and nuisance and annoyance (s 51(1)(b))); and

Without notice on certain grounds: serious damage to the property (s 90(1)(a)); injury to the landlord, neighbours or specified others (s 90(1)(b)); use of the premises for the manufacture, sale, cultivation or supply of illegal drugs (s 91(1)(a)) or for another illegal purpose (s 91(1)(b)); abuse or threats (s 92(1)(a)) or intimidation or harassment (s 92(1)(b)) to the landlord or specified others.

Between them, these proceedings ('breach proceedings' and 'without notice proceedings', respectively) have been used by social housing landlords — especially the public housing authority, Family and Community Services ('FACS') Housing[5] — to take action in relation to a very wide range of misconduct, from serious criminal offending to grievances between neighbours.[6]

In both types of proceedings, the onus is on the landlord to prove, on the balance of probabilities, the ground for termination. Use of the premises for an illegal purpose may be the subject of either type of proceeding; either way, it is not necessary for an offence to have been determined by a court, but it is necessary to show that the premises have been 'used'. The use for an illegal purpose may coexist with the use of the premises as a residence, and there need not be a 'substantial' or 'direct' connection between the use and the illegal purpose.[7] The Tribunal has long held that even small-scale instances of manufacturing, selling, cultivating and supplying drugs upon premises were uses of the premises for the purposes of s 91(1)(a) and, in a number of recent cases, has also held that *using* illegal drugs — as distinct from manufacturing, selling, cultivating or supplying them — on premises was a use of premises for the purposes of s 91(1)(b).[8]

Both types of proceeding may be taken against tenants on the basis of misconduct by another person. In breach proceedings, the relevant contractual terms provide that the tenant will not 'cause or permit' a nuisance or illegal use; the RT Act further provides generally that a tenant is vicariously liable in breach for any act or omission by persons lawfully on their premises as 'if it had been an act or omission by the tenant' (s 54). This removes the question of the tenant's knowledge or control over the conduct of other occupiers (household members) and invited visitors, and means that a tenant could be in breach because of misconduct by a household member or invited visitor of which the tenant had no knowledge or control.

In 'without notice' proceedings, s 54 does not apply (because these are not breach proceedings). The grounds at ss 90 and 91 refer to where 'the tenant, or any person although not a tenant is occupying or jointly occupying the residential premises, has intentionally or recklessly caused or permitted' the proscribed conduct (ie, serious damage, injury, illegal use).[9] This means that there is always a question of the tenant or another occupier having some degree of knowledge and control over the misconduct; nonetheless, a tenant could be liable for another person's misconduct of which they had no knowledge or control, if another occupier at least recklessly permitted it.

In both types of proceedings, the Tribunal may, if satisfied that the grounds (breach, or the 'without notice' grounds) were proved, terminate the tenancy or, at its discretion, decline to terminate.[10] In breach proceedings, the Tribunal's discretion is directed to consideration of the circumstances of the case, with the RT Act providing lists of circumstances that the Tribunal may consider (s 87(5)) and *must* consider (previously s 152, now s 154E; these apply to social housing tenancies only). In 'without notice' proceedings, the discretion is not expressly structured the same way, but in practice the Tribunal has considered a similar range of factors.

Finally, in both types of proceedings, where it has decided to terminate a tenancy, the Tribunal has discretion as to the date by which possession of the premises must be returned to the landlord.

'Three strikes'

The PHAB amendments effect a 'three strikes' scheme for social housing tenancies by adapting the RT Act's provisions for breach proceedings. The scheme allows for breach proceedings to be taken as usual — it is not necessary to go first through three strikes. However, a record of strikes gives an advantage to the landlord in any subsequent proceedings by constraining the Tribunal's consideration of contrary evidence.

