

***Submission to the Department of Human Services
on behalf of Public Housing Tenants in relation to
Human Rights concerns raised by the Anti-Social
Behavior Pilot***

Fitzroy Legal Service June 2011

Meghan Fitzgerald
Community Development Officer/ Solicitor
Tel: 9419 3744
Email: mfitzgerald@fitzroy-legal.org.au



Introduction

We would like to take the opportunity to thank the Office of Housing for its commitment to tenant participation and for valuing input from public tenants with the aim of improving outcomes. The tenants/ advocates on behalf of whom we make this submission share concerns of Government regarding safety and peaceful enjoyment of their homes.

About the Fitzroy Legal Service (FLS)

FLS is a community based legal service providing free legal advice and advocacy support. The vast majority of clients accessing our services are in receipt of government benefits or low wages. A significant number of our clients reside in public housing, and FLS is a regular provider of advice to public housing tenants with disputes with other tenants. Many of our clients also have mental health concerns that may affect a range of aspects of their lives, including the maintenance of tenancies.

About this submission

We write in relation to concerns regarding unintended impacts of the anti-social behavior pilot working document (ASBP) raised directly with us by tenants, including as they interface with rights contained in the Charter of Human Rights and Responsibilities Act 2006 (Vic).

The following submissions are put forward specifically on behalf of Mr. Jeremy Dixon of the Public Tenant Representative Northwest Metropolitan Regional Tenants Council, and Ms. Fiona Ross, Facilitator of the Princes Hill Public Housing Association .

We have been instructed that the concerns enumerated in this submission have been raised on numerous occasions by tenants and tenant representatives at meetings where the ASBP in its pilot form have been discussed.

The submissions herein are also endorsed by the Victorian Mental Illness Awareness Council (VMIAC).

“Anti-social behavior”

The language of anti-social behavior is deeply value laden, implying purposeful negative action &/or behavior harmful to others. Simultaneously the term “anti-social behavior” retains an amorphous lack of definition - allowing a range of interests and concerns to be incorporated under a banner that implies an objective and shared understanding.

The ordinary understanding of the terminology of ‘anti-social behavior’ in a tenancy context relates to behaviors which are harmful to others. However, the majority of triggering events covered by the ASBP are not characterized by any inherent requirement that the relevant conduct directly affects other tenants in an adverse fashion.

In these contexts it is submitted the ASBP is substantially dedicated to dealing with disputes between landlord and tenant, with the central goal of extending the power and discretion of the Office of Housing in managing tenancies and precluding some members of the community from accessing public housing.

It is submitted as such that the language of 'anti-social behavior' is misleading, as impacts from a tenant's perspective on the concerns of anti-social behavior are not the central directive of the framing of the ASBP. This position is reinforced by concerns that the criterion by which a household is deemed 'anti-social' practically extends to a range of circumstances that should not appropriately be labeled or dealt with in this way (see below).

In making these submissions, we seek to make clear that the pejorative language of anti-social behavior is harmful and ought to attach to behavior clearly definable as such. We note also that the consequences of being flagged as a member of an anti social behavior household are clearly punitive, in that a more onerous set of requirements will apply in accessing housing and discretion may be exercised not to allocate housing.

It is our submission that the allocation of greater discretion with the relevant decision makers will not remedy the inherent flaws of the ASBP framework. The terms and values enunciated in the ASBP will necessarily guide the exercise of discretion and replicate those flaws.

Unintended Impacts & Disability Discrimination

A major concern in relation to the ASBP is that tenants can be penalized for exhibiting symptoms of their disabilities, which they are not always able to control.

Circumstances that will be included in this policy approach and have been raised with us by tenants , and through our own service delivery include the following:

It is not unusual that significant maintenance debts may be accrued by high needs households. For instance, risks of fire and flooding may be increased where psychiatric illnesses are being treated with strong medications, or where for a variety of reasons functioning capacities in relation to caring for property or relating to others is compromised, for example where persons are affected by the onset of dementia or are exhibited psychotic symptoms.

Similar concerns arise in relation to notices to vacate in relation to condition of premises, where issues such as hoarding (which can often be a symptom of psychiatric disorder) by one member of the household may lead to a notice. Again it would not seem appropriate that such matters be dealt with through an 'anti-social behavior' policy, though there may be interventions required to support tenancy and health/ safety concerns.

We note that symptoms deriving from disability which may present challenges to tenancy management by the affected person (both socially and materially) are precisely the factors that may preclude that person from accessing the private rental market and provide grounds for accessing public housing.

It is extraordinary that these circumstances would be labeled as a matter of course as instances of anti-social behavior, with opportunity to review such classification only available through administrative review mechanisms. This would not seem to be consistent with the expectations and views of ordinary Victorians, and does not reflect the legitimate need of tenants to be supported in maintaining their tenancies with compassion.

