



A Better Way

A report into the Department of Housing's disruptive behaviour strategy & more effective methods for dealing with tenants

"Homelessness should never be used as a punitive measure to shape behaviour in a group with such documented disadvantage," - Commissioner for Equal Opportunity Yvonne Henderson

June 2013



Foreword

The Equal Opportunity Commission has a long history of investigating complaints alleging discrimination in relation to housing.

It has conducted extensive previous investigations into alleged discrimination in the provision of public housing (Finding a Place in 2004) and in the private rental accommodation market (Accommodating Everyone 2009).

The Commission also established a monitoring committee to oversee the implementation of the recommendations of the 2004 report which continued to meet until March 2011 when a final report was released detailing the extent of implementation achieved.

When the Department of Housing introduced its Disruptive Behaviour Management Strategy in 2009 the Commission worked with the Department to successfully resolve most of discrimination complaints that arose out of this strategy; however in 2011 the then Minister for Housing announced that the DBMS would be more strictly adhered to in the future following a review which found there 'was too much scope for discretion' and a new strengthened policy would commence from 3 May 2011.

Since that time the Commission has received a marked increase in the number of complaints that relate to DBMS. Negotiations with the Department have indicated that there will be no scope for conciliating these complaints as the DBMS was now a policy required by the Minister to be strictly adhered to, so that terminations resulting from the policy's three strikes provisions could not be reversed by the Department.

Housing underpins everyone's sense of security and wellbeing. The right to shelter is a fundamental human right and it is for this reason that I have chosen to conduct a further inquiry into any systemic discriminatory impact of the DBMS on housing and homelessness.

Nothing impacts more on health, the ability to get a job, children's schooling and general wellbeing than having a home. Homelessness has an impact on everyone, not just those without a roof over their head.

This report makes a number of recommendations about dealing with disruptive behaviour by public housing tenants. It looks at best practice from other jurisdictions and it endorses the view that with the exception of dangerous or illegal activity normal household noise and behaviour that arises from a tenancy should be addressed in a supportive manner where it impacts on others.

A significant proportion of public housing tenants come from disadvantaged backgrounds and have health problems including mental health issues. The trend in public housing in Australia is for this proportion to increase. This requires the development of a range of early intervention and supportive measures tailored to the very circumstances of individuals and families whose tenancies show signs of stress. I appreciate that this is resource intensive work that some housing authorities do not see themselves as well equipped to provide.

Nevertheless it is essential that such support is provided to prevent individuals and families particularly involving young children, and people with mental illnesses from being evicted. Homelessness should never be used as a punitive measure to shape behaviour in a group with such well documented disadvantage.

In addition it would appear that public housing tenants are in many cases described in this report subject to a harsher regime than tenants in the private market.

This report recommends that the DBMS scheme should be limited to its original intention – to target dangerous and illegal activities and should not capture the range of normal domestic activities which it does at present.

I would like to thank all those involved in gathering material for this report and in particular Shelter WA.

I thank the staff of the EOC who have been involved over a long period of time in addressing complaints such as those described in this report. This work is at times demanding and distressing.

I also thank Diana MacTiernan, Victoria Williams and Sarah Johnston who contributed to the writing of this report.

A handwritten signature in black ink, appearing to read 'Yvonne Henderson', with a long horizontal flourish extending to the right.

Yvonne Henderson
COMMISSIONER FOR EQUAL OPPORTUNITY

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Acronyms

DBMS – Disruptive Behaviour Management Strategy

EO Act – *Equal Opportunity Act 1984*

FAP – Finding a Place Report -

HSO – Housing Services Officer/s

NIA – Needs and Impact Assessment

RTA – *Residential Tenancies Act 1987*

1. Introduction

This inquiry and report is undertaken pursuant to s 80(b)(i) of the *Equal Opportunity Act 1984* (WA) ('the EO Act'). Section 80(b)(i) of the EO Act enables the Equal Opportunity Commissioner (the Commissioner) to acquire and disseminate knowledge on all matters relating to the 'elimination of discrimination on the ground of sex, marital status or pregnancy, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment or age and elimination of discrimination against gender reassigned persons on gender history grounds'.

The Department of Housing's Disruptive Behaviour Management Strategy (DBMS) commenced in 2009.¹ In April 2011 the Minister for Housing announced that the DBMS would be more strictly adhered to in the future following a review of the strategy which had found that there 'was too much scope for discretion' and inconsistency in the implementation of the strategy.² It was said that the new strengthened policy would commence from 3 May 2011. Since May 2011, the Equal Opportunity Commission (the Commission) has received a marked increase in the number of formal and informal complaints that relate to the DBMS. The Commissioner met with the Director General of the Department of Housing (the Department) to raise concerns about the potential systemic discrimination which seemed to be presenting in a number of the complaints which were received in the first few months following the Minister's announcement.

Because complaints concerning the DBMS continued to be received by the Commission, and concerns have been raised by the Commissioner for Children and Young People and many other advocates, the Commissioner determined in July 2012 it was appropriate to instigate an inquiry into and report on the DBMS.

The specific issues which are examined in this report include:

1. The extent to which factors associated with the disadvantage experienced by and complex needs of social housing tenants that may contribute to complaints of disruptive behaviour have been taken into consideration by the Department during its investigation of complaints.
2. Whether the process of investigation of complaints of disruptive behaviour and the issuing of strikes by the Department has been carried out in accordance with the principles of natural justice.
3. The overall impact of the DBMS on tenants with particular characteristics.

¹ See further discussion below in relation to the development of the Disruptive Behaviour Management Strategy.

² Buswell T, 'Public Housing Tenants Face Tougher 'Three Strikes' Policy', *Western Australian Government Media Statements* (4 April 2011).

4. Consideration of alternative mechanisms and strategies to address antisocial behaviour in order to limit the number of evictions from the public housing sector and the negative consequences which follow.

This report will also assess, by reference to the complaint files lodged with the Commission since May 2011, whether there is evidence of systemic discrimination associated with the strategy. This assessment has been undertaken by considering a range of grounds or characteristics including Aboriginal³ and ethnic minority groups, gender (primarily expressed as a link to domestic violence), mental illness, large families and the presence of children. In addition to examining the Commission's complaint files, the Commission attended Shelter WA's consultations with tenants and advocates to listen to perceptions of how the investigation of allegations of disruptive behavior is working. This has enabled the Commission to get a broader view of the impact of the DBMS.

2. Background

2.1 The Department of Housing's /Housing Authority role as social housing provider

Whilst the Department reports to the Minister for Housing⁴, it is the Housing Authority that is the legal property owner in relation to public housing tenancies.⁵ It is also the body which employs all staff.⁶ It is acknowledged that the Housing Authority is the correct legal entity; however, for ease of reference this report refers to 'the Department'.

In recent years the Department has broadened its objectives to be the facilitator of the Affordable Housing Strategy; however, it retains the core responsibility for providing public housing in Western Australia.

In 2011–2012 there were 36,749 public housing rental properties under the control of the Department.⁷ The Department also has control of other properties (eg, for crisis accommodation and community housing). Whilst the Department increased stock through various building programs, a range of new stock has been transferred to the community housing sector, which in turn houses people from a joint waiting list.

³ In this report, the term 'Aboriginal' is used to refer to Aboriginal and Torres Strait Islander people.

⁴ See Department of Housing, *Annual Report 2011–2012* (2012) 3.

⁵ The Housing Authority is a statutory authority established under the *Housing Act 1980* (WA).

⁶ The Department of Housing has no financial, physical or human resources': Department of Housing, *Annual Report 2011–2012* (2012) 3.

⁷ Housing Authority, *Annual Report 2011–2012* (2012) 155 (Appendix 2: Housing Statistics).

The Department's client management system, Caretaker showed that as at 30 June 2012 there were 69,290 people living in departmental stock. From self identified data 28% of these tenants identified as Aboriginal or Torres Strait Islander. Five per cent of people reported being born in a country other than Australia and 0.4% needed an interpreter (although there is no detail about the particular languages required).⁸

The Commission notes the percentage of WA public housing tenants born in a country other than Australia is considerably lower than the one 30 percent of Australian public housing tenants who identify as such as will be seen in section 5.2 of this report.

The primary basis for determining eligibility for public housing is income level.⁹ These levels are currently under review because they have not been amended since 2006. There are additional eligibility criteria such as the requirement for the applicant to be an Australian citizen or have permanent residency status as well as a residential and postal address in Western Australia; the requirement that applicants must not own (or part own) property or land; and the requirement that applicants must generally be at least 17 years old.¹⁰ Typically, the allocation of public housing properties is made on the basis of the time that the application was submitted (waiting list). However, there is also the ability to apply for priority assistance where an applicant has urgent needs (eg, medical condition caused by existing housing situation, domestic violence or racial harassment). Applicants seeking priority assistance may be provided with accommodation ahead of their place on the waiting list. Priority assistance is distinguished from crisis accommodation (ie, where a person requires immediate accommodation¹¹). Persons requiring crisis accommodation are assisted by specific local agencies that provide crisis accommodation and such persons are not eligible for priority assistance.¹² Currently, the practice is that once it has been determined an applicant is eligible for priority housing they are placed on the priority list in date order. This practice, however, is also under review to match the Department's newly stated objective of 'Meeting the housing needs of those in greatest need for the duration of that need'.¹³

⁸ Department of Housing, *A Review of Property Condition Reports and associated policies, practices and procedures - Needs and Impact Assessment 2012*. Pp11/12

⁹ See Department of Housing, *Rental Policy Manual* (April 2013) 9.

¹⁰ Department of Housing, *Rental Policy Manual* (April 2013) 19–28.

¹¹ The provision of crisis accommodation is the financial responsibility of the Department for Child Protection and Family Support although the Department works with the Department for Child Protection and Family Support in relation to crisis accommodation: Equal Opportunity Commission, *Finding a Place: Final Report for the Section 80 Implementation and Monitoring Committee of the Inquiry into the Existence of Discriminatory Practices in Relation to the Provision of Public Housing to Aboriginal People in Western Australia* (2011) 45.

¹² Department of Housing, *Rental Policy Manual* (April 2013) 122.

