DISPUTE RESOLUTION AS A CATALYST FOR CHANGE IN THE HOUSING SYSTEM: A CALL FOR GENUINE ENGAGEMENT WITH ABORIGINAL COMMUNITIES

Jemima McCaughan
Merinda Dutt□n

Jemima McCaughan is a senior solicitor for the Civil Law Service for Aboriginal Communities at Legal Aid NSW. She was instrumental to the establishment of this service in 2014 and prior to that worked with Aboriginal communities and people across NSW and Australia as a native title lawyer and in ASIC's Indigenous Outreach Program. Merinda Dutton is an Aboriginal lawyer and Barkindji/ Gumbaynggirr woman. She is currently working with the Civil Law Service for Aboriginal Communities at Legal Aid and prior to this worked within the field of native title and land rights.

The ability of Aboriginal people and their communities to fully realise and access fundamental human rights in respect of housing is diminished by a system that does not adequately accommodate them. Policies, laws and procedures in New South Wales ('NSW') that have been designed to enshrine the right to adequate housing fall short of that purpose, favouring landlords (including the State) and further entrenching poor housing outcomes. For Aboriginal people in particular, the housing system fails to adequately recognise the complexity of their lived experiences, the histories of their communities and their priorities in relation to housing. From a perspective grounded in legal practice, this article explores how, for Aboriginal people in NSW, the rights to adequate housing and self-determination in housing are not being met. It looks specifically at dispute resolution as a point in the system that is both failing Aboriginal people and for which there is a real opportunity for Aboriginal people to be actively involved in developing the system that affects them.

I POLICIES AND LAWS ARE NOT DELIVERING ADEQUATE HOUSING

The right to adequate housing as set out in the *International Covenant on Economic, Social and Cultural Rights ('ICESCR')*[1] is encompassed in the right to an adequate standard of living. The United Nations ('UN') has noted that the right is more than mere shelter and should be beneficially defined as 'the right to live somewhere in security, peace and dignity'.[2] Factors that are helpful in determining whether adequate housing is available to particular communities include accessibility, cultural adequacy, affordability, habitability and security of tenure.[3] Much has been written about how Australia is failing Aboriginal people across all of these factors including unreasonably high homelessness statistics,[4] a disregard for cultural factors in housing design that contributes to the poor condition of

1 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1).

2 Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) [7].

3 Ibid [8].

4 See Australian Institute of Health and Welfare ('AIHW'), 'Homelessness Among Indigenous Australians' (Research Paper, 16 July 2014) 7.

houses[5] and to overcrowding,[6] and the impact of poor housing and overcrowding on health.[7] In recent months, the UN has condemned Australia's approach to housing issues in Aboriginal communities noting their concern about the persistent shortage of social housing particularly in remote areas, overcrowding and the precarious housing landscape for Indigenous people.[8]

In our work as lawyers in the legal assistance sector, it is not uncommon to hear a client say that they shouldn't have to pay rent to live on their Traditional Country and certainly not when the landlord doesn't repair or maintain the property. It is invariably followed by advice that they will face eviction if they refuse to pay rent – that the *Residential Tenancies Act 2010* (NSW) ('*RTA*') does not provide tenants with any legal right to suspend rent payments even in the face of a landlord breaching its duties to repair and maintain property,[9] and that their best chance of getting repairs is to come to the table with clean hands and apply to the NSW Civil and Administrative Tribunal ('NCAT') for an order for repairs.[10] This scenario illustrates the reality of our housing system. That is, that existing law and policy does not adequately protect tenants – there are structural inequalities that inhibit enforcement of housing rights particularly by Aboriginal people – and that little has been done to listen to the priorities of Aboriginal communities with respect to housing and create a system that enshrines a right to self-determination in housing.

