Law and Order in Public Housing: the Residential Tenancies Amendment (Public Housing) Act 2004 (NSW)

Introduction

The influence of 'law and order' politics in New South Wales is evident in recent criminal justice law reform. In its almost ten years in power, the Carr Government has sponsored legislation to change the law relating to bail,[1] sentencing,[2] and police powers including, amongst other things, provision for the removal of children from public spaces[3] and move-on directions and searches.[4] Some enduring themes of law and order politics are reflected in these pieces of legislation: in particular, some expand the powers and functions of the police, while others are directed at structuring and restricting judicial decision-making to emphasise punishment.

With the passage in June 2004 of the *Residential Tenancies Amendment (Public Housing) Act* 2004 ('the Act'), the 'law and order' law reform agenda now extends beyond criminal justice legislation to residential tenancies law. On 4 May 2004, the Government announced the introduction of the Act as 'part of a new strategy of reforms to reduce anti-social behaviour in public housing communities across NSW' (NSW Department of Housing 2004). To this end the Act introduces the concept of 'anti-social behaviour' (ASB) to the *Residential Tenancies Act* 1987 (NSW), and includes special provisions for the NSW Land and Housing Corporation (the corporate aspect of the NSW Department of Housing) to alter and terminate public housing tenancies in relation to ASB. Like other law and order legislation, the Act is marked by extraordinary changes to what are effectively the policing powers of the Department of Housing, and to the judicial processes relating to public housing tenancies — including the reversal of the onus of proof against tenants and the removal of discretion from the Consumer, Trader and Tenancy Tribunal (CTTT).

ASB in the UK

New South Wales 'law and order' politics is one way of contextualising the Act; another is activity around ASB in the United Kingdom. In the UK, ASB and other problems of law and order have been taken to be squarely within the purview of social housing authorities, and the British Government has introduced legislation and other initiatives to enable and encourage their activities in these areas. Under the *Crime and Disorder Act* 1998, social landlords, local government authorities and the police may apply for an Anti-Social Behaviour Order (ASBO) against any person over the age of 10 years who has behaved 'in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself' (section 1). An ASBO may contain such prohibitions as are 'necessary for the purpose of protecting from further anti-social acts of the defendant' (section 6) and, although it is a civil order, breaching the terms of an ASBO is a criminal offence. The *Housing Act* 1996 provides social landlords with a number of

1 *Bail Amendment (Firearms and Property Offences) Act* 2003; *Bail Amendment (Terrorism) Act* 2004.

2 *Crimes (Sentencing Procedure) Amendment (General Principles) Act* 2002; *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentences) Act* 2003.

3 *Children (Protection and Parental Responsibility) Act* 1997.

4 *Police and Public Safety Act* 1998; *Police Powers (Drug Detection Dogs) Act* 2001; *Police Powers (Drug Premises) Act* 2001; *Police Powers (Internally Concealed Drugs) Act* 2001.

measures relating to ASB, such as 'introductory tenancies' with 'trial periods', and the right to apply for injunctions restraining tenants against causing threats and violence towards other persons, including powers of arrest. These injunctions have recently been expanded by the *Anti-Social Behaviour Act* 2003 to become 'anti-social behaviour injunctions', covering conduct 'capable of causing nuisance or annoyance' (section 153A) and the unlawful use of premises (section 153B). This Act also provides for the 'demotion' of tenancies to less secure forms of tenure on grounds of ASB, and requires all social housing authorities to develop policies in relation to ASB. The Home Office has also been promoting the use of Acceptable Behaviour Contracts (ABC) in conjunction with ASBOs, though ABCs are informal agreements without a statutory basis.

The NSW Government has been explicit in acknowledging the influence of these developments in the UK. It has described its approach as 'UK-style', and the name given by the Department of Housing to its new strategy, 'Tackling Anti-Social Behaviour', is the same as that of the Home Office's ASB project. A comparison between the NSW and UK regimes shows, however, that there are significant differences in the approach of the NSW government that may have serious, negative implications for the effectiveness of the NSW measures, and for their just application. This is not to endorse the UK approach, but rather to argue that the NSW Act is a poorly conceived piece of legislation, hastily cobbled together from bits of the UK strategy, and geared to 'law and order' reaction.