¹³ The requirement to house those most in need is part of the funding agreement under the Commonwealth's National Affordable Housing Agreement (NAHA) and the concepts of "greatest need" and "for duration of need" were adjacent references in the *"Affordable Housing Strategy; Opening Doors 2010 – 2020 p.25*

2.2 Commission's Involvement in Public Housing Matters

In 2003 an inquiry was commenced under section 80 of the EO Act into the existence of discriminatory practices in the provision of public housing in Western Australia. This inquiry resulted from a deluge of complaints filed in the Commission by or on behalf of Aboriginal applicants alleging discrimination in relation to the allocation of public housing. The report of this inquiry, *Finding a Place* (FAP) (released in December 2004), identified many issues that significantly contributed to what could reasonably be classified as systemic discrimination; this in turn led to housing services for Aboriginal people which were not always appropriate to their needs. There are issues that were identified in FAP which remain relevant to assessing the impact of the DBMS. These issues are outlined below.

Overcrowding

The FAP report states:

Many submissions reported that the practice of declining priority assistance on the basis of an applicant staying with the family has led to Aboriginal families, who are already under public housing stress, accommodating family members who would otherwise be primary homeless. It was widely reported that this practice results in the overcrowding of households and is often followed by complaints of anti-social behavior, primarily from non-Aboriginal neighbors.¹⁴

The extent of overcrowding has not changed in the eight years following the release of the FAP report. In fact, arguably the situation has deteriorated. The Department reviewed its policy (as recommended by FAP) and changed its eligibility criteria for priority assistance and, as a result, more people were assessed as needing priority assistance. However, this was not matched by an appropriate increase in housing stock. As a consequence, some people are now on the priority list for well over two years and these people remain in either primary or secondary homelessness for a significant period of time.

“I received a complaint of visitors that was [sic] at my home, one of their children was jumping over the fence I didn't know about it until Homeswest sent the complaint to my address so I spoke to my visitors and told them to stop then apologised to the Department of Housing and admitted to what had happened at the property and received a strike,” – Tenant.

¹⁴ Equal Opportunity Commission, *Finding a Place: Inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Aboriginal people* (2004) 177.

The problem of overcrowding is now also exacerbated by the DBMS 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.

One of the major systemic issues which was considered at the time of the FAP inquiry, is the cultural obligation of Aboriginal people to offer housing to other family members in need. There has certainly been recognition of this and as the earlier citation from FAP inferred, it is actually in the interests of the Department to recognise that the support Aboriginal people provide to their homeless family members takes the pressure off the waitlist because those who are deemed to be in secondary homelessness are often not classified as needing priority listing.

It was noted in the 2011 final report on the implementation of the recommendations in FAP that the Department's rental policy now provides that:

Generally only clients who are experiencing primary homelessness will be approved for priority assistance. However, secondary or tertiary homelessness may be considered grounds for priority assistance where it is confirmed with supporting documentation that the applicant's accommodation arrangement cannot continue and where other factors prevent the applicant from accessing other viable housing options.¹⁵

It was argued in the implementation report that:

[F]urther recognition needs to be given to the fact that secondary homelessness i.e. staying with family or friends is still a state of homelessness and allocation of priority housing is required without proof that the existing arrangements will not be ongoing, especially when it is at another Departmental tenancy.¹⁶

While it was recognised that in practice the Department does place many people in secondary homelessness on the priority waiting list, it was recommended that the formal rental policy manual should be amended to 'remove the distinction between primary and secondary homelessness'.¹⁷

It is important to highlight overcrowding is not acceptable because it is well recognised that it leads to a raft of health and social issues, including allegations of disruptive behaviour. The potential for increased complaints about disruptive behaviour arises because there will be considerably more noise emanating from a house with 10 or more people than would come from a standard Perth household with an occupancy rate of four people. There will also be

¹⁵ Equal Opportunity Commission, *Finding a Place: Final Report for the Section 80 Implementation and Monitoring Committee of the Inquiry into the Existence of Discriminatory Practices in Relation to the Provision of Public Housing to Aboriginal People in Western Australia* (2011) 30.

¹⁶ *Ibid.*

¹⁷ *Ibid* 31.

more activity from visitors to the tenancy and, as one submission to FAP noted, 'loud animated and excitable conversations are not uncommon in the Indigenous community and this is often misinterpreted as arguments'.¹⁸

Process of investigation of complaints

FAP also considered the manner in which allegations of antisocial behaviour by Aboriginal tenants were dealt with. Many submissions from advocates, and Aboriginal tenants themselves, referred to the manner which vexatious complaints made as a result of racial prejudice and/or bias against public housing tenants were dealt with. A resulting recommendation was that trivial matters, such as children crossing lawns, should not be investigated and matters that belonged in the domain of local council should be dealt with through that avenue. It was also recommended that these trivial complaints should not be noted on the tenant file.

“At one stage the people that are [sic] making the complaints said to Homeswest ‘if you don’t do anything about moving them out of the street I will take matters into my own hands’ and I have felt threaten [sic] for me, my partner and my children’s safety.” - Tenant

The concern at the time of the FAP inquiry was that such matters were taken up as legitimate complaints and the tenants were issued with breach notices and sometimes these notices culminated in evictions.

The recommendations relating to these issues and the Department’s responses as at December 2010 are listed on the following page:

¹⁸ Equal Opportunity Commission, *Finding a Place: Inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Aboriginal people* (2004) 211.

<i>Finding a Place</i> recommendations in chronological order	General status within Dept	Responsibility	General Description of extent of implementation as of December 2010
105. The DH to discourage and not record trivial complaints from neighbours regarding issues such as children running across verges and cutting corners, balls thrown over fences, loud music, etc. The DH to refer these complaints to appropriate bodies, for example, excessive noise to the local authority; disputes in relation to children's behaviour to appropriate local mediation services etc.	Recommendation Supported	DH	Disruptive Behaviour Management Strategy has included these definitions for vexatious and trivial
106. The DH not to offer advice that could be construed as encouragement to a neighbour wishing to complain about a tenants' behaviour, for example, as to whether that person should go to the Police, should gather a petition against the tenant, approach a local Member of Parliament etc.	Recommendation Supported	DH	
107. Where a complaint is of a sufficiently serious nature as to require investigation, the DH is to conduct a complete investigation, including seeking the response of the tenant to the allegations.	Partially Implemented	DH	This is covered by the stated policy.
108. The DH to remove from a tenant's file any reference to anti social behaviour claims that were not found to be substantiated after investigation by the appropriate authority, or in any event after three years.	Not Currently Addressed	DH	Advice is required from the State Records' Office as to the ability to implement this given SR Act requirements
109. The DH is to engage independent mediators to assist in disputes between neighbours.	Recommendation Supported	DH	The Department states it will provide resources to fund independent mediators if tenants wish to participate in mediation. The issue may be facilitating the parties to get to mediation.
110. That a specialised independent mediation service with trained mediators be established to deal with socially based disputes between neighbours to prevent matters escalating. The availability of this service is to be widely publicised amongst DH tenants.	Not Currently Addressed	DH	As above
111. The DH to ensure that all officers receive training to sensitise them to cultural difficulties, for example, preferred socialising etc, which could result in a better understanding of situations that are culturally influenced that could give rise to complaints from neighbours, and that Homeswest use this knowledge to respond to complaints.	Partially addressed	DH	Department policy states all officers receive cultural awareness training at induction and then within four years. Monitoring Committee recommends review of the courses and refresher time.

During the period 2005 to 2010 the Department and the Commission worked collaboratively on the implementation of recommendations of FAP. The work stemming from the FAP report formally concluded in March 2011 with the publication of the Final Report of the Monitoring and Implementation Committee.¹⁹ The Final Report aimed to provide direction for the ongoing joint work of the Department and the Commission through the Policy Framework for Substantive Equality. One issue which was identified as requiring ongoing attention was the DBMS and its potential for considerable impact on public housing tenants.

The Final Report also recommended that a range of practices relating to evictions (such as the use of section 64 of the *Residential Tenancies Act 1987* (RTA) where no reason is required to be given for the termination of the tenancy), should be subject to the Needs and Impact Assessment (NIA) process under the Policy Framework for Substantive Equality. The major purpose of undertaking an NIA is for issues of systemic discrimination in the provision of services to be identified and remedied.

The Department in its response to the Final Report provided in February 2012 gave partial support to this recommendation. In discussions with departmental officers about how the recommendations of the Final Report could be implemented it was agreed that a NIA on the DBMS should be given priority. The Department however foreshadowed that because the strategy was at the direction of the Minister it would be unlikely that any significant changes could be made. The Department also indicated it was unlikely that the NIA could be undertaken in 2012.

3. Methodology

There are four major components to this report:

1. Assessment of relevant Commission complaint files.
2. Review of relevant literature concerning approaches to addressing antisocial behaviour in public housing tenancies.
3. Assessment of approaches to addressing anti-social behaviour in other jurisdictions.
4. Summary of the comments of tenant and advocates who attended the Shelter WA forums.

¹⁹ Equal Opportunity Commission, *Finding a Place: Final Report for the Section 80 Implementation and Monitoring Committee of the Inquiry into the Existence of Discriminatory Practices in Relation to the Provision of Public Housing to Aboriginal People in Western Australia* (2011).

3.1 Assessment of EOC Complaint files

For the purposes of this report, closed complaint files lodged within the Commission over the period May 2011 until January 2013, were analysed to examine whether there were issues of potential systemic discrimination related to the 'strikes' which were issued under the DBMS and/or whether the investigation process followed by the Department flagged any systemic issues.

Each of these files would have been examined during the Commission's investigation process as required by the EO Act; however, that assessment would have been undertaken to determine specifically whether there was evidence of either direct or indirect discrimination in relation to the particular grounds cited in the complaint. Therefore, it has been necessary to re-examine the complaint files to ascertain whether there was any indication of systemic issues facing the tenant which may have led to the allegation of antisocial behaviour and whether these issues were taken into consideration during the process of investigation.

3.2 Review of Research

A search of research literature has been undertaken in relation to systemic discrimination on the grounds of race, impairment, sex and age as well as research in relation to approaches to antisocial behaviour and sustaining public housing tenancies.

3.3 Comparisons with other jurisdictions

This report provides a synopsis of the policies and practices of other public housing authorities that deal with the issue of antisocial behaviour within Australia and in the United Kingdom and New Zealand.

3.4 Consultation

At the time of the instigation of this inquiry by the Commission, coincidentally Shelter WA had commenced a series of education workshops on the DBMS. The focus of the four metropolitan workshops was to provide tenants and advocates with an overview of how the strategy was implemented by the Department (in particular, how the Department investigated complaints of antisocial behaviour) and then to hear from those attending whether their experience had varied from the stated policy. A fifth session was held in conjunction with Western Australia Council of Social Services (WACOSS) and this session focused on major advocacy and tenancy support organisations and their views of the DBMS.

Shelter WA invited the Commission to attend these sessions and officers attended three of the four metropolitan sessions and the also the WACOSS session and were able to hear experiences first hand.