New s 154C allows a social housing landlord to issue a 'strike notice' to a tenant where it considers that the tenant is in breach of any term of the tenancy agreement. The strike notice must give particulars of the breach, and invite the tenant to make submissions to the landlord disputing the strike notice within 21 days. If the landlord decides that the strike notice stands, new s 154C(4) further provides for the tenant to seek binding review of the decision by a 'review panel' (the NSW Housing Appeals Committee).

After two 'strikes' have been recorded against a tenant, the landlord can record a third strike without first giving a strike notice, and give a termination notice to commence breach proceedings under s 87.

The bite of the scheme comes in its provisions about proof in proceedings. Where a strike is not disputed in time by the tenant, in any subsequent proceedings the Tribunal must take as conclusively proved the details of the strike (as set out in an 'evidentiary certificate' given by the landlord to the Tribunal: new s 156A(3)). Where a strike is disputed, the Tribunal must take the details of the strike as proved, unless the tenant can disprove them (new s 156A(2)). In other words, in the former case the Tribunal is forbidden from considering any contrary evidence that the tenant may be able to give, and in the latter case the onus of proof is on the tenant.

These provisions don't go so far as to dictate that the details in the strike notice amount to a breach; the Tribunal still must determine that question for itself, according to law and the facts as 'proved'. However, it is still a strong restriction of and interference in the Tribunal's decision-making. The point on which the provisions turn — whether the tenant disputed the strike notice within the 21-day period — is odd. It means, in effect, that tenants who do not, or cannot, comply with a certain formal requirement are placed at a special disadvantage. It is easy to imagine allegations of breach arising at a time when a tenant's personal or domestic circumstances are widely, but temporarily, in disarray (for example, someone is ill, or someone is arrested) and the prospect of the tenant composing a timely submission of dispute is unrealistic. The trouble may be temporary, and later in proceedings the tenant may be able to furnish contrary information, but the provisions would prevent the Tribunal from getting past the temporary problem.

Also, in practical terms, the advantage it confers on landlords in proceedings may encourage the issuing of strike notices where diversionary responses may be more appropriate (for example, a referral to mediation at a Community Justice Centre, or an informal discussion as to support needs).

'One strike'

The PHAB amendments' 'one strike' scheme is an adaptation, specific to social housing, of the RT Act's provisions for 'without notice' termination proceedings. It is a complex scheme. Not every sort of misconduct that is actionable under one of the 'without notice' grounds is caught by the 'one strike' scheme, but those caught are numerous. There is also variation in the severity with which different sorts of 'one strike' misconduct are treated, effectively creating two tiers of 'one strike' misconduct.

The first and more severely dealt-with tier of 'one strike' misconduct (at new s 154D(1)) comprises:

- manufacture, sale, cultivation or supply of any prohibited drug within the meaning of the *Drug Misuse and Trafficking Act 1985* (the ground at s 91(1)(a));
- use of the premises for an illegal purpose (s 91(1)(b)), being storage of a firearm without a licence;
- use of the premises for an illegal purpose (s 91(1)(b)), being a 'show cause offence' under the *Bail Act 2013* (NSW);[11]
- injury to the landlord, agent or neighbour (part of the ground at s 90(1)(b)), where the injury constitutes grievous bodily harm.

For each of these sorts of misconduct, where the ground is proved, the Tribunal *must* terminate the tenancy. The PHAB amendments also make the illegal use ground (s 91(1)(b)) more readily proved for 'one strike' offences, by providing that where the Tribunal is satisfied that an offence has been committed on the premises or any adjoining property, it must assume that the premises have been 'used' and that the use justifies termination (new s 154D(4)(b)).

There are also some specific provisos: for alleged firearm or 'show cause offence' misconduct to be actioned under tier one of the 'one strike' scheme, the tenant or other occupier must actually be charged with the offence; and for injury amounting to grievous bodily harm to be actioned as tier one 'one strike', the injury must arise from an act by the tenant (alone or acting with another occupier), not another occupier only.