In regional, rural and remote Aboriginal communities in NSW, poor housing conditions and access to housing are consistent and endemic complaints that we hear. Significant funding has been allocated under the National Partnership Agreement on Remote Indigenous Housing in the past, including to refurbish and rebuild 942 houses in NSW.[11] Despite this, tenants continue to face difficulty getting the housing repairs they need and houses are not meeting the basic standards of habitability required by *ICESCR*. In accessing affordable housing Aboriginal applicants are often disadvantaged by tedious and document heavy application processes,[12] waiting times are significant[13] and the evidence requirements to show priority needs[14] can be difficult to meet. Recent changes that enable applicants to apply for public housing on the telephone[15] are, therefore, welcome but the severe shortage of housing continues to limit access.

The *RTA* itself is depressing in its attempt to deliver adequate housing to our most vulnerable. As highlighted in the above example, the duty to repair[16] is limited because there is no mechanism for immediate enforcement as there would be in other kinds of contracts. The right given to landlords to terminate tenancies with no grounds[17] curtails a tenant's security of tenure, and in practice the landlord's obligation to maintain the property in a reasonable state of repair adopts a bizarre reverse onus whereby the tenant faces an uphill battle to achieve basic maintenance of their home. A right to withhold rent when a landlord breaches the agreement in certain circumstances (without the need to go to NCAT) or a proactive approach to maintaining properties, are obvious and simple ways to recalibrate the current power imbalance. These are just some of the many aspects of our current housing system that are failing to deliver adequate housing for Aboriginal people and communities.

II A LANDLORD'S TRIBUNAL!

It is clear that the current mechanisms for dispute resolution are insufficient to support full and sustainable access to adequate housing. We commonly see our clients encounter major hurdles

5 Vicki-Ann Ware, 'Closing the Gap Clearinghouse: Housing Strategies That Improve Indigenous Health Outcomes' (Resource Sheet No 25, AIHW and Australian Institute of Family Studies, December 2013) 3, citing Tess Lea and Paul Pholeros, 'This is Not a Pipe: The Treacheries of Indigenous Housing' (2010) 22(1) *Public Culture* 187, 191.

6 Ware, above n 5, 8.

7 Ibid; Ross S Bailie and Kayli J Wayte, 'Housing and Health in Indigenous Communities: Key Issues for Housing and Health Improvement in Remote Aboriginal and Torres Strait Islander Communities' (2006) 14 *Australian Journal of Rural Health* 178.

8 Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, 61st sess, 47th mtg, UN Doc E/C.12/AUS/CO/5 (11 July 2017, adopted 23 June 2017) 8 [41], [42(d)].

9 *RTA* ss 63, 65.

10 *RTA* s 65.

11 Department of the Prime Minister and Cabinet, *The National Partnership Agreement on Remote Indigenous Housing ('NPARIH')* (30 June 2016) <https://www.pmc.gov.au/indigenous-affairs/housing/national-partnership-agreement-remote-indigenous-housing-nparih>.

12 See Department of Family and Community Services (NSW), 'Application for Housing Assistance' (February 2017) <http://www.housing.nsw.gov.au/__data/assets/pdf_file/0003/329223/DH3001-WIP-0217.pdf>.

13 See Housing Pathways, *Expected Waiting Times*, Department of Family & Community Services (NSW) <http://www.housingpathways.nsw.gov.au/how-to-apply/expected-waiting-times>.

14 See Housing Pathways, *Evidence Requirements Information Sheet*, Department of Family & Community Services (NSW) <http://www.housingpathways.nsw.gov.au/__data/assets/pdf_file/0004/329224/DH3001a-140717.pdf>.

15 See Housing Pathways, *Home*, Department of Family & Community Services (NSW) <http://www.housingpathways.nsw.gov.au/>.

16 *RTA* s 63.