4 The Disruptive Behavior Management Strategy

4.1 Overview

This section provides an overview of the genesis of the DBMS, and the precursor policies relating to antisocial behaviour. A description of the policy and how it has been implemented by the Department is discussed in the following section.

Historically the Department attempted to deal with antisocial behavior through its 'Good Neighbour Policy' which was an addendum to the public housing tenancy agreement. It outlined the expectations about how public housing tenants were expected to interact with their neighbours. However, the Good Neighbour Policy could not be enforced in proceedings before a magistrate because it was not considered to be part of the tenancy agreement. The Good Neighbour Policy remains included in the Rental Policy Manual which indicates that public housing tenants are required to sign an Acceptable Behaviour Agreement to the effect that they will not allow disruptive behaviour to occur on their property. It is stated that the Acceptable Behaviour Agreement 'forms part of the terms of the Tenancy Agreement so a breach of the Acceptable Behaviour Agreement is a breach of the Tenancy Agreement'.²⁰

It is also outlined that the Acceptable Behaviour Agreement is only enforceable if signed at the same time as the tenancy agreement²¹. It is assumed the Department included this direction in the Rental Policy Manual as the Acceptable Behaviour Agreement may not have been considered to be enforceable if it was introduced during a tenancy as an attempt to modify behaviour.

In May 2009 the Department piloted a new strategy—the Antisocial Behaviour Intervention Team—in the South East Metropolitan Region (Cannington Office). This team consisted of experienced Housing Services Officers (HSOs)²² who worked with tenants where issues of antisocial behaviour had been identified. According to the Department, the team worked with tenants to address antisocial behaviour by:

- Identifying the causes of the problems and establishing options to deal with the problems;
- Putting in place, in conjunction with the tenant, an appropriate action plan that might include required support services; and

²⁰ Department of Housing, *Rental Policy Manual* (2013) 196.

²¹ Department of Housing, *Rental Policy Manual* (2013) p.63

²² The Commission understands that these HSOs were Level 4 as distinct to normal Level 3 HSOs.

- Communicating with the tenant to ensure awareness of the consequences if there is no meaningful change in tenant behaviour.²³

The Antisocial Behaviour Intervention Team was extended to the South Metropolitan Region in 2009–2010. At the time of the 2009–2010 Annual Report, the team had dealt with 119 referrals. Of these referrals, 80 were dealt with successfully, four were withdrawn because of non-engagement and two did not agree to participate in the process. Thirty-three cases remained current at the time of the Annual Report.²⁴ As far as the Commission is aware, the Antisocial Behaviour Intervention Team pilot did not continue past 2010–2011 and was, in effect, superseded by the DBMS.

In 2009, the Minister for Housing announced the introduction of the DBMS. In recounting (in 2011) why the strategy was introduced, the Minister stated that one of the precipitating events for the introduction of the strategy was his visit to Jandakot in 2009 with the local Member of Parliament. They visited a couple who were profoundly deaf and who had complained that they were being terrorised by public housing tenants who lived next door.²⁵

The DBMS was developed as a consultation paper in the first instance. The Commissioner made a submission to this paper in February 2010 outlining a raft of concerns about the proposed draft strategy especially in relation to the Department's role as the provider of housing of last resort for those who had no other viable housing options.

In the period February 2010 through to April 2011, the core elements of the draft strategy, namely the 'three strikes' approach became operational but there was never a public announcement by the Department as to what formally constituted the strategy during this time. During this period, the Commission received formal complaints from public housing tenants where 'strikes' had been issued, and the Department would make reference to the strategy in its response to the complaints received.

In April 2011, the Minister announced the implementation of the strategy would be strengthened. During Parliamentary Debates the Minister referred to some of the problems with the strategy in its early days: that there was too much flexibility under the strategy in relation to whether a strike would be issued; that two warnings were given before the first strike was recorded; and that a strike was only held against the tenant for six months.²⁶ The catalyst for the escalation of the policy was the explosion of a drug laboratory in a public housing

²³ Housing Authority, *Annual Report 2009–2010* (2010) 29.

²⁴ *Ibid.*

²⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 2011, 1785–1787 (Mr T.R. Buswell, Minister for Housing).

²⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 2011, 1785–1787 (Mr T.R. Buswell, Minister for Housing).

property in early 2011.²⁷ The Minister stated in response to this incident that ‘it was obvious to me that the three-strikes policy was not working with the intent we had hoped. We toughened it up.’²⁸

The discussion below provides an overview of how the DBMS operates and how it has been implemented to date. The information is largely drawn from material on the Department’s website.

4.2 What is disruptive behaviour?

The DBMS defines three levels of disruptive behaviour and the response to each level varies:

- 1. Dangerous behaviour** is defined as activities that ‘pose a risk to the safety or security of residents or property or have resulted in any injury to a person in the immediate vicinity with subsequent police charges or conviction’ (eg, assault, violence, serious threats, serious intentional damage). The Department’s response to dangerous behaviour under the strategy is immediate legal action to terminate the tenancy (eg, an urgent application is made under s 73 of the RTA).²⁹
- 2. Serious behaviour** is defined as activities that ‘intentionally or recklessly cause serious disturbance to persons in the immediate vicinity, or which could reasonably be expected to cause concern for the safety or security of a person or their property’ (eg, verbal threats, abusive language, vilification, graffiti, fighting). The response of the Department is to issue a strike which constitutes a first and final warning that legal action will commence to terminate the tenancy if a subsequent incident (of similar severity) occurs within 12 months.
- 3. Minor behaviour** is defined as activities ‘that cause a nuisance, or unreasonably interfere with the peace, privacy or comfort, of persons in the immediate vicinity’ (eg, loud parties, excessive noise, domestic disputes, unwanted entry to neighbouring properties, substantial and unreasonable disturbance from children such as noise). In

²⁷ It appears that members of the public had repeatedly lodged complaints about this property prior to the explosion taking place: Western Australia, Parliamentary Debates, Legislative Assembly, 22 March 2011, 1788–1800 (Mr M McGowan).

²⁸ Western Australia, Parliamentary Debates, Legislative Assembly, 29 March 2012, 1634–1635 (Mr T.R. Buswell, Minister for Housing).

²⁹ See further discussion below in relation to the link between the DBMS and the RTA.

response the Department will issue a strike and legal action to terminate the tenancy will occur if three strikes are issued within the next 12 months.³⁰

The Rental Policy Manual stipulates that the Department will apply the policy in all instances; however, it is also stated that where 'strong mitigating circumstances exist, the matter may be referred to the Executive Director Client Services for approval to manage the situation through alternative action'.³¹ The Commission is not aware of how often this occurs; however, given the issues discussed later in this report it would appear that 'mitigating circumstances' are not often considered in the decision-making process.

4.3 Legal Proceedings

The Department explains that it applies the strategy within current provisions of the RTA. If a tenant fails to vacate a property following receipt of an eviction notice the Department will seek a court order from the Magistrates Court and initiate a Bailiff eviction.

Initially under the DBMS, the Department primarily relied on s 64 of the RTA which provides that an owner may give notice of termination of a tenancy agreement to the tenant without specifying any ground for the notice but the period of notice must not be less than 60 days. The reason for relying on this provision is that under s 62 of the RTA, an owner may give notice of termination of a tenancy agreement on the ground that the tenant has breached a term of the agreement and the breach has not been remedied. If such a notice is given, the period of notice must not be less than seven days and further, in order for such a notice to be effectual the owner must have previously given the tenant a notice of the breach requiring it to be rectified at least 14 days before the notice of termination is given. If notice requiring a breach of the tenancy agreement had been given in relation to disruptive behaviour and there was no further occurrence of the behaviour within the 14 day period the breach was deemed to be rectified.

On 30 July 2012 amendments to the RTA which introduced special provisions in relation to social housing tenancies came into effect. Under these amendments, s 75A(1) of the RTA provides:

A competent court may, upon application by the lessor under a social housing tenancy agreement, terminate the agreement if it is satisfied that the tenant has —

- (a) used the social housing premises, or caused or permitted the social housing premises to be used, for an illegal purpose; or
- (b) caused or permitted a nuisance by the use of the social housing premises; or

³⁰ Department of Housing WA Disruptive Behaviour Management Strategy Brochure accessed from http://www.dhw.wa.gov.au/HousingDocuments/DBM_brochure.pdf on 8 April 2013.

³¹ Department of Housing, *Rental Policy Manual* (2013) 81.

- (c) 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.

This provision enables the tenancy agreement to be terminated without any notice of termination being given.

At the Parliamentary Committee stage of review of this legislation, the Commissioner made a submission raising concerns about the dual system this amendment potentially was enacting. In this submission, it was stated that:

The combined effect of the Strategy and section 75A means that should social housing tenants, in the Government's opinion, transgress any condition as to disruptive behaviour, they will be denied the statutory protections as to notice that other tenants covered by the RTA will continue to enjoy. It is, on any view, less favourable treatment of social housing tenants compared to other tenants and, in my opinion, an overreaction to the behaviour of a 'small number of tenants'.³²

The Commissioner remains concerned that the strategy and the use of s 75A apply a stricter standard to public housing tenants than non-public housing tenants.³³

4.4 Complaint process and investigation

Under the DBMS the Department has set up a Disruptive Behaviour Reporting Line and an online complaint form. The Disruptive Behaviour Management Unit³⁴ investigates complaints and until recently in some circumstances the local departmental Housing Service Officer may have also be involved in the investigation. Recently the Department engaged an additional 35 officers specifically for the purpose of complaint investigation under the DBMS. While they are part of the Unit, they will be located in the regional offices other than offices in the Great Southern and the Wheatbelt.

The DBMS brochure states that complaints made after four weeks of the alleged incident may not be able to be investigated because of the difficulty in substantiating the behaviour and this would seem to be designed to encourage complainants to lodge their complaint as early as possible.

The DBMS brochure also explains that once a complaint is made, the investigating officer will obtain details of the alleged behaviour, seek independent verification (eg, from neighbours, witnesses and/or police), discuss the matter with the tenant, assess the tenant's response and

³² Equal Opportunity Commission, *Submission to the Standing Committee on Uniform Legislation and Statutes Review Inquiry into the Residential Tenancies Amendment Bill 2011*, 6.

³³ See further discussion below under Key Principles.