The *Residential Tenancies Amendment (Public Housing) Act* 2004

The Act makes a number of amendments to the *Residential Tenancies Act* 1987: the provisions considered here are those relating to 'acceptable behaviour agreements' (ABAs) (new sections 35A, 57A and 64(2A)) and 'renewable tenancies' (new section 14A).[5]

Acceptable behaviour agreements

Under section 35A of the Act, the Department of Housing may request that a tenant sign an ABA if the Department is of the opinion that, based on the history of their tenancy and any past tenancies with the Department, the tenant or another occupant of the premises is likely to engage in anti-social behaviour. Anti-social behaviour is defined, non-exhaustively, as including 'the emission of excessive noise, littering, dumping of cars, vandalism and defacing of property' and, in briefings with non-government organisations on the legislation, the Government has stated that the meaning of ASB is deliberately wide enough to include conduct not otherwise covered by the *Residential Tenancies Act* 1987 (which already proscribes the causing of a nuisance or annoyance or property damage). It is unclear how far the meaning extends, but a sample ABA circulated by the Government (copied directly from a sample ABC published by the Home Office) includes the term 'I will not congregate in groups in communal areas of [specify the area], i.e. stairways and walkways', and additional prohibitions on 'act[ing] in a manner that causes or is likely to cause harassment, alarm or distress to other people' and 'swearing'. Also, section 35A(2) of the Act provides:

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5 The Act also includes provisions for the immediate termination of tenancies on grounds of intimidation or harassment of Department staff (new section 68A) — provisions that will certainly bear upon the behaviour of tenants (the explanatory schedule of the Act notes that harassment may include repeated phone calls to a Department office) but which would seem to be motivated more by the Department's industrial concerns than by the law and order/ASB agenda. Another aspect of the strategy announced by the Government is not included in legislation: this is the creation of multi-agency 'Specialist Response Teams' to prevent ASB on public housing estates. These teams will be referred to again in a consideration of some of the implications for policy and practice that may follow from the law and order approach laid down in the Act.

> the operation of an acceptable behaviour agreement extends to the behaviour of any other person occupying (or jointly occupying) the premises with the consent of the tenant (a *lawful occupier*). Accordingly, if any such lawful occupier engages in any anti-social behaviour that is specified in the agreement, the tenant is taken to have engaged in the behaviour and breached the agreement.

Unlike the UK's informal, voluntary ABCs, a request to sign an ABA is one that a tenant really cannot refuse — under section 57A, failure or refusal to sign an ABA is grounds for the Department to issue a termination notice and, after giving such a notice, the Department may apply, under new section 64 (2A), to the CTTT for an order terminating the tenancy. For the same reason there is little prospect for the terms of ABAs to be subject to the sort of negotiation that the Home Office encourages in relation to voluntary ABCs. The compulsory aspect of ABAs is rather more like that of the UK's ASBOs, which are imposed by magistrates. However, the decision to impose an ASBO is arrived at through a judicial process and is subject to the discretion of the magistrate; in the case of ABAs, the decision is entirely an administrative one for the Department, with little scope for scrutiny by the Tribunal. In proceedings for termination orders under section 64 (2A), the Department needs only to show that it made a request for an ABA under section 35A and that the tenant failed or refuse to sign it and the Tribunal, unlike in other termination proceedings, *must* terminate the tenancy. The Tribunal has no discretion to look into the circumstances of the tenants' failure or refusal to sign the ABA, and no discretion to consider whether a termination order is appropriate in the circumstances. This means that, strangely, the Tribunal has no power to impose the terms of the ABA on the tenant as an alternative to termination.

Section 57A also provides that serious or persistent breach of an ABA is grounds for a notice of termination, and applications by the Department for termination orders on this ground also proceed under section 64(2A). In such proceedings, the Department need only satisfy the Tribunal that the tenant signed an ABA — thereafter, the onus is on the tenant to prove that they did not seriously or persistently breach the terms of the ABA. If the tenant fails to discharge this onus, the Tribunal *must* terminate the tenancy, without consideration as to the circumstances of the breach or the circumstances of the tenant and their household.

Renewable tenancies

The Department introduced its 'renewable tenancies' policy in November 2002. Under the current policy, new public housing tenants sign up to a tenancy agreement with a fixed term (a 'renewable tenancy'), at the end of which the Department decides whether the tenancy has been satisfactory or not. Satisfactory tenants are offered further fixed term agreements; unsatisfactory tenants are given a notice of termination without grounds. The new section 14A gives statutory recognition to the policy and provides for its extension to all of the Department's tenancies, including those already in existence at the time of the policy's commencement, by allowing the Department to declare a further fixed term to any agreement that has continued past its original fixed term.

