

**ABORIGINAL LEGAL SERVICE OF WESTERN
AUSTRALIA LIMITED**



**SUBMISSION TO THE AUDITOR GENERAL'S INQUIRY INTO MANAGING
DISRUPTIVE BEHAVIOUR AND ILLEGAL ACTIVITIES IN PUBLIC
HOUSING**

16 August 2018

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA ('ALSWA')

ALSWA is a community based organisation which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples¹ throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, and human rights law. ALSWA also provides support services to prisoners and incarcerated juveniles. Our services are available throughout Western Australia via 13 regional and remote offices and one head office in Perth.

INTRODUCTION

The Auditor General of Western Australia is conducting an audit into how effectively the Department of Communities – Housing (the Housing Authority) manages tenants that are disruptive or conduct illegal activities in public housing. Two specific issues to be considered by the Auditor General are:

1. Does the Housing Authority have effective mechanisms in place to achieve good tenant and community outcomes?
2. Are complaints effectively managed to deliver consistent, timely and fair outcomes?

¹ In this submission ALSWA uses the term 'Aboriginal peoples' to refer to 'Aboriginal and Torres Strait Islander peoples.'

For a number of years, ALSWA has been concerned about the impact of the Housing Authority's Disruptive Behaviour Management Policy (DBMP) and the Illegal Use of Premises Policy on Aboriginal people. In particular, the application of these policies contribute to homelessness and serious overcrowding; exacerbate mental and physical health issues; and result in higher levels of anti-social behaviour and offending.

ALSWA highlights that it does not ordinarily provide legal services for tenancy disputes. It does, however, provide legal assistance in exceptional cases for tenancy matters where the client is an existing ALSWA client, where the client has mental or physical disability, where children are at risk of homelessness and where the client cannot obtain assistance from another agency.

DBMP

The DBMP states that legal action to terminate a tenancy agreement can commence after the tenant has accumulated the required number of strikes during a 12-month period. For 'disruptive behaviour' (as distinct to 'serious disruptive behaviour'), if three strikes are accrued within 12 months, eviction proceedings will commence. The guidelines define 'disruptive behaviour' as 'activities that cause a nuisance, or unreasonably interfere with the peace, privacy or comfort, of persons in the immediate vicinity'.² Examples listed for disruptive behaviour include 'loud parties'; 'domestic and family disputes'; and 'excessive noise from TVs, stereos, vehicle engines'.³

ALSWA notes that public tenants are held to a higher standard than private tenants. Under s 73(1) of the *Residential Tenancies Act 1987* (WA) (the Act), a court may terminate a private tenancy on application by the lessor if satisfied that the tenant has 'intentionally or recklessly caused or permitted, or is likely intentionally or recklessly to cause or permit, serious damage to the premises or injury to the lessor or the property manager of the premises or any person in occupation of or permitted on adjacent premises'. Therefore, the basis of termination is serious damage or injury. However, under 75A of the Act, social housing tenants can have their tenancy terminated if the court is satisfied, amongst other things, that the tenant has 'caused or permitted a nuisance' or '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. ALSWA is of the view that it is not appropriate that vulnerable and disadvantaged public tenants should be evicted on the basis of behaviour that could not result in termination of a tenancy for a private tenant.

ALSWA holds serious concerns that incidents of family and domestic violence may be relied on as a strike to the detriment of the victim (and children). If the Housing Authority receives a complaint that is related to family and domestic violence, the

2 Housing Authority WA, *Rental Policy: Disruptive Behaviour Management Policy*, 80.

3 http://www.housing.wa.gov.au/HousingDocuments/Disruptive_Behaviour_Management_brochure.pdf.

priority response should be ensuring the safety of the victim and any children living in the premises and providing the necessary support services to achieve safety. Likewise, if mental illness is associated with behaviour that leads to a 'strike' it would be preferable to facilitate access to relevant support and treatment services. These approaches are far more likely to achieve good tenant and community outcomes than investigating and recording the incident as 'a strike' against the person.

Homelessness and overcrowding

The Equal Opportunity Commission (the Commission) has condemned the use of homelessness as a punitive measure to deal with behaviour that is considered disruptive. The Commission also observed that the DBMP increases overcrowding because

when families are evicted as a result of the strategy, their only option (other than being homeless) is to stay with relatives. These relatives are often also tenants of the Department. This frequently creates increased noise levels in these households and raises the potential for antisocial behaviour. In turn, this adds to the likelihood of additional complaints under the DBMS.⁴

The Australian Housing and Urban Research Institute published a report addressing overcrowding in Aboriginal households. It indicated that the DBMP has contributed to overcrowding; Aboriginal people who have been evicted due to the strategy are living with family members as a means of avoiding homelessness.⁵ An example highlighting this issue is from the City of Swan where an Aboriginal household comprised of six adults and fourteen children, the large number of people in one household was attributed to some family members being evicted under the DBMP.⁶

Discrimination

It was observed in Parliament that in 2015–2016 there were 53 evictions under the DBMP and/or the Illegal Use of Premises Policy and 51% of these tenancies had Aboriginal people in the premises.⁷ ALSWA understands that there is no data available about the number of children evicted and left homeless as a consequence of these evictions.