³⁴ The Disruptive Behaviour Management Unit was established in May 2011 at the time the strategy was significantly strengthened: Campbell S, 'Disruptive Behaviour Management Strategy' (2012) 25(2) *Parity* 60, 60.

the evidence obtained and finally determine whether the complaint has been substantiated and whether there has been a breach of the tenancy agreement. It is also noted that the complainant's identity remains confidential unless action is taken under the RTA and the complainant is required to give evidence. If this is correct, there is the potential for the tenant to be disadvantaged because he or she may be unable to fully explain any relevant background concerning the particular complainant.

The Department outlined in its information provided for the Shelter WA community awareness sessions the following process is what its officers are expected to follow.

Once the Investigating Officer has completed the investigation, he or she will call a case conference to make a decision on how to proceed.

- *The final decision is made by a group of at least three officers, involving a senior officer.*

Case Conference Process

- *Procedural Fairness review – have all four criteria of procedural fairness been met? i.e.*
 - *As much detail as possible and, where appropriate, independent verification from police, neighbours and witnesses;*
 - *Contact has been made with the tenant to discuss the complaint and to hear their version of the incident;*
 - *Assessment of the tenant's response against the complaint, considering all evidence available;*
 - *Whether the complaint can be substantiated and whether the behaviour is a breach of the Tenancy Agreement*
- *Evidence assessment – is there adequate evidence to make a decision? Does the evidence prove or disprove incident under the RTA requirements?*
- *Severity of the incident - What severity does the behaviour constitute under the DBMS policy? Minor/Serious/Dangerous*
- *History of the tenancy - Have previous strikes been issued? Are they current and valid?*
- *Personal circumstances - Which support agencies would provide the fastest, most efficacious help to the tenant?*
- *Follow up – invite tenant for an interview to outline the situation and offer supports.*

4.5 Statistics to Date

The Department provided the following statistics in relation to the DBMS for the May 2013 Public Housing six monthly forum which is convened by the Commissioner to continue to monitor and report on progress of outcomes of FAP. The Commissioner has requested this information be disaggregated in relation to Aboriginality but to date that information has not been provided.

Evictions

Period	Tenants Vacated Post Termination Notice	Tenants Vacated Post Court Order	Bailiff Evictions	Total
May-11	7			7
Jun-11	7			7
Jul-11	0	2	6	8
Aug-11	3	2	0	5
Sep-11	5	0	1	6
Oct-11	1	3	0	4
Nov-11	0	2	2	4
Dec-11	0	0	2	2
Jan-12	2	1	2	5
Feb-12	2	0	2	4
Mar-12	4	2	1	7
Apr-12	0	4	0	4
May-12	0	2	2	4
Jun-12	0	0	1	1
Jul-12	2	0	1	3
Aug-12	0	0	3	3
Sep-12	2	0	3	5
Oct-12	0	1	2	3
Nov-12	0	3	0	3
Dec-12	0	2	1	3
Jan-13	3	5	6	14
Feb-13	2	2	6	10
Mar-13	1	0	1	2
Apr-13	0	0	1	1
Total	27	31	43	108

Strikes

Period	1 st	2 nd	3 rd	Total Strikes
May-11	129	26	8	163
Jun-11	108	27	11	146
Jul-11	61	30	8	99
Aug-11	95	22	9	126
Sep-11	66	27	9	102
Oct-11	76	31	0	107
Nov-11	56	32	12	100
Dec-11	81	26	7	114
Jan-12	81	39	19	139
Feb-12	78	50	16	144
Mar-12	110	41	8	159
Apr-12	70	33	8	111
May-12	67	33	6	106
Jun-12	65	18	8	91
Jul-12	38	20	4	62
Aug-12	50	27	13	90
Sep-12	53	25	12	90
Oct-12	60	30	10	100
Nov-12	53	20	12	85
Dec-12	44	18	8	70
Jan-13	68	26	16	110
Feb-13	58	24	12	94
Mar-13	33	18	10	61
Apr-13	105	27	8	140
Total	1,705	670	234	2,609

*Please note the total of 108 evictions includes the 7 vacations in May to June 2011

*Data for the above table was taken from the Strikes & Evictions Registers

* Please note the total of 75 includes the 7 Evictions for May – Jun-11

Data for the above table was sourced from the strikes and evictions snapshots

It has been reported that early results show that the Disruptive Behaviour Management Strategy has 'an increasing, deterrent effect on disruptive behaviour'.³⁵ The Department claims the deterrent effect is 'clear' because for the period May 2011 to 31 May 2013 there were 1751

³⁵ Campbell S, 'Disruptive Behaviour Management Strategy' (2012) 25(2) *Parity* 60, 60.

first strikes issued, 688 second strikes issued (39% of tenants who received a first strike) and 237 third strikes issued (34% of tenants who received a second strike) – strikes ‘reduced sequentially from first to second to third, indicating a progressively increasing, deterrent effect, which is the desired outcome of the policy’.³⁶ It is noted that it is difficult to extrapolate from statistics of this nature a clear and direct link between a policy and its deterrent effect, especially in the absence of any comparison data of the frequency of incidents of disruptive behaviour before the policy was implemented.

It has also been argued that the DBMS is a form of responsive regulation which ‘is about recognising that a range of approaches are needed including both coercive and voluntary compliance models’ and that the strategy encourages tenants to ‘exercise self-control early’.³⁷ However, the Commissioner notes that coercive strategies are questionable in relation to public housing tenants with high and complex needs (eg, mental health issues, domestic violence, substance abuse) and where the behaviour complained of is beyond the effective control of the tenant (eg, Aboriginal grandmother who is looking after many children and her uninvited visitors cause trouble).

It appears that a relatively small proportion of complaints lodged with the Department in relation to disruptive behaviour result in a strike being issued. It has been reported that ‘only 12 per cent of all complaints lodged resulted in a strike being issued, which reflects that a substantial volume of frivolous and unfounded complaints are received’.³⁸

It was stated in Parliament on 21 May 2013 that:

The figures to date, from May 2011 to the end of April 2013, indicate that 223 tenants are no longer in occupation due to maximum strike or dangerous behaviour occurrences and 26, 212 complaints had been received and actioned. In April 2013 alone, 31 tenancies were referred to the unit, 140 strikes were issued, 1372 complaints were received and 1430 complaints were closed out. The disruptive behaviour management strategy is not simply about booting people out of houses. Where tenancy issues arise, tenants are given the opportunity to go through our supported assistance housing program to assist them in meeting their obligations. There is also a StrongFamilies program, which is a Department for Child Protection and Family Support program that helps dysfunctional families. Importantly, when an eviction is imminent, the department engages with the Department for Child Protection and Family Support to arrange crisis accommodation for affected families.³⁹

The Supported Housing Assistance Program (SHAP) is described by the Department as a ‘free service to Department of Housing tenants who are having problems maintaining their

³⁶ Presentation by Disruptive Behaviour Management Unit to Tenancy Network Conference June 2013.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 May 2013 812 (Mr W.R. Marmion, Minister for Housing).

tenancy'.⁴⁰ The Department engages independent non-government agencies to assist tenants. Participation in the program is voluntary and it is acknowledged that places in the program are limited. The Commission understands that some tenants may not view the program as sufficiently independent from the Department and it is noted that the brochure states that the tenant's HSO will attend the first meeting with the relevant service provider engaged under the program.

Following is a summary of the information provided on SHAP by the Department.

The Supported Housing Assistance Program (SHAP) is a free service to Department of Housing tenants who are having problems maintaining their tenancy. Independently run non-government organisation providers are engaged to help tenants develop their knowledge, skills and capacity to meet their tenancy agreement obligations.

SHAP is for tenants who may have a history of homelessness or who face possible eviction for tenancy breaches. Tenancy breaches may include:

- *Rental payment arrears.*
- *Not maintaining the property.*
- *Disruptive behaviour.*

Participation in the SHAP program is voluntary. Tenants may ask to join the program or the Housing Services Officer may suggest it if the tenant is facing difficulties in maintaining their tenancy. Places are limited and tenants need to complete the consent form to be considered for the program.⁴¹

The Department undertook a comprehensive review of the contract provisions and contractors for SHAP services throughout 2012. The program has been renamed Support and Tenancy Education Program (STEP).

⁴⁰ Department of Housing, *Supported Housing Assistance Program*, Brochure.

⁴¹ Dept of Housing Website

<http://www.dhw.wa.gov.au/currenttenants/publichousing/SupportedHousingAssistanceProgram/Pages/default.aspx>

5. Key Principles

In undertaking this inquiry, a number of key principles have informed the analysis and formulation of recommendations. These principles are discussed briefly below.

5.1 *Human rights*

The right to adequate housing is recognised in a number of international human rights instruments. Article 25(1) of the *Universal Declaration of Human Rights* provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article 27(3) of the *Convention on the Rights of the Child* provides that:

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.⁴²

As discussed below, the most severe potential consequence for public housing tenants under the DBMS is eviction and the possibility of homelessness. The Australian Human Rights Commission has observed that people 'experiencing homelessness face violations of a wide range of human rights' and that:

Access to safe and secure housing is one of the most basic human rights. However, homelessness is not just about housing. Fundamentally, homelessness is about lack of connectedness with family, friends and the community and lack of control over one's environment...A person who is homeless may face violations of the right to an adequate standard of living, the right to education, the right to liberty and security of the person, the right to privacy, the right to social security, the right to freedom from discrimination, the right to vote, and many more.⁴³

Similarly, it has been argued that 'appropriate, affordable and secure housing is a fundamental human right and an essential ingredient for individual well-being and community harmony'.⁴⁴

⁴² See also Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* which provides that: 'The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

⁴³ Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (2008) available at <http://www.humanrights.gov.au/publications/homelessness-human-rights-issue#1>.

⁴⁴ Habibis D et al, *A Sustaining Tenancies Approach to Managing Demanding Behaviour in Public Housing: A good practice guide* (Australian Housing and Urban Research Institute, Final Report No 103, July 2007) x.

The Department in its 2011–2012 Annual Report appears to be mindful of this obligation because it states that its primary role is to provide and support housing for Western Australians who cannot otherwise afford their own home.⁴⁵ Although unstated, clearly the Department’s primary role also includes providing housing for those people who cannot afford private rental.

“The tenant is the carer of a disabled child and his behaviour lead to the first strike against the tenancy. The behaviour of this disabled son makes us fear that if he is homeless he could either take his own life or he could be injured on the streets,” – Advocate.