The second tier of 'one strike' misconduct (at new s 154D(2)) comprises:

injury to the landlord, agent or neighbour, but less than grievous bodily harm, or serious damage to the property; or
use of the premises for an illegal purpose, being:

- use as a brothel;
- the production, dissemination or possession of child abuse material;
- car or boat rebirthing; or
- any other use for unlawful purpose sufficient to justify termination.

In proceedings on these types of misconduct, the Tribunal retains discretion, subject to a threshold: where the ground is proved, it may decline to terminate in 'exceptional circumstances' only (new s 154D(3)(c)). The three specified illegal uses (brothel, child abuse material, and car and

boat rebirthing) are more readily proved, because new s 154D(4)(b) operates to require that the Tribunal assume that the premises were used and that the use justifies termination.

Finally, in proceedings relating to either tier, the Tribunal retains its discretion, per the existing 'without grounds' provisions, where termination would result in undue hardship being suffered by:

- a child,
- a person in whose favour an apprehended violence order ('AVO') could be made, or
- a person suffering from a disability per the *Anti-Discrimination Act 1977* (NSW) (new s 154D(3)).[12]

This important exception from the 'one strike' scheme was something of an afterthought in the government's legislative process, being the result of a crossbench amendment moved in response to concerns raised by the Tenants' Union of NSW, other community legal centres and the Law Society about the swingeing impact of the scheme originally proposed. The precise extent of the exception is uncertain, for two reasons. First, s 154D(3)(b) contains, after the three categories of persons, the qualifier 'who is occupying or jointly occupying the social housing premises'. It is not clear whether the qualifier attaches to all three categories or just the last (a person suffering from a disability).[13] Secondly, it is not clear how the second category — 'a person in whose favour an apprehended violence order could be made' — is to be interpreted. Particularly, it is unclear whether it means any person who 'has reasonable grounds to fear and in fact fears' violence, intimidation or stalking by another person (s 19(1)(a) and (b), *Crimes (Domestic and Personal Violence) Act 2007* (NSW)) or, narrowly, a person with respect to whom an application for an AVO is in fact pending determination by a court (because an AVO cannot be made unless it is applied for).

An indication of how this complex scheme may operate can be seen by considering the published decisions of the Tribunal in termination proceedings brought by FACS Housing, particularly on the grounds of illegal use, injury and serious damage.

Who will be hit by 'one strike'? Indications from the case law

There were 88 illegal use, injury and serious damage cases on the public record to the end of 2015.[14] In 65 cases, the Tribunal's decision disclosed evidence of at least one of the three exclusionary factors at s 154D(3). In 26 cases, children lived at the premises. In four cases, there was evidence of the tenant being in fear of violence (including one where the tenant in fact had an AVO against the person who committed the relevant offence); and in 46 of the cases, there was evidence of the tenant or another occupier having a disability. Had these proceedings been taken under the 'one strike' scheme, there is a question of their being excluded by s 154D(3) and the Tribunal retaining discretion.

It should be said that these cases also show that the presence of one of these factors does not necessarily mean the Tribunal will exercise its discretion and decline to terminate — in half the cases disclosing a child, and in half the cases disclosing a person with disability, the Tribunal terminated. The Tribunal also terminated in the case where the tenant had an AVO. Additionally, in some cases where discretion was exercised, factors other than the three at s 154D(3) appear to be more significant. For example, in *NSW Land and Housing Corporation v Baldwin* [2013] NSWCTTT 281, an illegal use case where the tenant allowed two acquaintances to store stolen firearms at the premises, discretion was exercised not only because the tenant's six-year-old child lived at the premises, but because the firearms offence took place a week after the tenant had been sexually assaulted and 'was in a vulnerable state'. Had this case proceeded under the 'one strike' scheme, it would be a first tier case and, were it not for the question of the child, the tenancy would be mandatorily terminated — unless the tenant could 'shoehorn' her circumstances to fit the AVO or disability exclusions.

Of the 23 cases that do not disclose a s 154D(3) factor, four disclose facts that resulted in the Tribunal declining to terminate — but which arguably would have a different outcome if they had proceeded under 'one strike'.