ALSWA is aware that racism underpins many complaints made to the Housing Authority. As the Commission observed, racism is likely to prompt complaints from some individuals who have lower tolerance to noise because the tenants are Aboriginal.⁸ While the tenant in following case study was subject to an application to terminate his tenancy primarily based on illegal activities on the premises, at least

4 Equal Opportunity Commission Western Australia, *A Better Way: A report into the Department of Housing's disruptive behaviour strategy and more effective methods for dealing with tenants* (June 2013) 11 & 52.

5 Memmott P et al, *Australian Indigenous House Crowding* (Australian Housing and Urban Research Institute, Final Report No. 194, 2012) 120^[1]_{SEP}

6 Ibid.

7 Western Australia, Parliamentary Debates, Legislative Council, 8 September 2016, 5673 (Hon Lynn MacLaren).

8 Equal Opportunity Commission Western Australia, *A Better Way: A report into the Department of Housing's disruptive behaviour strategy and more effective methods for dealing with tenants* (June 2013) 51.

two complaints of nuisance by a neighbour were relied on by the Housing Authority. The neighbour who complained had attempted to light a fire on the tenant's property, had thrown a drink bottle at his son and had called him racist names. Significantly, the Housing Authority confirmed that the neighbour was taken by police for a mental health evaluation on one of these occasions. In such circumstances, these complaints should not have been used against the tenant.

Case Study 1

A 60-year-old Aboriginal man, Z, was subject to an application to terminate his public housing tenancy in September 2017. Z entered into the tenancy agreement in February 2014 and the Housing Authority sought to terminate his tenancy because it alleged he had used the premises or caused or permitted the premises to be used for an illegal purpose, contrary to s 75A(1)(a) of the Residential Tenancies Act 1987 (WA).

The Housing Authority relied on various incidents from August 2014 until July 2016 where Z had been convicted of drug related charges included selling a prohibited drug and where it was alleged that Z had allowed occupants of the premises to possess prohibited drugs. Further incidents relied on included an allegation that police had been called to the premises and around 15 people were fighting and damaging cars; where police attended to respond to a fight involving four people and Z was arrested for abusing police; and another incident where police were called to respond to a fight involving about eight people. The Housing Authority also alleged that in July 2016 police conducted a raid of the premises and a number of weapons were seen at the house (both Z and another occupant were charged with possession of a prohibited drug). In addition, the Housing Authority relied on various allegations of nuisance that resulted in police attendance over the previous six months. ALSWA responded on behalf of Z, explaining that:

- *two incidents involved Z arguing with his 13-year-old son about his son's misuse of cannabis*
- *another incident involved extended family members having an argument while visiting the premises*
- *two incidents related to difficulties Z experienced with a neighbour including that the neighbour had attempted to light a fire in his property, had thrown a drink bottle at his son and had called Z racist names (it was confirmed by the Housing Authority in its correspondence with ALSWA that on one occasion the neighbour was taken by police for a mental health evaluation).*

ALSWA were representing Z in relation to a care and protection matter for his 10-month old son. In September 2017, ALSWA wrote to the Housing Authority explaining Z's current circumstances: that he had three children in his care (13-year-old son, 6-year-old grandson and 3-year-old grandson). It was highlighted that the Department of Communities were supportive of Z having these children in his care and were working towards reunifying his 10-month old son into his care. A letter of support from the Department of Communities, Child Protection and Family Support was provided which outlined that Z had engaged well and

stressed the negative implications that his eviction would have on the vulnerable young children in his care.

ALSWA also advised that Z was working closely with two youth crime intervention officers from WA Police in relation to his older son and had managed to have him reengage in a nearby school. The school reported that he was doing extremely well. These police officers also provided a letter of support dated August 2017 which confirmed that Z had been working with them regarding his son and that he had no outstanding inquiries with police nor any recent offending. A similar letter of support was provided by a youth justice officer. The authors of the various letters of support confirmed that Z was engaging positively and looking after all of the children in his care. The police officers confirmed that the premises were always well presented and maintained.