It is vital when assessing the impact of the DBMS be mindful of the possibility that the strategy contributes to homelessness and a resultant breach of human rights. Most importantly, the potential for the DBMS to lead to children becoming homeless is a major concern. As the Commissioner highlighted an earlier submission on the DBMS:

[I]t is unconscionable for any government agency to render children homeless as a result of anti-social behaviour of their parents or visitors to their household. Clearly the needs of children need to be assessed before any eviction occurs.⁴⁶

5.2 Characteristics of public housing tenants

As is the case elsewhere, the profile of Western Australian public housing tenants has changed over time. In this regard it has been stated that:

Public rental housing in Australia has gradually become a more residualised form of housing provision, reserved for those in greatest need. In its early days after the Second World War, many of the people entering public housing were returning soldiers and lower-paid workers employed in manufacturing jobs. At that time, public housing was viewed as either a transitory tenure form in a housing pathway leading towards home ownership (often through buying one’s public housing dwelling) or an alternative for those who did not choose that path (Hayward 1996; Jones 1972). Following extensive sales to tenants from the 1950s and a subsequent decline in the available rental stock, the remaining public housing increasingly became seen as a housing form for the poorest population groups—predominantly income support recipients—and for households in high need, particularly the elderly, single parents and people with a disability. Deinstitutionalisation and demographic and social changes—such as population ageing and increases in the number of single parents—have created a rise in demand for public housing among disadvantaged groups. The increasing demand for public housing from these

⁴⁵ Housing Authority of Western Australia, *Annual Report 2011–2012* (2012) 5.

⁴⁶ Commissioner for Equal Opportunity, *Submission to the Minister for Housing on Disruptive Behaviour Management Strategy* (2010) 2.

high need groups was not matched by growth in the supply of public housing. As a result, lower-need households and lower-income households participating in the workforce have been gradually excluded from accessing public housing, with access increasingly targeted to those with the greatest needs.⁴⁷

It has been observed that in mid-2009 there were more than 325,000 households living in public housing in Australia with a further 38,000 households living in community housing. An additional 225,000 households were on a waiting list for public or community housing.⁴⁸ Some of the characteristics of public housing tenants across Australia are that:

- Seventy-eight percent of public housing tenants are aged 45 years or older.
- Almost one-third of public housing tenants were born overseas (with many coming from culturally and linguistically diverse backgrounds) and 10 percent speak a language other than English at home.
- A significant proportion of public housing tenants are Aboriginal (in 2007 six percent of public housing tenants across Australia self-identified as Aboriginal; however, this figure is considerably higher for Western Australia⁴⁹).
- Public housing tenants are invariably on low incomes. In 2007, 85 percent of public housing tenants described their main source of income as the disability pension, aged pension or other government benefit.
- Many public housing tenants are unemployed (in 2007 it was found that only 23 percent were employed either full-time or part-time).⁵⁰

Moreover, it appears that in more recent times, there has been an increase in the number of public housing tenants with complex needs.⁵¹ A Victorian Parliamentary Committee observed that since the 1990s 'people living in public housing have increasingly experienced homelessness, mental illness, disability, family violence and alcohol and/or drug dependence'.⁵² It has been observed that in South Australia, in the 1980s, approximately 10–15 percent of housing allocations by Housing SA were made to people with high needs. In

⁴⁷ Wiesel I et al, *Pathways Into and Within Social Housing* (Australian Housing and Urban Research Institute, Final Report, 2012) 8.

⁴⁸ Bell K, 'Protecting Public Housing Tenants in Australia from Forced Eviction: The fundamental importance of the human right to adequate housing and home' (Costello Lecture, Monash University Faculty of Law, 18 September 2012) 2.

⁴⁹ As noted earlier, as at 31 October 2011 there were 69,685 people living in public housing in Western Australia and approximately 34% of these people self-identified as Aboriginal or Torres Strait Islander peoples.

⁵⁰ *Ibid* 2–3.

⁵¹ Habibis D et al, *A Sustaining Tenancies Approach to Managing Demanding Behaviour in Public Housing: A good practice guide* (Australian Housing and Urban Research Institute, Final Report No 103, July 2007) x.

⁵² Victorian Parliament, Family and Community Development Committee, *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria*, Report No 375 (2010) 17.

contrast, 93 percent of new housing allocations in South Australia in 2009–2010 were made to people with high needs.⁵³

Further, it has been explained that the presence of complex needs such as unemployment, illness, financial problems, relationship breakdown, domestic violence, family conflict and the presence of risk factors such as a history of substance abuse, family violence, physical or sexual abuse, mental health issues, and physical or intellectual disability is one of the main causes of ‘demanding behaviour’ among public housing tenants.⁵⁴

Understanding the link between demanding behaviour and social disadvantage is essential for social housing workers. It implies a moral argument about providing assistance to those who, compared to many others, may have been dealt a raw deal. Equally important, it provides the foundation for developing a sympathetic relationship with tenants, which without being sentimental or over-involved, can assist them to accept the need for support to develop the personal, social and life skills they need to sustain their tenancies.⁵⁵

Therefore, it is vital that when assessing the impact of the DBMS and considering recommendations for its future direction, the high level of complex needs among public housing tenants is properly recognised and accommodated within the policy.

5.3 Eviction should be option of last resort

Apart from the human rights issues associated with homelessness and the clear direct impact on those tenants who are evicted (and their families), there are broader social and financial consequences flowing from eviction of public housing tenants. Eviction represents a failed tenancy and there are benefits in endeavoring to sustain public housing tenancies to avoid these negative consequences.

It has been observed that failed tenancies may lead to homelessness which has its own social and health costs (eg, physical and mental illness, unemployment, offending behaviour, financial problems, family breakdown and vulnerability to victimisation).⁵⁶ Moreover, the process of eviction carries with it its own direct costs such as court fees and legal fees and indirectly increases financial pressure on other housing sectors (eg, emergency or crisis accommodation). More widely, frequent evictions may lead to ‘less social capital’ in local communities because local residents are transient and do not have the opportunity to form

⁵³ McCann W, *A Review of the Operational Performance of Housing SA* (2011) 59.

⁵⁴ Habibis D et al, *A Sustaining Tenancies Approach to Managing Demanding Behaviour in Public Housing: A good practice guide* (Australian Housing and Urban Research Institute, Final Report No 103, July 2007) 9.

⁵⁵ Ibid 10.

⁵⁶ Ibid 4.

relationships with neighbours.⁵⁷ For this reason, the Commissioner has approached this inquiry with the view that evictions should only be instigated as a last resort.

5.4 Processes must be fair and accountable

Bearing in mind the potential for the DBMS to result in eviction, it is vital that the processes adopted by the Department are fair and accountable. In this regard, the fact that many public housing tenants have high and complex needs must be taken into account (eg, mental health issues, language and cultural barriers). It is, therefore, important that such tenants who are subject to complaints and investigation in relation to alleged disruptive behaviour are properly informed of the allegations against them and provided with a reasonable opportunity to respond to the allegations (including the opportunity to explain the full background and the circumstances of the incident). The right to appeal or have a review of any decision made under the DBMS to issue a strike is equally important.

“These remote Aboriginal clients live together in communities and when they are sent to Perth this is a culture shock for them as they have never left their families and country before. Do they understand when they sign a contract with Homeswest that they are responsible for the property even if they are in hospital and not there?” – Advocate.

5.5 Equality

Shelter WA has recently published its report on the outcomes of a number of community forums held in relation to the DBMS. This report identifies concerns about the unequal treatment of public housing tenants in comparison to private tenants and homeowners. Participants at the forums indicated that they felt public housing tenants are treated more harshly as a consequence of the DBMS than private housing tenants or homeowners.⁵⁸ It is also stated that:

More than 90% of the complaints received do not lead to a strike, following investigation. This highlights negative community attitudes towards public housing tenants and gross

⁵⁷ Ibid 5.

⁵⁸ Shelter WA, *Disruptive Behaviour Management Strategy Community Forums*, Report (May 2013) 4.

inconsistencies between what is tolerated in the private housing sector and the triviality of complaints which may lead to eviction in public housing.⁵⁹

While it is acknowledged that private homeowners cannot be evicted from their homes as a consequence of antisocial behaviour, private tenants may have their tenancy terminated as a consequence of specific behaviour under the RTA. For example, under s 73 of the RTA a court may terminate a tenancy agreement 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 owner or his agent or any person in occupation of or permitted on adjacent premises’. In contrast, a social housing tenancy may be terminated under s 75A of the RTA if the court is satisfied that the tenant has, among other things, ‘caused or permitted a nuisance by the use of the social housing premises’ 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 the behaviour justifies terminating the tenancy.

Minor examples of antisocial behaviour (eg, excessive noise) should not cause public housing tenants to potentially lose their accommodation in circumstances where private housing tenants would not be subject to the same consequences. In such cases, there are other relevant laws that apply (ie, local council laws in relation to excessive noise). It is the Commissioner’s view that, as far as possible, the consequences for tenants who are found to have engaged in disruptive behaviour (especially minor behaviour) should not be any more severe for public housing tenants than for private housing tenants.

“I have attended [a] pain management clinic. These pains are ongoing and at times very severe causing me distress at which times I cry out in pain. It is a sorry state when someone in their own home, in pain and crying out, can be judged to have engaged in anti-social behaviour and so face the very real possibility of being evicted under the present government’s highly discriminatory policy,” – Tennant.

⁵⁹ Ibid 3.

6. Jurisdictional comparison and alternative strategies to address antisocial behaviour in public housing tenancies

This section of the report outlines antisocial behaviour policies and practices in other Australian jurisdictions. Some international comparisons are also included. The information for this section has been primarily sourced from the publicly available material on the relevant housing authority website (as well as relevant legislation). It is noted that, in some instances, there is no explicit policy applicable to antisocial behaviour by public housing tenants.

6.1 New South Wales

Housing NSW⁶⁰ states on its website under the link 'Neighbours' that:

Housing NSW wants to assist tenants to live in peace and harmony with their neighbours.

Housing NSW will encourage tenants to sort out their own problems with other tenants between themselves or through mediation. Tenants will be referred to Community Justice Centres for assistance when required.

Tenants have a right to the peaceful enjoyment of their home and an obligation to abide by the conditions of their tenancy agreement.

Housing NSW will investigate complaints against tenants where there is an alleged breach of the tenancy agreement. If the complaints are substantiated, tenants will be given the opportunity to change nuisance and annoying behaviour.

Housing NSW supports the principles of a culturally and linguistically diverse society, and it will not tolerate harassment in the form of racism, homosexual or transgender vilification.