All four are illegal use cases involving a female tenant and an offence committed by another person. In *NSW Land and Housing Corporation v Yothoun* [2004] NSWCTTT 660, the tenant's daughter supplied drugs from the premises. The Tribunal found that the tenant was 'at least wilfully blind' to the offending, but not complicit in it, and declined to terminate, observing that the daughter was incarcerated and no longer at the premises, and that 'termination would really amount to punishment of the tenant.' In *NSW Land and Housing Corporation v Pryde* [2004] NSWCTTT 22, the tenant's partner was charged with drug offences and acquitted. The Tribunal found that illegal use was established on the civil standard of proof, but exercised its discretion because the tenant had not been charged, had a low income and an otherwise good tenancy record, and testified as to the steps she had taken to ensure her partner would not deal in drugs again. Under the 'one strike' scheme, both these cases could have proceeded as tier one cases, and termination would have been mandatory.

In the third case, *NSW Land and Housing Corporation v Robertson* [2008] NSWCTTT 1197, the tenant's teenaged sons kept at the premises equipment stolen from the local school. The Tribunal accepted that the tenant had known nothing about the stolen goods but found an illegal use had occurred; it then exercised its discretion in favour of the tenant. Under 'one strike', this would be a second tier case and, because the tenant's children no longer lived with her, she would have had to show that there were 'exceptional circumstances' to enliven the Tribunal's discretion. In *NSW Land and Housing Corporation v Ozen* [2014] NSWCATCD 27, the tenant's son had been convicted and fined $740 for possession of restricted substances (steroids) under the *Poisons and Therapeutic Goods Act 1966* (NSW)), having previously assured his mother that his possession of steroids was not illegal. The Tribunal held that the son did not sufficiently 'use' the premises in his offence, and the tenant had not caused or permitted an illegal use. The Tribunal also indicated alternatively that it would have exercised its discretion because of the 'unblemished' record of the tenant. In separate proceedings prior to the PHAB amendments, the Appeal Panel of the Tribunal had indicated that the decision in *Ozen* regarding 'use' was incorrect, which would have left the tenant relying on the Tribunal's discretion. Had the case proceeded under 'one strike', it would be a second tier case with discretion applying only if exceptional circumstances were shown. It may be that such cases are regarded as straightforward — and hence 'unexceptional' — instances of the extensive liability imposed by the RT Act on tenants for the conduct of others.

Other PHAB amendments

Aside from the 'three strikes' and 'one strike' schemes, the PHAB amendments have a number of other relevant effects. The new s 154F provides that where the Tribunal has found that a tenant has breached their agreement and is considering whether to terminate, a social housing landlord may submit a 'neighbour impact statement', summarising anonymous statements given by neighbouring residents. It should be noted that neighbour impact statements will have no role to play in first tier 'one strike' proceedings (because where the ground is proved, the Tribunal does not get to decide 'whether' to terminate), and there may be a question in some other 'without notice' proceedings as to

whether the ground is also a 'breach' (that is, there is no term of the tenancy agreement prohibiting a tenant from injuring or harassing their landlord per ss 90 and 92). Where neighbour impact statements will have a role is in breach proceedings (including under the 'three strikes' scheme) and in s 91 illegal use proceedings (including under the second tier of 'one strike'). It remains to be seen what weight will be given by the Tribunal to anonymous, unsworn evidence that cannot be cross-examined.[15]

Finally, where the Tribunal terminates a social housing tenancy (whatever the ground), new s 154G(1) limits the period by which the tenant must give vacant possession to not more than 28 days, unless 'exceptional circumstances' are shown. Previously, the Tribunal could set the date for possession at its discretion.