ALSWA emphasised that if Z were to lose his home, it would jeopardise his chances of having his 10-year-old son returned to his care and would most likely result in homelessness for the three other young children. Even if alternative accommodation could be accessed, the positive outcomes achieved in relation to the older son would be damaged.

In April 2018, the Housing Authority considered all of the material and agreed to provide Z with one final chance with a suspended termination order that would lapse after 12 months if Z abides by the conditions of his tenancy.

The Indigenous Legal Needs Project (ILNP) reported on the discriminatory effects of the DBMP on Aboriginal tenants. The report expressed concerns that some neighbours may use the policy in a ‘racially discriminatory way to exclude Aboriginal people from their community’.⁹ Furthermore, it was observed that Aboriginal people are more likely to be negatively affected by the policy due to cultural reasons (eg, Aboriginal people typically communicate in larger gatherings and with extended family as compared to non-Aboriginal people).¹⁰ The ILNP found that the ‘current approach of the Department is seen as being highly punitive, utilising a law enforcement type model of managing tenancies of some of the most vulnerable persons in the community, including through the employment of ex-police officers to implement the relevant policy’.¹¹

The DBMP does not take into account that the behaviour may be beyond the control of the tenant. The Commission indicated that it had received multiple complaints from Aboriginal people referring to complaints that have been made against them as a result of visitors.¹² The Commission provided an example of an Aboriginal grandmother who was looking after multiple grandchildren and the behaviour of her uninvited visitors were the basis of the complaint.¹³ Another complaint received by

9 Allison, F., Schwartz M. and Cunneen, C. (2014) *The Civil and Family Law Needs of Indigenous People in Western Australia*, Cairns: James Cook University, 35.

10 Ibid 98.

11 Ibid 33.

12 Equal Opportunity Commission Western Australia, *A Better Way: A report into the Department of Housing’s disruptive behaviour strategy and more effective methods for dealing with tenants* (June 2013) 23.

13 Ibid.

the Commission was from an Aboriginal woman who assumed the responsibility of caring for her brother's children. Her brother, in an intoxicated state, sought to visit his children. The Aboriginal woman refused; however, her brother exhibited disruptive behaviour. Despite her brother's behaviour being outside of her control, the Aboriginal woman received strikes from the Housing Authority and no consideration was given to the circumstances of her case.¹⁴ ALSWA has also been told of a case in the Magistrates Court where an elderly Aboriginal woman was facing eviction, due to the DBMP and unpaid rent. In the span of a few short months she had lost her brother and two sisters as well as her daughter. She attended funerals outside of the Perth area and during this time her son had occupied the property and displayed some disruptive behaviour. During her daughter's funeral service, she had family members from outside of the Perth area stay with her. She received strikes due to her visitors' disruptive behaviours. She was experiencing mental health issues as a result of these multiple and unexpected deaths in her family. However, her circumstances were not taken into consideration.

Process for Investigating Complaints

The Housing Authority's Rental Policy Manual (June 2018), outlines the DBMP.¹⁵ When the Housing Authority receives a complaint, the complaint will be investigated by an investigating officer. The complaint will be corroborated by gathering evidence from neighbours, police, eye witnesses etc. The matter will be discussed with the tenant and the tenant will be able to respond to the allegations. The investigating authority will then assess the tenant's response and other evidence obtained and determine whether there has been a breach of the tenancy agreement and an appropriate response. The response taken by the Housing Authority will depend on the nature, severity and rate of occurrence of the alleged behaviour.

The Commission has expressed concerns with some aspects of the complaint and investigation process. When the investigating officer communicates with the tenant, the tenant may acknowledge an incident taking place in order to fully explain the circumstances. However, in some instances, such an acknowledgement was considered to be evidence to corroborate the complaint.¹⁶ In other instances, the Department of Housing did not fully consider the circumstances of the case or the background when investigating the complaints and issuing strikes.¹⁷ The Commission in their report, *'Finding a Place,'* considered some allegations of disruptive and anti-social behaviour made against Aboriginal tenants were trivial. The Commission recommended that complaints that were a result of racial prejudice or bias should not be dealt with through the DBMS as in some cases it has resulted in notices being issued and eventually resulted in evictions.¹⁸

14 Ibid 59.

15 Government of Western Australia Housing Authority (June 2018) *Housing Authority Rental Policy Manual*, 78.

16 Western Australian Equal Opportunity Commission (June 2013) *A Better Way: A report into the Department of Housing's disruptive behavior strategy & more effective methods for dealing with tenants*, 63.