Since it commenced, the intention of the renewable tenancies policy has been to create something like an 'introductory' tenancy — an intention reinforced by the new section 14A declarations and the Government's use of the term 'demotion', from the UK's *Anti-Social Behaviour Act* 2003, to describe their effects. As with the provisions relating to ABAs, there are however important differences to 'demotions' in the UK: there it is a court that decides, on the application of a landlord, whether to make a demotion order, rather than the landlord simply declaring it. Also, notwithstanding the breadth of the meaning of the term 'anti-social behaviour', UK demotion orders cannot be made unless the court is satisfied that the

tenant has engaged in, or threatened to engage in, ASB; there is no such stipulation in the NSW Act. Indeed, under the current renewable tenancies policy all manner of tenancy breaches (such as rent arrears) are factors in the decision whether or not to renew a tenancy.

Implications for housing policy and practice

At the time of writing, the Act has received assent, but has yet to commence, and the Department has yet to formulate the various policies that will guide its officers' use of the new provisions. However, already a number of real and potential problems can be seen, at the levels both of principle and practice.

Problems of principle

• *a blunt, exclusionary instrument.* In terms of regulating people's conduct, residential tenancy law is a blunt tool. It is essentially exclusionary. It relies, ultimately, on the threat and execution of evictions. The Act merely amplifies this blunt, imprecise effect. ABAs widen the net of tenancy law, imposing additional conditions on tenants and increasing the prospect of breach. The changes to Tribunal procedure will mean that more proceedings for breach will result in evictions.

• *how a person is expected to behave will depend on the type of housing they live in.* The Act provides that there is to be one standard for the rest of the community, and another harsher standard for public housing tenants. Whereas the UK's ASBOs and ABCs can be applied regardless of tenure, NSW's ABAs will apply only to public housing tenants. It is difficult to imagine that a private tenant in NSW — let alone a homeowner — would ever be made the subject of a prohibition on congregating in common areas. This is fundamentally unjust — but more than that, it reinforces the stigma that is attached to public housing, and which in other respects the Department is committed to removing.

• *the perversion of contract principles.* The Act effectively allows one party to a contract to unilaterally alter the terms of the agreement — a dangerous power in any event, and especially where the party is the government landlord. The Government has called its ASB strategy an instance of 'mutual obligation', but the truth is that public housing tenants have always been subject to a regime of mutual obligation, as parties to contracts for housing that oblige them to pay rent, cause no damage and refrain from creating nuisances. Perhaps better than any other area of public policy, public housing reveals the sham of mutual obligation as simply the unilateral imposition of additional strictures.

• *the reversal of the onus of proof.* This is a dangerous legislative precedent. In the particular operation of the Act, the reversal of the onus of proof means that once a tenant has signed an ABA they are, for the purposes of any action by the Department, effectively presumed to have broken it. This legislative pall of suspicion reinforces the stigma of public housing. Some public housing tenants have already noted that the reversed onus puts them in the same company as suspected terrorists (section 33, *Terrorism (Police Powers) Act* 2002).

• *the restriction of discretion and scrutiny.* In briefings with NGOs, the Minister for Housing has stated that he is 'anxious' that tenants whose behaviour is related to a mental illness, brain injury or other disability should not be caught up in the ABA regime — a concern repeated in speeches on the legislation in Parliament. This intention is not, however, reflected in the Act. The restriction of the CTTT's discretion removes a crucial safeguard for these and other tenants who reasonably ought not to be required to sign an ABA, or who ought not be held responsible for breach of an ABA, or whose circumstances are such that eviction is not justified. The following examples are illustrative:

1. Tenant A has a mental illness that causes sleeplessness and delusions. The Department sends a notice requesting that A sign an ABA, but A fails to respond.

2. Tenant B has signed an ABA stating that B's husband will not engage in loud or threatening behaviour. B is the victim of domestic violence perpetrated by her husband — in the course of which he breaches the ABA.

3. Tenant C has five children under the age of 14. The eldest has been caught with friends writing graffiti on a fence, and C signs an ABA in relation to the child's graffiti and congregating with groups. Late one night the child sneaks out and is caught congregating with his friends again.

If each of these examples were to go to a hearing before the Tribunal, the tenancy would be terminated and the tenant and any other household members evicted. As Brown (2002:72) notes in relation to mandatory and grid sentencing, denying an adjudicator discretion to consider such factors is to install 'a slot machine approach to justice ... [and] a trashing of the traditions and processes of moral and legal judgement.'