17 *RTA* ss 84–5. This right is only available in periodic agreements or at the end of fixed term agreements and is not available where the same tenant has occupied the premises for 20 years or more.

accessing relevant dispute resolution mechanisms be they direct negotiations with landlords, accessing internal review by a housing provider, using the Housing Appeals Committee ('HAC') or proactively applying to NCAT. It is not uncommon to have clients tell you adamantly that they have asked the landlord for repairs, only for the landlord to say they have no record of those requests and that requests must be made in writing.[18] In some communities merely contacting the landlord is a challenge, with phones that ring out and emails that are not responded to. In these cases, we rarely see people proactively apply to NCAT to obtain the required repairs. For those living in regional, rural and remote areas, making an application to NCAT is challenging. Firstly, NCAT has 6 registries across NSW with only 3 of those in regional locations.[19] For paper applications, the form and the payment needs to be submitted in person to one of those registries.[20] An online application process is available in tenancy matters, but for those with literacy issues, limited education or other vulnerabilities, the 30-minute application process presents a major barrier. In many Aboriginal communities simply getting access to computers and the internet is difficult, and even then people are not aware that this process exists for them.

Similarly, people are often unaware of their right to internal review in relation to a misapplication of Housing NSW policy or of a classification that has been made about their housing status. In a 2015 report, Legal Aid NSW called for information about a tenant's housing status to be provided to tenants, particularly at the time they are relinquishing a tenancy due to incarceration.[21] It also recommended that classification of tenants as ineligible for housing should require an order from NCAT.[22] It is clear from our practice that changes in law and policy are required to make housing status information and avenues for review more readily available to tenants. Access to this information via an automated phone service or an online account and the ability to apply for review on the phone or online could increase access to available dispute resolution mechanisms. As it stands, lack of access to critical information and the avenues for redress further entrenches poor housing conditions, homelessness and inadequate standards of living.

Recent research supports our observations and suggests there are structural inequalities that inhibit Aboriginal peoples' enforcement of their housing rights. According to data drawn from NCAT and analysed by the Law and Justice Foundation of New South Wales, only 5.5 per cent of matters that come before NCAT in the social housing list are filed by a tenant,[23] and only 1.4 per cent of matters in that list finalise in an order for repairs.[24] This leaves 94.5 per cent of matters which are brought by landlords, 63.1 per cent of which are termination matters.[25] Given other research shows that housing is one of the most prevalent legal issues experienced by Aboriginal people,[26] and that living in social housing exponentially compounds the likelihood of experiencing other legal problems,[27] this new data suggests that housing issues remain largely unresolved for Aboriginal people and that access to NCAT as the primary dispute resolution forum is a major issue.

The right to adequate housing necessitates full and sustainable access to housing that meets the cultural and other needs of disadvantaged communities.[28] It is clear from the NCAT data that NSW needs to do more to ensure that the dispute resolution mechanisms that are a key aspect of maintaining access to housing, are accessible, culturally appropriate and allow the full participation of Aboriginal people. It is unlikely that a tribunal based forum, at least in

18 There is no requirement in the *RTA* for the notice to be in writing.

19 NCAT, *Contact NCAT* (11 April 2017) <http://www.ncat.nsw.gov.au/Pages/contact_ncat.aspx>.

20 See NCAT, *Social Housing Application* (January 2017) <http://www.ncat.nsw.gov.au/Documents/ccd_form_social_housing_application.pdf>.

21 Legal Aid NSW, 'Aboriginal Women Leaving Custody: Report into Barriers to Housing' (Report No 32, 2015) 6.

22 Ibid.

23 Suzie Forell and Christine Coumarelos, 'Data Insights in Civil Justice: NSW Civil and Administrative Tribunal Consumer and Commercial Division (NCAT Part 2)' (Report, Law and Justice Foundation of New South Wales, November 2016) 18.

24 Ibid 40.

25 Ibid 39.

26 See, eg, Chris Cunneen and Melanie Schwartz, 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' (2009) 32 *University of New South Wales Law Journal* 725.

27 Zhigang Wei and Hugh M McDonald, 'Indigenous People's Experience of Multiple Legal Problems and Multiple Disadvantage – A Working Paper' (Paper No 36, Law and Justice Foundation of New South Wales, January 2014) 5.