Whilst it may be argued that discretionary aspects to the decision making process might address these issue, this does not alter the extremely valid concern that it is a pejorative misnomer to use for example the existence of debt as evidence of 'anti-social behavior' given the varying circumstances where this scenario may arise. A more appropriate characterization would be that of a high risk tenancy.

It is submitted there are not sufficient safeguards within this policy protecting the right to housing of people with mental illness.

Procedural fairness

The extension to the flagging process to persons not directly responsible for any of the triggering behaviors creates a system where individual rights are diminished without concern for whether the fault or responsibility of that person is shown. In principle this bypasses any mechanism that would meet ordinary natural justice requirements. The failures of the flagging process as presently constituted to engage with principles of fairness and natural justice is so extreme we submit it constitutes an unlawful attack on reputation (see below).

We note again that the ASBP is discriminatory and punitive in nature and function, and appropriate justification/ checks and balances must be built in to its terms. Relying on appropriate exercise of discretion is, as mentioned above, admission of failure to provide a best practice blue print for decision making (the ordinary role of policy documents).

In addition, concerns have been raised in relation to group two households, as expressly applying to circumstances where allegations leading for instance to breach of duty notices and MCAT charges need not be proven/ ratified. In the context of high density housing where complex needs may attach to different households it has been raised as a concern that inadequate value has been attached to the principles of procedural fairness/ natural justice.

We put forward as examples of unintended and/or incongruous impacts of the ASBP flags unfairly putting whole households at risk, and subjecting all members to onerous requirements and diminishing of rights:

- care-givers for family-members with psychiatric diagnoses
- household members that are victims of domestic violence/ coercive abuse
- persons residing within household not aware of behavior constituting illegal use

In many cases the behavior of one member of a household may unfairly put the security of the whole household at risk. That all members of such households should be labeled as members of an anti-social behavior household, with equal prejudicial impacts and diminishing of rights (subject to possible amelioration only through exercise of discretion) seems patently unjust.

We are concerned that the ASBP flag process should apply only to:

- (a) behavior appropriately characterized as anti-social
- (b) those personally responsible for the behavior so characterized

We note in this regard the duty of the Department to house and support vulnerable Victorians, and to provide support to families and care-givers. In the examples outlined above, we submit ensuring optimal support and priority to all community members whose tenancies are at risk through no fault of their own is the appropriate response. This should be achieved through support for high risk tenancies programs as opposed to through the ASBP which by its terms and functions involves a negative engagement with the Department.

Right to privacy and reputation

We note that the operation of ASBP creates a framework wherein reputation is impacted through the imposition of an anti-social behavior household flag in circumstances where no individual responsibility may exist for the triggering conduct. We submit this to be a wholly unfair process.

We note also the requirement to consent to information sharing in order to access housing once flagged diminishes rights in relation to personal information that would otherwise be protected as confidential. Again we do not consider this to be a fair process, and this is especially so given the individual concerned need not have engaged in any triggering conduct.

We raise concerns also in relation to the written acknowledgment that must be provided by a tenant acknowledging history of ASB/ causing damage in public housing through their relationship with their support worker. We note this places such workers in a position of conflict of interest in that such an acknowledgment may undermine legal interests of their client and be signed in a context where consent is not free, ie a context where fiduciary obligations would be triggered in an adverse fashion.

Similarly, by asking support workers to provide information regarding conduct within the context of the tenancy, and to provide updates regarding the health and well-being of their client, a conflict of interest may arrive in three respects –

- (a) where the support workers is asked to make an assessment regarding behavior that occurs outside the scope of the professional relationship
- (b) where consent is provided by the tenant to allow information sharing in a context where that consent is given under significant inducement
- (c) where a support worker not employed to manage the tenancy is placed in a position where they are unable to act to the benefit of the legitimate interests of their client.

We submit the current role of support workers in providing voluntary recommendations, and in breaching confidentiality on request of their client, should be preserved and respected through the terms of the ASBP. The importance of maintaining confidentiality as central to the integrity of therapeutic relationships has strong support through professional codes of conduct and the law. We recommend if this has not already occurred consultation with the Office of the Victorian Privacy Commissioner.

A further concern that has been raised is the lack of resourcing to fund tenancy support roles as seems to be envisaged by the ASBP has been raised also.

Rights under the Charter of Human Rights and Responsibilities Act 2006 (Vic)

It has been requested by the tenant representatives on whose behalf we write that the following protected rights are given due consideration in the review of this policy as is incumbent on the Department:

Right to life

The right to life connotes not just a prohibition on the arbitrary deprivation of life, but consistent with international jurisprudence, imposes positive obligations on public authorities to take steps to prevent the arbitrary (unreasonable or disproportionate) deprivation of life.