17 Ibid.

18 Ibid 12.

Although the tenant is provided the opportunity to speak to the investigating officer and respond to the allegations, the identity of the complainant is not provided. Although this is for security purposes, the tenant is disadvantaged because it impacts their ability to be able to fully respond to the allegations.¹⁹

ILLEGAL USE OF PREMISES POLICY

Under the Illegal Use of Premises Policy, public housing tenants will be subject to eviction proceedings for illegal activity occurring on the premises or arising out of the use of the premises and tenants are held responsible for any illegal act by a person who has been given express or implied permission to be on the premises by the tenant. While ALSWA understands that the Western Australian government cannot condone the use of public housing to commit serious offences (eg, methamphetamine lab in public housing premises), consideration must be given the nuances of offending behaviour and the likelihood that evictions may lead to further and possibly more serious criminal behaviour. Furthermore, holding tenants responsible for criminal activities by others is fraught with difficulties. Victims of family and domestic violence may have no real choice; other tenants may be ignorant of the illegal activities of family members.

Case Study 2

Y was a young mum of three children under the age of 13. She had been subjected to very serious domestic violence by the father of her children, who was in jail after being convicted of an offence of doing grievous bodily harm against her. In 2015 and 2016, there were five raids on her Housing Authority home, leading to charges being laid against Y and four other adults including Y's current partner. ALSWA represented Y. Y pleaded guilty to a number of charges and was placed on a 12-month Intensive Supervision Order.

As a result of the raids and charges, the Housing Authority applied to the Magistrates Court to terminate Y's tenancy, on the basis that she had 'caused or permitted' the house to be used for an illegal purpose, under s75A of the Residential Tenancies Act 1975 (WA). ALSWA represented her and argued that the illegal behaviour did not justify termination, especially considering the fact that Y and her three children would be homeless as a result. The Magistrate found in favour of the Housing Authority, and found that she could not consider the surrounding circumstances of Y, only the circumstances of the behaviour.

ALSWA appealed to the Supreme Court of Western Australia and it was argued on Y's behalf that the Magistrate had erred in not taking into account Y's surrounding circumstances. The Supreme Court found in favour of Y and remitted the matter back to the Magistrates Court for determination.²⁰

ALSWA wrote to the Minister for Housing, the Hon Peter Tinley and asked him to direct the Housing Authority to withdraw its application to terminate the tenancy. At the end of 2017, Mr Tinley confirmed that the Housing Authority

¹⁹ Ibid 21.

²⁰ (Re Magistrate Johnston: Ex Parte Wallam [2017] WASC 226.

would withdraw its application, and further, would transfer Y to a more suitable house for her and her children. In early 2018, Y confirmed she was in a new four-bedroom house with security screen to ensure the safety of her and her children.

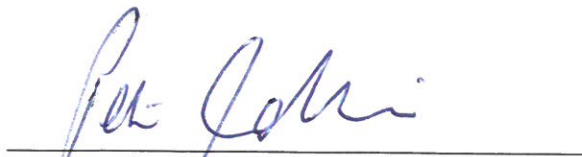
Case Study 3

X was a tenant in a Housing Authority property, living in the home for approximately 20 years. X was charged with possession of prohibited drugs with intent to sell or supply (cannabis) and possession of stolen or unlawfully obtained property. X pleaded not guilty to the charges, maintaining that she used the cannabis to self-medicate her chronic arthritis. Police officers had found a significant amount of cash found in X's kitchen, as well as various clip seal bags of cannabis. X was convicted and sentenced to fines of \$3,000.00.

In November 2016, the Housing Authority applied for termination of X's tenancy pursuant to section 75A of the Residential Tenancies Act 1987 (WA). The matter had been adjourned numerous times prior to ALSWA's involvement in October 2017. The matter again adjourned to allow ALSWA to prepare for the trial which was anticipated for early 2018.

In November 2017, the Housing Authority made a settlement offer. After some negotiation, it was agreed that the Housing Authority would withdraw its application to terminate X's tenancy, and place X on a 6 month 'probationary period'. If X used or allowed anyone else to use the property for an illegal purpose during that period, the Housing Authority would re-apply to the court to terminate X's tenancy. Consent orders were made to this effect.

As a consequence of the Supreme Court decision in Case Study 2 above, it is clear that when determining an application to terminate a public housing tenancy, the court is not restricted to considering the alleged disruptive and/or illegal behaviour. The court is permitted to consider the tenant's behaviour up until the date of the court hearing as well as all of the surrounding circumstances. This is important because the tenant may have addressed the issues that led to the disruptive or illegal behaviour by the time of the court hearing. And most significantly, it enables surrounding circumstances (such as the risk of homelessness to three children in Case Study 1), to be taken into account. However, access to advocacy and legal support is essential so that tenants facing eviction proceedings can properly present all of the relevant information to the Housing Authority and/or the court.



Peter Collins
Director, Legal Services
Aboriginal Legal Service of Western Australia Limited