28 Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 6th sess, UN Doc E/1992/23 (13 December 1991) [8(e)].

its current formulation, has the capacity or power to take into account the complexities at play for many Aboriginal tenants, particularly when a tenancy dispute involves multiple Indigenous parties or has arisen out of a complex set of past and present circumstances that are beyond the tribunal to unravel. The multiple layers of disadvantage that exist for many Aboriginal people living in social housing need to be taken into account when thinking about the forms of dispute resolution that are going to work. HAC has elements that could be built upon including an informal hearing process, simple and free processes and the inclusion of Aboriginal committee members.[29] Unfortunately, it cannot be used to deal with repairs and maintenance issues or other *RTA* claims, it is non-binding and barriers and delays at the first tier internal review stage mean we do not see it being actively used by Aboriginal people without support from lawyers or tenants' advocates. Data about access to and use of HAC would provide a more fulsome understanding of the ways tenants use current dispute resolution mechanisms. In the meantime, more research is required into why current dispute resolution mechanisms are failing Aboriginal people and how we can change the system to be inclusive of the needs of Aboriginal people and their communities.

III SELF DETERMINATION IN DISPUTE RESOLUTION: A STARTING POINT FOR CHANGE IN THE SYSTEM

The *UN Declaration on the Rights of Indigenous Peoples* sets out the 'right to determine and develop priorities and strategies for exercising their right to development', including where it relates to housing.[30] The right to self-determination is a fundamental right that prioritises Aboriginal knowledge systems and the critical need for Aboriginal people to freely determine the laws and policies that affect them. It is widely acknowledged that where initiatives are community led, or supported by and inclusive of Aboriginal ways of working, they stand much higher chances of being effective. The UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz was recently highly critical of Australia's work in this regard, stating that:

> While Australia has adopted numerous policies aiming to address Aboriginal and Torres Strait socio-economic disadvantage, the failure to respect the right to self-determination and the right to full and effective participation in these [policies] is alarming.[31]

That we are not providing opportunities for self-determination, and by extension, the advancement of housing outcomes for Aboriginal communities, is of serious concern, particularly as governments continue to pursue Closing the Gap.[32] In NSW, the opportunities for genuine participation by Aboriginal people in mainstream processes beyond consultation are few and far between. While the land rights scheme provided an opportunity for self-determination in housing, the Build and Grow Aboriginal Community Housing Strategy[33] adopted by the Aboriginal Housing Office has frustrated those opportunities by taking decision making away from Aboriginal communities.[34] Furthermore, the array of policies and laws which operate across the confusing congregation of housing providers are not necessarily in harmony. For the most part, these policies and laws are driven by public servants and not Aboriginal people. There is significant scope for improvement particularly in relation to the way housing providers, NCAT and other dispute

29 See Housing Appeals Committee, *NSW Housing Appeals Committee* <http://www.hac.nsw.gov.au/>.

30 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 23.

31 Victoria Tauli-Corpuz, 'End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz on Her Visit to Australia' (Speech delivered at the United Nations Information Centre, Canberra, 3 April 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>.

32 Department of the Prime Minister and Cabinet, 'Closing the Gap – Prime Minister's Report 2017' (Australian Government, 2017) <http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf>.

33 Aboriginal Housing Office, *Build & Grow Aboriginal Community Housing Strategy* (2016) Department of Family & Community Services (NSW) <http://www.aho.nsw.gov.au/housing-providers/build-grow> ('Build and Grow').

34 Under Build and Grow, some Local Aboriginal Land Councils ('LALC') who could not meet a performance-based assessment leased their properties to the Aboriginal Housing Office who subleased them to social housing providers in exchange for funding. LALCs retained ownership of the properties but lost control of management and decisions about how housing services were provided. For more information, see Aboriginal Housing Office, *Head Lease Program* (2016) Department of Family & Community Services (NSW) <http://www.aho.nsw.gov.au/housing-providers/build-grow/headlease>.

resolution avenues (such as HAC) engage with, and facilitate the decision making of, Aboriginal people.