There is also reference to an Antisocial Behaviour Strategy which 'emphasises support, prevention and early intervention'.⁶¹ It is explained that in June 2007 (following two pilots for managing antisocial behaviour), 19 'Senior Client Services Officers (Antisocial Behaviour) were appointed to, amongst other things, support other staff in managing antisocial behaviour; develop partnerships with government and non-government agencies to support tenants; and 'assist staff to take appropriate action to terminate a tenancy where tenants seriously and/or persistently engage in antisocial behaviour'. It appears from the information available on the website that the department is reviewing the strategy including the effectiveness of the Senior

⁶⁰ Housing NSW is part of the Department of Family and Community Services.

⁶¹ <http://www.housing.nsw.gov.au/Changes%2Bto%2BSocial%2BHousing/People%2Band%2BCommunities/Antisocial%2BBehaviour%2BStrategy.htm>

Client Service Officer positions.⁶² It is also noted that the *Residential Tenancies Act 2010* (NSW) enables Acceptable Behaviour Agreements to be entered into between a public housing tenant and the New South Wales Land and Housing Corporation. However, it appears that these provisions may not be used often.⁶³

6.2 Northern Territory

The Northern Territory's *Public Housing Safety Strategy* has four key elements:

- A Public Housing Safety Unit that coordinates the strategy, and manages complex antisocial behaviour issues.
- A Three Strike policy that categorises the nature and severity of antisocial behaviour, with the third and final warning potentially resulting in eviction proceedings.
- A Memorandum of Understanding between the Department of Housing and the NT Police that ensures a strong, coordinated approach to addressing antisocial behaviour, in and around public housing properties.
- Public Housing Safety Officers with legislated powers who address antisocial behaviour in and around public housing properties.⁶⁴

The policy in the Northern Territory is closely aligned to the Western Australian DBMS because it overtly adopts a 'third-strike and you're out' approach.

The Northern Territory *Three-Strikes Policy* was released on 30 May 2012. It provides that:

The behaviour of a Territory Housing tenant, or household member or visitor, will be considered to be antisocial behaviour if it disturbs the peace, comfort or privacy of other persons (including Territory Housing tenants) residing in the vicinity of the premises.⁶⁵

In 2011 the *Housing Act* (NT) was amended by the *Housing and Other Legislation Amendment Act 2011* (NT) and new provisions covering antisocial behaviour (Parts 5, 6 and 7) were inserted. Section 28A defines antisocial behaviour as behaviour that 'involves abusive or violent behaviour', 'creates alarm or fear in, or annoyance to, neighbours or others in the

⁶²

<http://www.housing.nsw.gov.au/Changes%2Bto%2BSocial%2BHousing/People%2Band%2BCommunities/Antisocial%2BBehaviour%2BStrategy.htm>

⁶³ See http://www.legalanswers.sl.nsw.gov.au/guides/tenants_rights_manual/social_housing/public_housing.html.

⁶⁴ http://www.housing.nt.gov.au/public_housing/safety_strategy.

⁶⁵ Northern Territory, Department of Housing, *Three Strikes Policy* (2012) 2.

vicinity' or 'involves graffiti, littering or vandalism'. The section 'notes' provide that making excessive noise is an example of something that might create annoyance.

In addition, antisocial behaviour is defined under the *Information Sheet for People Affected by Anti-social Behaviour* as behaviour that 'repeatedly interferes with others and examples provided include 'loud noise from a television, radio or stereo'; 'nuisance pets like barking dogs'; 'verbal abuse and domestic disputes'; 'vandalism'; and 'littering'. It is further stated that serious acts of anti-social behaviour may include 'illegal activity', 'serious harassment', 'threats to the health or safety of a person', 'physical assaults and violent acts' or 'extensive, intentional property damage'.

Under the *Three Strikes Policy*, antisocial behaviour is categorised depending on its nature and its frequency. In terms of the nature of the behaviour there are three categories: minor (nuisance behaviour); moderate (abusive behaviour or behaviour that affects the health or safety of others) and serious (behaviour that poses an immediate or imminent threat to life or personal safety or involves intentional damage, physical assault or other aggressive behaviour). All complaints of antisocial behaviour are recorded by the Department of Housing so that an assessment can be made of the frequency of incidents but generally, 'it is the frequency of *substantiated* incidents of antisocial behaviour that will determine what action will be taken, not the number of complaints received'.⁶⁶

The nature and frequency of substantiated antisocial behaviour is assessed to determine whether a verbal warning (called a 'Step') or a written warning (called a 'Strike') will be issued. If three strikes are issued 'action to terminate the tenancy and evict the tenant will be considered' and legal advice sought. The institution of eviction proceedings must be approved by the Regional Executive Director and the Executive Director, Regulation and Compliance.⁶⁷ The following table⁶⁸ outlines the response to antisocial behaviour and the issuance of strikes depending on the nature of the behaviour and its frequency:

⁶⁶ Ibid 3 (emphasis added).

⁶⁷ Ibid 3.

⁶⁸ This table has been compiled from material taken directly from the Northern Territory Department of Housing, *Three Strikes Policy* (2012) 4.

Strike 1	Strike 2	Strike 3
<p>6 minor incidents in a 6-month period</p> <p>4 minor and 1 moderate incident in a 6-month period</p> <p>2 minor and 2 moderate incidents in a 6-month period</p> <p>3 moderate incidents in a 6-month period</p> <p>1 serious incident</p>	<p>4 minor incidents in a 4-month period after Strike 1 issued.</p> <p>2 minor incidents and 1 moderate incident in a 4-month period after Strike 1 issued.</p> <p>2 moderate incidents in a 4-month period after Strike 1 issued</p> <p>A further serious incident after Strike 1 issued.</p>	<p>A further 2 minor incidents in a 2-month period after Strike 2 issued.</p> <p>A further moderate incident in a 2-month period after Strike 2 issued.</p> <p>A further serious incident after Strike 2 issued.</p>
<p>Strike 1 remains valid for 6 months – if no further substantiated incidents within that 6-month period the tenancy will revert to normal status</p>	<p>Strike 2 will remain valid for a period of six months – if no further substantiated incidents of ASB occur during this period then the tenancy will revert to normal status</p>	<p>If the decision is made not to commence legal action a Strike 3 will remain valid for a period of six months – if no further substantiated incidents of ASB occur during this period then the tenancy will revert to normal status</p>

The Northern Territory policy does not appear to be as strict as the Western Australian policy. In Western Australia, three minor incidents in a 12-month period will result in proceedings for termination of the tenancy, whereas in the Northern Territory 12 substantiated minor incidents would have to occur within a 12-month period before a third strike is issued. Likewise, under the Northern Territory policy one serious incident will result in a first strike only compared to Western Australia where one substantiated complaint for dangerous behaviour will result in termination proceedings. However, the Northern Territory policy does provide that in cases of

very serious or extreme substantiated anti-social behaviour, eviction proceedings may be commenced immediately without any verbal or written warnings (strikes) being issued. This decision must be made by the Regional Executive Director and the Executive Director, Regulation and Compliance.⁶⁹

Under the policy, general Department of Housing staff are responsible for investigating complaints and referring matters to the Anti-Social Behaviour Unit (if it is determined that a first strike should be issued).⁷⁰ The functions of the Anti-Social Behaviour Unit include reviewing the actions of general staff, issuing first strikes, investigating further complaints, issuing second and third strikes and, when necessary, recommending legal action. The authorisation and issuance of formal notices and the commencement of legal action is the responsibility of the Executive Director/Manager.⁷¹

The Department of Housing's *Operational Policy Manual* suggests that alternative approaches may be adopted where a complaint of antisocial behaviour does not constitute a breach of the tenancy agreement.⁷² For example, Housing Services staff will encourage the parties to resolve the dispute themselves or refer to the parties to mediation or other agencies.⁷³ Even where a breach of tenancy has apparently occurred, the Northern Territory department may use alternative approaches including the option of requiring the tenant to enter into an Acceptable Behaviour Agreement.⁷⁴

An Acceptable Behaviour Agreement is a 'written declaration by the tenant not to engage in antisocial behaviour at their tenancy'. A written notice must be provided to the tenant setting out the following matters:

- the period that the tenant has to enter into the agreement (this period must not be less than 28 days);
- the length of the agreement (usually three months);
- a description of the antisocial behaviour and the terms of the agreement;

⁶⁹ Ibid 4.

⁷⁰ Although in some regional areas, general staff undertake the role of antisocial behaviour investigators.

⁷¹ Ibid 2.

⁷² The *Operational Policy Manual* explains that under a lease agreement, tenants agree to 'treat neighbours in a reasonable and courteous manner and not create a nuisance or trespass onto any neighbour's property'; 'not cause or permit a nuisance or disturbance on the premises, ancillary property or on land adjacent to or opposite the premises'; 'not cause or permit ongoing or repeated interference with the reasonable peace or privacy of another person'; and 'ensure that any person on the premises with consent of the tenant complies with all of the above': Northern Territory, Department of Housing, *Operational Policy Manual* 17.

⁷³ Ibid 17.2.1.

⁷⁴ Ibid 17.2.1.

- that the agreement applies to other household members and visitors with the consent of the tenant; and
- that Housing Services may apply for termination of the lease agreement if the tenant does not enter into the Acceptable Behaviour Agreement or if the tenant seriously or repeatedly breaches the terms of the agreement.⁷⁵

Another potential option available is for disruptive tenants to be transferred to an alternative property; however, it is stipulated that this is usually only considered where the tenant is not the main source of the antisocial behaviour and he or she has not previously been transferred or evicted for antisocial behaviour. If transfer is effected, the tenant will be required to enter into an Acceptable Behaviour Agreement and the tenancy will operate for three months to enable the department to monitor the tenancy. Further, the tenant is not able to choose the location of their new property and if they refuse to move into the property chosen by the Northern Territory department eviction proceedings will commence.⁷⁶

Under s 28D of the *Housing Act* (NT) public housing safety officers⁷⁷ have the power to request the name of a person who they reasonably believe has engaged, is engaging or will engage in conduct that constitutes antisocial behaviour (or a prescribed offence). Likewise, a public housing safety officer has the power to request the name of a person whom he or she believes may be able to assist in the investigation of a prescribed offence or antisocial behaviour. If the officer reasonably believes that the person is under the age of 18 years he or she may also ask the person for their age. It is an offence to fail to comply with a name request (or a request for proof of identity in circumstances where the officer reasonably believes that the information provided is false) without a reasonable excuse.