This failure of justice is compounded by the lack of other means of scrutinising and challenging decisions of the Department. Decisions to request an ABA, or to not renew a tenancy, are not subject to review by the Administrative Decisions Tribunal; even the Housing Appeals Committee (HAC), the specialist independent administrative review panel for the Department of Housing, has no reference to hear appeals under the current renewable tenancies policy, and the Minister for Housing has indicated to NGOs that he is disinclined to allow the HAC to review future decisions relating to ABAs and renewable tenancies. If so, the only means of review of a decision in relation to an ABA or the renewal of a tenancy would be an appeal to the Supreme Court of NSW. In any event, review under administrative law merely asks if the decision-maker took into account relevant considerations and not irrelevant ones, and whether the decision was not unreasonable — a lower standard than that of the balance of probabilities in civil proceedings, let alone the standard of beyond reasonable doubt in criminal proceedings.

Problems of practice

• *the potential for increased tensions*. The Minister for Housing has described the intention of the Act as hanging 'the sword of Damocles' above the heads of tenants who fail to take 'responsibility' for themselves and their families. It is not clear that this approach will not inflame tensions and ASB rather than restrain them. It is conceivable that the additional stress of an ABA may result in conflict and violence within families, and a break down of family relations — 'parental responsibility' being manifested as clouting the child who misbehaves and places the family's housing in jeopardy. Indeed, some reports from the UK suggest that where local authority landlords have introduced tough tenancy conditions, tenants whose children are in the care of authorities are reluctant to take their children back, for fear of the children breaching the tenancy conditions (Burney 1999:114) — the radical opposite of the intended result.

• *the potential for damage to trust-based initiatives and the delivery of support services*. The Specialist Response Teams (SRTs), the 'support service' side of the Government's ASB strategy, are to be funded out of existing budgets. The Department has already indicated that it is considering using funds from the 'Families First' strategy, which funds a variety of trust-based initiatives and support services that work co-operatively with parents and children to build up skills and support, to pay for the SRTs. The SRTs might divert not just money from these services. If the SRTs are seen as part of the punitive regime of ABAs, renewable tenancies and fast evictions, tenants might avoid both the SRTs and the support services to and from whom referrals are made.

Ironically, in strengthening the Department's position in relation to its tenants, the Act may also weaken the Department's position in relation to other government agencies and service providers. It is possible that in a context of scarce resources for the delivery of services across government — housing, health, community services, the police, local government — the Department of Housing's power to readily evict troublesome people will be a magnet for buck-passing by other government agencies. Even within the framework of the multi-agency SRTs, conscientious housing officers may find their efforts to negotiate with other agencies for the services and support their clients needs undermined by the easy option of eviction.

• *the intimidation of witnesses in Tribunal proceedings*. In its announcement and in briefings with NGOs, the Government has stated that one of the motivations for the amendments, and particularly the reversal of the onus of proof, was to avoid the situation of neighbours of a tenant having to give evidence against the tenant, as they were susceptible to intimidation. Witness intimidation is not a factor in all, or even most, proceedings against tenants in the Tribunal. In any event, the Act does not actually address it, because reversing the onus means that instead of being called by the Department, neighbours will be called as witnesses by the tenant. Those tenants who are determined to intimidate the Department's witnesses will, presumably, not shrink from intimidating their own.

• *more complaints*. In widening the net for proceedings against breaches, and increasing the certainty that proceedings will result in evictions, the Act may also encourage a lower threshold of tolerance among neighbours in public housing and hence more complaints. In particular, if evictions are easier to get, more complainants will expect their problems to be dealt with that way, when they would be more appropriately dealt with by the police, or a health service, or by conciliation between neighbours at a Community Justice Centre. It may also encourage complaints of the worst kind: the writer has spoken to one public housing tenant who recounts that an acquaintance, also a public housing tenant, reacted to the Government's announcement by saying 'oh good, now we'll be able to get rid of the Abo family up the street'. Less outrageous, but no less of a problem, will be complaints based on simple ignorance: for example, against tenants who look or act differently or strangely, because of a mental illness or disability or sheer eccentricity. The Department already pursues evictions proceedings against too many such people (Martin, Mott & Landles 2002). The Act significantly increases the prospect of more.

Finally, each vacancy created by an eviction will be filled by another person from the waiting list who is no more or less likely to cause problems than someone already in public housing. In its present state of funding, the Department will continue to house only people who are very poor and, increasingly, people who have some other crisis affecting their lives and who need housing as a result. This structural problem underlies the stress and grievance experienced in many public housing neighbourhoods, and harsh, exclusionary, ill-conceived, 'law and order'-style tenancy laws do nothing to help solve it.

Christopher Martin

B Ec(Soc Sc) (Hons), LLB (Hons) (*Sydney*), and PhD student in the Institute of Criminology, University of Sydney. Christopher Martin is also Policy Officer for the Tenants' Union of NSW, and Chair of Shelter NSW. The views expressed in this comment do not necessarily reflect those of either the Tenants' Union or Shelter NSW.

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