Much has been written about the implementation of Aboriginal decision-making processes to resolve disputes, particularly where those disputes arise out of a clash with Western law. Although speaking in a native title context, Behrendt and Kelly articulate an important point in relation to the use of alternative dispute resolution processes in Indigenous disputes. That is, that procedures which are modelled on 'traditional Aboriginal community dispute resolution structures offer an alternative to litigation' in a number of ways, including that they 'rely on a deeper understanding' of the complexities of 'Aboriginal culture, communities and families'.[35] This is of particular importance in the housing context where legal and policy issues, funding issues and housing disputes are interconnected, overlapping and don't always fit into Western structures. Behrendt and Kelly also point to the use of Aboriginal dispute resolution processes as a means of resolving disputes, thereby empowering Aboriginal people and 'nurturing Aboriginal self-determination and sovereignty'.[36]

One tenancy dispute may cut across a number of legal issues and relationships. For example, a dispute arising in relation to a LALC tenancy may simultaneously intersect with community conflict arising out of a native title claim, personal relationships between the tenant and LALC employees, and claims that promised funding has not been delivered. In any such dispute, 'the boundaries between "family", "community" and "work" may be blurred'[37] and it is clear that any Western model for resolving those disputes will be ill equipped to do so as the issues do not clearly fit within the structures which are already established. In their report on Indigenous 'lifeworlds', Moran et al found that the importance Aboriginal tenants placed on family and kin relationships would occasionally be at odds with any obligations held under a tenancy agreement.[38] In practice, we see Aboriginal clients risking their tenancy (and potentially the health of the household through overcrowding) by accommodating additional occupants for extended periods in breach of their housing provider's policies. Disputes arising out of such issues would benefit from a 'recognition space', being 'the potential for relations between actors to take place through consensual, negotiated relations of mutual cultural understanding and respect'.[39] Moran et al propose a recognition model in relation to the delivery of housing outcomes for Aboriginal people in the context of the issues surrounding housing as a form of welfare dependence.[40] Is there scope for a 'recognition space' to be embedded in the NSW housing system? And could Aboriginal dispute resolution processes be considered as a means for achieving self-determination and progressing the right to adequate housing? It is not within the scope of this article to fully explore these questions, however, it is worth noting that any future discussions about Aboriginal dispute resolution processes within the housing system should take place with local Aboriginal communities at the centre.

IV CONCLUSION

The recent Uluru Statement from the Heart is a timely call for an enshrined Aboriginal voice; one that could provide 'direct input into decisions that are made about law and policy that affect Aboriginal and Torres Strait Islander peoples'.[41] Poor housing outcomes for Aboriginal people in NSW are a clear case of why that is required in the housing sector. In our engagements with individuals, households and communities, we see complex and

35 Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press 2008) 9–10.

36 Ibid 12.

37 National Alternative Dispute Resolution Advisory Council, 'Indigenous Dispute Resolution and Conflict Management' (Report, January 2006) 5.

38 Mark Moran et al, 'Indigenous Lifeworlds, Conditionality and Housing Outcomes' (Final Report No 260, Australian Housing and Urban Research Institute, March 2016) 2.

39 Ibid 8, citing Daphne Habibis, 'Housing Conditionality, Indigenous Lifeworlds, and Policy Outcomes: Towards a Model for Culturally Responsive Housing Provision' (Final Report No 212, Australian Housing and Urban Research Institute, September 2013) 21.

40 Moran et al, above n 38, 93.

41 Megan Davis, 'To Walk in Two Worlds: The Uluru Statement is a Clear and Urgent Call for Reform', *The Monthly* (online), July 2017 <https://www.themonthly.com.au/issue/2017/july/1498831200/megan-davis/walk-two-worlds>.

interrelated systemic barriers that prevent Aboriginal people from realising their right to adequate housing. More often than not, those barriers relate to the lack of involvement of people and communities in the systems affecting them. Dispute resolution mechanisms play a critical role in creating a fair, equitable and accessible housing system. Dispute resolution might ordinarily be seen as the part of the system that is set up to protect established rights, and as such is driven by those rights. In this case, it is possible the contrary is true and there is an opportunity for dispute resolution to be the catalyst for change in the housing system. By creating a dispute resolution system that includes Aboriginal ways of working and is flexible enough to look at the dispute as a whole, gaps in the laws and policies that are meant to deliver adequate housing could be brought to the fore.