Further, if a public housing safety officer reasonably believes that a person on public housing premises has been, is or will be engaging in conduct that constitutes antisocial behaviour (or a prescribed offence), he or she may direct the person not to engage or to stop engaging in the conduct. If the person is not a tenant or a recognised occupier of the premises the officer may direct the person to leave the premises and not to enter those premises for a specified period (no longer than 12 months). Failure to comply with these directions, without a reasonable excuse, is an offence.⁷⁸ Under s 28G of the *Housing Act* (NT) a public housing safety officer has certain powers to seize dangerous articles and articles containing liquor in specified

⁷⁵ Ibid 17.4. The requirements in relation to Acceptable Behaviour Agreements are also set out in s 28C of the *Housing Act* (NT).

⁷⁶ Northern Territory, Department of Housing, *Operational Policy Manual*, 10.1.9.

⁷⁷ Public housing safety officers are appointed by the CEO and must be 'suitably trained to exercise the power or perform the functions' under the Act. A public sector employee is not eligible for appointment as a public housing safety officer if he or she has a conviction for a disqualifying offence (prescribed by regulation) (s 28Q).

⁷⁸ *Housing Act* (NT) s 28E.

circumstances. A decision made by public housing safety officers (eg, directions under s 28E and the seizure of articles) are subject to review by the CEO and the CEO's decision is also subject to review by the Local Court.⁷⁹

Another option utilised in the Northern Territory is a declaration by the Northern Territory Licensing Commission that particular public housing premises are alcohol restricted.⁸⁰ If a tenant is worried that family and friends cause trouble drinking alcohol in their home or in their area, they can apply to have the premises declared. If such a declaration is made, it is prohibited to consume or carry an open container of alcohol on the relevant premises. A sign will be placed on the door of a unit or on the fence of a house stating the penalties applicable for bring alcohol onto the relevant premises. The Department of Housing will assist a person to make such an application. Police and public housing safety officers can enter alcohol restricted premises without a warrant if they believe people are drinking alcohol and they can seize alcohol and issue a fine.⁸¹

6.3 Queensland

The Queensland Department of Housing and Works has recently announced its new Antisocial Behaviour Policy which will commence operation in July 2013. The new policy will introduce a three-strikes approach to antisocial behaviour in public housing. It is stated that the policy 'will aim to balance the needs and rights of other tenants, private owners and the broader community with the need to support tenants to sustain their public housing tenancies'.⁸²

Under the policy, antisocial behaviour is defined as behaviour which 'may or is likely to disturb the peace, comfort or privacy of other tenants or neighbours or any person living in the vicinity of the premises or surrounding community' (eg, harassment, criminal and illegal activities, deliberate or reckless damage). As is the case in Western Australia, antisocial behaviour is separated into three levels: minor general or nuisance behaviours; serious behaviours; and dangerous or severe behaviours. Minor general or nuisance behaviours are defined as 'activities that could reasonably occur occasionally in a household, but which disturb the peace, comfort or privacy of other tenants or neighbours'. Examples provided are 'excessive noise from televisions or stereos, a loud party or an untidy yard'. Serious behaviours are activities 'that intentionally or recklessly disturb neighbours, or could reasonably cause concern for the safety or security of a tenant, household member, neighbour or their property, or

⁷⁹ *Housing Act* (NT) ss 28K and 28L.

⁸⁰ The Licensing Commission can make such a declaration in relation to non-public housing premises.

⁸¹ Northern Territory Department of Housing, *Alcohol Restricted Premises*, Fact Sheet (2012).

⁸² Queensland Department of Housing and Works, *Antisocial Behaviour Policy* (2013) available at <http://www.communities.qld.gov.au/resources/housing/renting/reforming/antisocial-behaviour-qas.pdf>.

damage to the department's property' (eg, harassing neighbours or using aggressive or obscene language). Dangerous or severe behaviours are activities 'that pose a risk to the safety or security of residents or property' (eg, illegal activity such as drug production or supply, assault or malicious damage to property).

If any allegation of antisocial behaviour is substantiated a strike will be issued against the tenant. If the substantiated behaviour is categorised as dangerous or severe, a first and final strike will be issued and action to evict the tenant will be taken. Otherwise, if a tenant receives three strikes within a 12-month period action to the end the tenancy may be taken. It appears that there is some flexibility in relation to 'minor general or nuisance behaviour' – a warning, rather than a strike, may be issued depending on the circumstances.

If a tenant is evicted as a consequence of antisocial behaviour he or she is unable to apply for public housing for at least three months. If granted a further tenancy at some stage, such a tenant will be required to enter into an Acceptable Behaviour Agreement and will be subject to a fixed 12-month tenancy with ongoing monitoring.

The policy also notes that in some cases the Queensland department needs to take into account issues such as mental health and other options may need to be considered in such cases to 'assist the tenant to change their behaviour and maintain their tenancy including referral to a support worker or agency, closely monitoring the tenancy or listing the household for a transfer to an alternative, more suitable public housing property'.⁸³

6.4 South Australia

The applicable housing authority in South Australia, Housing SA, is a division of the Department of Communities and Social Inclusion. Housing SA uses the term 'disruptive behaviour' as distinct from antisocial behaviour. The relevant policy explains that complaints about the disruptive behaviour of a Housing SA tenant are investigated by a local Housing Officer. Following an investigation the Housing Officer will determine whether the complaint can be substantiated. If so, and if the complaint is deemed 'infrequent and minor' the Housing Officer will counsel the tenant and issue a verbal warning. A second 'infrequent and minor' incident within six months will result in a second verbal warning with a third incident resulting in a formal written warning and the requirement to enter into an Acceptable Behaviour Agreement. If there are further complaints within the next six months another verbal warning will be issued (if the behaviour is deemed to be infrequent and minor). However, if the behaviour is considered moderate/serious and ongoing the matter will be referred to Housing

⁸³ Queensland Department of Housing and Works, *Antisocial Behaviour Policy* (2013).

SA Disruptive Management Team 'which will intensively monitor the tenancy for a further period'.

Any substantiated complaint deemed moderate/serious and ongoing will result in a formal written warning and an Acceptable Behaviour Agreement will be entered into with the tenant along with the provision of any relevant support services to assist the tenant to manage the disruptive behaviour.⁸⁴

The South Australian policy is more flexible than its Western Australian counterpart with a focus on support and monitoring rather than eviction. It has been observed that the Disruptive Management Team was introduced in 2008 to work with Housing SA tenants 'exhibiting severe and complex levels of disruption'.⁸⁵

The Disruptive Management Team supports tenants with repeated serious disruption *to remain in their home* and behave in an appropriate manner. The Disruptive Management Team employs a number of strategies to support tenants to modify their behaviour, including Acceptable Behaviour Contracts where tenants enter into an agreement with Housing SA which details specific behaviours that are not acceptable.⁸⁶

Housing SA has also entered into an Operational Protocol with Families SA to provide for a 'collaborative approach to working with families at risk of eviction and for whom there are child protection concerns'.⁸⁷ The stated aim of the protocol is to provide priority access to support services to assist families, at risk of eviction and who have children for whom there are child protection concerns, to maintain their accommodation. It is noted that one reason why families may face eviction is disruptive behaviour. The protocol focuses on agency collaboration and integrated management of support services. In cases of disruptive behaviour it is stated that the Housing Officer will ordinarily refer the family to community mediation services and the Supported Tenancy Scheme⁸⁸ for assistance.

In addition, a Strategic Protocol between the South Australian Housing Trust, the Aboriginal Housing Authority and the South Australian Police deals with processes between the parties to address disorder and criminal activity in social housing.⁸⁹ Interestingly, the protocol states that the parties will provide coordinated planning and services to 'ensure the safety and well-being

⁸⁴ Housing SA, *Disruptive Behaviour* (2012) available at http://www.sa.gov.au/upload/franchise/Housing.%20property%20and%20land/Housing%20SA/Disruptive_behaviour.pdf.

⁸⁵ McCann W, *A Review of the Operational Performance of Housing SA* (2011) 61.

⁸⁶ *Ibid* (emphasis added).

⁸⁷ Operational Protocol between Housing SA and Families SA (2006).

⁸⁸ Under the Supported Tenancy Scheme 'Housing SA leases properties to non-government and government agencies to enable them to provide crisis, short term and transitional accommodation for high needs clients. The properties are used to assist high needs groups including homeless youth, women and children escaping domestic violence': McCann W, *A Review of the Operational Performance of Housing SA* (2011) 48.

⁸⁹ Strategic Protocol between the South Australian Housing Trust, the Aboriginal Housing Authority and the South Australian Police for the Strategic Management of Processes between the Parties to the Protocol which are intended to address disorder and criminal activity in social housing (2005).

of social housing tenants and the wider community' and that the parties will adopt a 'pro-active early intervention and prevention approach'. Housing SA also funds and is responsible for specific programs for tenants with high needs (eg, Case Work Support Initiative, Indigenous Consultancy Program and Disruptive Management Team) and funds other programs that are delivered jointly with other agencies (eg, Mental Health Supported Housing Program).⁹⁰

6.5 Tasmania

Housing Tasmania⁹¹ published a Discussion Paper on antisocial behaviour and neighbourhood disputes in 2007 and this paper was revised in 2008.⁹² The Discussion Paper is listed on Housing Tasmania's website under 'Policies' and it has been confirmed that, at present, this paper represents the current approach to antisocial behaviour in public housing tenancies in Tasmania. However, the policies outlined in the paper are currently under review and it is anticipated that a revised policy will include more emphasis on support for public housing tenants as well as more support for staff to adequately deal with antisocial behaviour.⁹³

The Discussion Paper distinguishes between antisocial behaviour (ie, behaviour by tenants that 'adversely affects the lives of those who live around them' and breaches the lease agreement) and a neighbourhood dispute (ie, where neighbours are in conflict but there is no breach of the lease agreement). However, it is noted that the source of a neighbourhood dispute may be antisocial behaviour and a neighbourhood dispute may develop into antisocial behaviour.⁹⁴

In regard to neighbourhood disputes, the approach is to encourage neighbours to sort out the problem first by discussing the issues and, when necessary, by making referrals to other agencies such as the local council, police or community mediation. In cases of antisocial behaviour it is emphasised that eviction proceedings should only be instituted where all other efforts to resolve the conflict have failed (eg, request to attend appointments, referral to mediation, formal warning letters).⁹⁵

Where a public rental tenant causes a serious and persistent disturbance of the peace, privacy and comfort of a neighbour we will consider formal action under the terms of the lease to end the tenancy. Eviction is seen as a last resort after a period of significant

⁹⁰ For further details see McCann W, *A Review of the Operational Performance of Housing SA* (2011) 59–65.

⁹¹ Housing Tasmania is part of the Department of Health and Human Services.

⁹² See http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0017/59111/Pol_antisocialbehav_July_2008.pdf

⁹³ Telephone consultation with Housing Tasmania on 18 April 2013.