Conclusion

The 'three strikes' and 'one strike' schemes introduced by the PHAB amendments restrict the Tribunal's role in social housing termination proceedings in complex ways: variously requiring the Tribunal to take certain matters as proved, shifting the onus of proof, setting thresholds for discretion in some respects and removing it in others. Through the complexity, it appears that the most likely actual targets of the schemes may be those tenants who are less literate or organised, and those tenants — often women — who have not committed offences themselves, but who are made liable by tenancy law for the misconduct of their partners and children.

The past cases show that FACS Housing uses tenancy law to effect a far-reaching regulation of tenants' individual lives and domestic and neighbourhood relations, and that this has in numerous respects been facilitated by the Tribunal's interpretations of the law. However, the Tribunal's testing of evidence and discretion have also been important independent checks on FACS Housing's practice and the potential for extensive tenancy obligations and liabilities to result in injustice. Rather than trying to restrict these functions to prescribed circumstances, the state government should allow the Tribunal to hear and address submissions on injustice wherever the cases throw it up.

CHRIS MARTIN is a Research Fellow, Housing Policy and Practice, with the City Futures Research Centre at UNSW Australia.

email: <c.martin@unsw.edu.au>

REFERENCES

1. New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 August 2015, 2058 (Brad Hazzard, Minister for Family and Community Services).

2. Tasmania, Victoria, Western Australia and the Northern Territory currently have 'three strikes' policies; Queensland and South Australia have previously had such a policy.

3. In the US, almost 20 years ago, Bill Clinton introduced the 'One Strike and You're Out' policy for adoption by local public housing authorities. William J Clinton, 'Remarks Announcing the "One Strike and You're Out" Initiative in Public Housing', *The American Presidency Project*, 28 March 1996 <http://www.presidency.ucsb.edu/ws/?pid=52598>.

4. There are two other ways – proceedings on a termination notice without grounds (ss 84 and 85), and proceedings on the 'behaviour ground', which is associated with provisions for 'acceptable behaviour agreements' – but, in practice, both are almost never used by social housing landlords. See Chris Martin, 'Conduct and Contracts: Using tenancy law to govern crime and disorder in public housing in New South Wales' (2015) 5 (2) *Property Law Review* 81, 86; and Chris Martin, *Government Housing: Governing crime and disorder in public housing in NSW* (PhD thesis, University of Sydney, 2010), chapter 7.

5. FACS Housing is an agency of NSW Family and Community Services and manages public housing properties owned by another government agency, the NSW Land and Housing Corporation.

6. See the cases reviewed at Martin, 'Conduct and Contracts', above n 4.

7. *McGuiness v NSW Land and Housing Corporation* [2014] NSWCATAP 98.

8. *NSW Land and Housing Corporation v John Raglione* [2015] NSWCATAP 75; *NSW Land and Housing Corporation v Romeyn* [2015] NSWCATCD 123; *Davis v NSW Land and Housing Corporation* [2015] NSWCATAP 271.

9. The ground at s 92(1)(a) – threats or abuse – differs only in that it does not use the qualifiers 'intentionally or recklessly'. The ground at s 92(1)(b) – intimidation and harassment – differs in that the conduct (by the tenant, or other occupier) must be intentional, and reasonably likely to cause the proscribed effect.

10. *Cain v New South Wales Land and Housing Corporation* [2014] NSWCA 28.

11. Section 16B of the *Bail Act 2013* (NSW) sets out numerous 'show cause offences', most of them serious indictable offences.

12. Notably, s 49PA expressly countenances that a disability may relate to a person's addiction to illegal drugs.

13. There is a similar problem with a qualifier in s 90, discussed in *NSW Land and Housing Corporation v Lesniewski* [2015] NSWCATAP 185 and *Jackson v NSW Land and Housing Corporation* [2015] NSWCATAP 281.

14. This represents a small fraction of the total number of termination proceedings taken by FACS Housing (and its predecessors) against tenants on these and other grounds; see Martin, above n 4, for further discussion of the numbers.

15. The Tribunal is generally subject to the rules of natural justice. *Civil and Administrative Tribunal Act 2013* (NSW), s 38(2).