Given the impacts outlined above, wherein it is submitted the operation of this policy is likely to adversely affect the most vulnerable Victorians in accessing already scarce resources in the public housing sector, we consider this right should be given real consideration. That is, we ask the Department to reflect on whether the ASBP as presently constituted supports the right to life of Victorians experiencing mental illness, domestic violence, harmed through the unlawful actions of others.

Privacy and reputation

Section 13 - A person has the right: (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with & (b) not to have his or her reputation unlawfully attacked

We submit the infringements on privacy and reputation facilitated by the policy derive from

- (a) requirements to consent to the sharing of personal information in order to access housing
- (b) the flagging of all household members under the anti-social behavior household flag regardless of whether the triggering events attach to the particular individual concerned and regardless of whether the triggering events have on the balance of probabilities been disproven
- (c) the identification of behaviors through the flagging process as 'anti-social' when these behaviors may derive from a range of circumstances that are benign and/or outside of the control of the person

In relation to subsection (a) we would submit that the interference with privacy facilitated by the policy is arbitrary ie. not authorized by positive law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his/her conduct by reference to it.

This policy sits below positive law in the form of privacy legislation that requires consent to be provided in order to facilitate disclosure of personal information held by services and government. The law of consent requires that agreements allowing disclosure must be made freely, and without undue or unconscionable influence.

In addition, the policy is arbitrary in the sense that a person may be subjected to its operation (infringing on privacy) without having any control over the behaviors and circumstances leading to a triggering event.

For these reasons, it is submitted the infringement on privacy facilitated by the policy are unreasonable, unlawful and arbitrary.

In relation to sub-section (b) of section 13, the flagging of a person individually as a member of an anti-social behavior household without the requirement for personal responsibility over any of the triggering events is again in our view an unlawful attack on reputation (not derived under positive law that is formulated in a manner that can be complied with by the individual concerned).

Protection of families & children

Section 17 – (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State; (2) Every child has the right without discrimination to such protection as is in his or her best interests and is needed by him or her by reason of being a child

We submit the impacts on children and family members of being flagged through this policy should be given serious consideration and clearly enunciated amendments made to protect the interests of children and family members.

It is unclear how young people will be impacted as a result of being a member of an anti-social behavior household, and it would be extraordinary if they were subjected to differential requirements as adults as a result of conduct engaged in by others whilst they were children. Similarly, it is unclear what value if any is attached to the position of care-givers to their children where the acts of their children may be result in the flag.

Maintaining the integrity of family relations, working to prevent detrimental impacts on children and care givers, and ensuring persons who may be victims of violence/ supporting high needs tenants within the family context must be given priority. This is particularly so given the devastating impacts that may result to a family as a result of homelessness and the creation of further barriers to accessing public housing.

Conclusion

We are grateful for the opportunity to make submissions with the goal of improving the ASBP to serve the legitimate interests of public tenants as outlined to us.

We note that in the context of the growing public housing crisis, it is vital that the duty to safely house the most vulnerable people in our community remains the central goal of any policy approaches developed of the Department.

We note as outlined in our submissions that there are a very broad range of circumstances captured by the ASBP whereby particularly vulnerable Victorians may be subject to the process of pejorative labeling, discretionary exclusion and diminished rights to privacy. In relation to many of these circumstances, we do not believe it is appropriate for the ASBP to be applied.

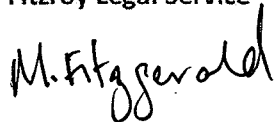
We note that the circumstances triggering the application of the ASBP often would relate to the same underlying conditions which ought to place a person as a priority in accessing public housing – e.g. victim of family violence, mental health disorder, exiting prison.

We reaffirm that the right to access public housing exists as a reflection of interrelated concerns:

- (α) A portion of people in the community are unable to access the private rental market for a range of reasons that contribute to their vulnerability (age, disability, poverty, unpaid care-giving role)
- (β) Management of high density housing where community members with a range of circumstances contributing to their vulnerability (and exclusion from private rental) interact can present significant challenges
- (γ) There is strong and longstanding commitment to ensuring all Victorians are able to access some form of a housing as a reflection of community commitment to our fellow Victorians.

We thank you again for allowing us the opportunity to put forward our concerns.


Yours faithfully,
Fitzroy Legal Service



Per: Meghan Fitzgerald
Community Development Officer/ Solicitor

Endorsed by

Victorian Mental Illness Awareness Council

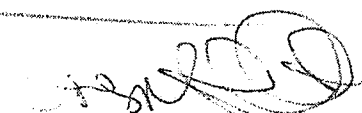


Per: Isabell Collins
Director

Princes Hill Public Housing Association



Per: Fiona Ross
Facilitator



Per: Jeremy Dixon
Nth West Metropolitan Regional Tenants' Council