⁹⁴ Housing Tasmania, *Policies, Anti-Social Behaviour and Neighbourhood Disputes* (2007, revised 2008) 1.

⁹⁵ *Ibid* 2.

effort by Housing Tasmania and a demonstrated lack of commitment by the tenant to comply with their lease.⁹⁶

However, in urgent cases (where serious damage or physical injury is likely) eviction proceedings may be commenced at an earlier stage.

The paper acknowledges that neighbourhood disputes and antisocial behaviour among public housing tenants may be the result of the complex needs of the tenants (eg, alcohol and drug problems, mental or physical health issues). It is recognised that early intervention to address these issues is important in order to reduce the potential for problems with the tenancy in the long term. However, this may not always be possible if the tenant refuses assistance or support.⁹⁷

6.6 Victoria

The Department of Human Services has responsibility for public housing in Victoria; this department has a broad mandate covering a number of areas (in addition to housing) such as children and families and disability services. The Victorian department's Tenancy Management Manual⁹⁸ deals with tenancy breaches and explains that the *Residential Tenancies Act 1997* (Vic) sets out the rights and duties of landlords and tenants including public housing tenants. As landlord, the Victorian department 'investigates and attempts to resolve all matters that involve a breach of the [*Residential Tenancies Act*] or the tenancy agreement'. It is stated that the 'Department is committed to *supporting* and *sustaining* public housing tenancies which experience difficulties in meeting their tenancy obligations' and it will try to resolve disputes before commencing legal action for eviction.⁹⁹ The manual notes that appropriate responses to tenancy breaches include 'early intervention to avoid escalation of issues' and 'referral to support services'.¹⁰⁰

In relation to disputes between neighbours the manual states that 'where two or more neighbouring tenants are in serious conflict and it is difficult to determine if a tenancy breach has occurred, the Department encourages and assists the involved parties to engage in a mediation process'. If mediation does not resolve the issue, legal proceedings may need to be instituted.¹⁰¹ In line with the aim to support and sustain public housing tenancies, the Victorian department will flag tenants who are also clients of other departmental programs in order to

⁹⁶ Ibid 2.

⁹⁷ Housing Tasmania, *Policies, Anti-Social Behaviour and Neighbourhood Disputes* (2007, revised 2008) 3.

⁹⁸ Victorian Department of Human Services, *Tenancy Management Manual: Chapter 9 – Tenancy breaches* (July 2012).

⁹⁹ Ibid [9.2.2].

¹⁰⁰ Ibid [9.2.6].

¹⁰¹ Ibid [9.2.11].

'maximum support'.¹⁰² Furthermore, where eviction is imminent and the tenant is not engaging with the Department, a local support agency may be appointed to work with the tenant (even in the absence of the tenant's consent) if the departmental officer reasonably believes it is necessary to 'lessen or prevent a serious and imminent threat to an individual's life, health, safety or welfare'.¹⁰³ Importantly, the policy provides that if a formal breach notice is being considered, the potential negative impact of eviction on the tenant (or other members of the household including children) will be considered (eg, impact on mental health, impact on family unit or impact on tenants' ability to practice their culture, religion or language). Any negative impacts are balanced against other relevant considerations under the policy.¹⁰⁴ This is a reasonable approach because it ensures that consideration is given to whether the negative impacts outweigh the benefits of eviction and enables the individual circumstances to be taken into account rather than a strict 'three strikes and you're out' policy.

More specifically, a pilot program to deal to antisocial behaviour commenced in 2009 in particular housing offices on a voluntary basis. The implementation of the pilot was announced in response to recommendations of a project that examined antisocial behaviour among public housing tenants. It is noted that the pilot will be evaluated with a view to possible expansion throughout the state.¹⁰⁵ Under the pilot, prospective public housing tenants will be categorised as either Group One (history of antisocial behaviour) or Group Two (high risk of antisocial behaviour).¹⁰⁶ All households under the pilot must have supports in place at the point of allocation; however, Group One households require supports to be in place before approval for housing is granted.¹⁰⁷ It is also noted that the proposed site for a public housing tenancy is carefully considered under the pilot with the aim of reducing the potential negative outcomes on surrounding neighbours (eg, there may be consideration of whether the proposed site is near elderly people).¹⁰⁸ Tenants may be provided with a social worker or support worker and there is a 'High Risk Tenancies Officer' available for cases where it is difficult to engage a support worker.¹⁰⁹ Group One tenants are required to enter into a one-year fixed tenancy agreement which will not be renewed unless they demonstrate 'acceptable behaviour'. Some Group Two tenants may be required to enter into a fixed tenancy on the same basis.¹¹⁰ During the management of fixed term tenancies, regular home visits are conducted.¹¹¹ Under the pilot, where there is a dispute or issue that does not amount to a breach of the tenancy agreement, the households are assisted to organise mediation through the Dispute Settlement Centre of

¹⁰² Ibid [9.2.14].

¹⁰³ Ibid [9.2.14].

¹⁰⁴ Ibid [9.3.9].

¹⁰⁵ Department of Human Services, *Anti-social Behaviour Initiatives: Application and tenancy management framework for pilot offices* (2009) 5.

¹⁰⁶ Ibid 6.

¹⁰⁷ Ibid 7.

¹⁰⁸ Ibid 14.

¹⁰⁹ Ibid 7–8.

¹¹⁰ Ibid 10.

¹¹¹ Ibid 15.

Victoria which offers a range of strategies such as mediation and education.¹¹² If there has been a breach of the tenancy, the support worker is required to work ‘intensively with the tenant on remedying the breach’ – a case conference is held within seven days and an action plan is developed to ensure that no further breaches occur.¹¹³

6.6 Australian Capital Territory

Housing ACT which is part of the Community Services Directorate¹¹⁴ is responsible for public housing. Housing ACT’s disruptive behaviour policy is available on its website¹¹⁵ and it explains upfront that the policy is based on the following principles:

- All Housing ACT tenants and their neighbours are entitled to quiet enjoyment of their dwellings;
- Housing ACT intends to provide assistance to tenants and those members of their immediate community affected by such actions; and
- Housing ACT will coordinate provision of resources in resolving disruptive situations and/or achieving positive behavioural change to assist tenants to sustain their tenancies.

As is the case in some other jurisdictions, there is a clear emphasis on sustaining public housing tenancies. It is stated that:

Housing ACT strives to ensure tenants and their neighbours have quiet enjoyment of their dwellings. Housing ACT encourages all parties to resolve issues at neighbourhood level in a positive and appropriate manner. In recognition of the particular role of Housing ACT in the social fabric of the ACT community and its relationship with tenants, Housing ACT may take the role of facilitator or referral agency by assisting all parties to access community resources to address the causes and resolve neighbourhood disputes. The ultimate aim of any such intervention is to ensure that tenancies are sustained. Housing ACT will offer assistance impartially with the knowledge that receipt of a complaint indicates that there is a problem but does not prove fault.

The policy defines ‘disruptive behaviour’ as behaviours that ‘cause nuisance or annoyance to sector/s of the community over a period of time and have an adverse or disturbing effect on that community’. It is stated that disruptive behaviours may include criminal activities (eg, theft or assault) domestic disputes, harassment and uncomfortable noise levels. The policy mentions a range of options available to people impacted by disruptive behaviour in public housing including mediation; referrals to dispute resolution services and other support agencies; multi-agency responses; and reporting illegal behaviour to the Australian Federal

¹¹² Ibid 15–16.

¹¹³ Ibid 16.

¹¹⁴ The Community Services Directorate is responsible for a number of areas including multicultural affairs; women; older people; children, youth and family; disability services; Aboriginal and Torres Strait Islander Affairs; and community disaster recovery.

¹¹⁵ http://www.dhcs.act.gov.au/hcs/policies/disruptive_behaviour.

Police. Equally, the policy explicitly refers to the approach adopted for tenants who are subject to a complaint about disruptive behaviour. This approach includes the assumption of innocence, access to counseling services, assistance to resolve disputes, referrals to appropriate agencies to remove disruptive behaviour and regular visits by housing managers, support workers and/or the police.

6.7 *New Zealand*

Housing New Zealand is the body that deals with public housing.¹¹⁶ The website states that:

Most neighbourly disputes are resolved amicably but there are some cases where we may be asked to help. We will help if our tenants, their neighbours or our staff are in danger of physical harm, or if the dispute affects people in the surrounding area.

In some instances, we will write to the person who seems to be causing the problem. If we continue to get complaints about a tenant we may take further action. This could lead to eviction if they are at fault. Eviction is a last resort and involves applying to the Tenancy Tribunal to get possession of the property.¹¹⁷

In November 2011, Housing New Zealand introduced a suspensions policy for public housing tenants who are evicted or vacate their house as a consequence of antisocial behaviour or a serious breach of their tenancy agreement. Suspended tenants may be ineligible for further public housing for up to 12 months. The *Suspending Tenants from Housing New Zealand Houses Fact Sheet* provides that public housing tenants may be suspended from obtaining a house for 12 months if their tenancy ends¹¹⁸ because they have lied about their circumstances to obtain public housing; intimidated or harmed other people; sublet their house; repeatedly failed or refused to pay rent; accumulated a large debt; substantially damaged a public house or used a public house for criminal activities. It is also stated that visitors to a property may be suspended from obtaining public housing for 12 months if they have caused damage to a public housing property or intimidated or harmed other people. In addition, the tenant may be held accountable under the suspension policy for the actions of their visitors/guests. In the first year of the new policy, 75 public housing tenants were suspended.¹¹⁹

However, Housing New Zealand also recognises that many public housing tenants have high and complex needs and that where 'non-accommodation needs are unmet, tenants may find it

¹¹⁶ See <http://www.hnzc.co.nz/>.

¹¹⁷ See <http://www.hnzc.co.nz/rent-buy-or-own/information-for-neighbours/how-to-make-a-complaint/?searchterm=neighbour>.

¹¹⁸ That is, even if the tenant has vacated or abandoned the property.

¹¹⁹ Housing New Zealand, *Briefing for the Incoming Minister of Housing* (January 2013) 20.

difficult to sustain their tenancies and their wellbeing'. Accordingly, Housing New Zealand maintains that it supports tenants to access appropriate support services where necessary.¹²⁰ Also, a tenant who has been suspended under the policy may have their suspension waived. In determining whether to waive a suspension various issues will be considered on a case-by-case basis (eg, 'the severity of the housing related hardship; a 'demonstrated commitment to repay debt' and 'proven changes in behaviours or circumstances').¹²¹

6.8 United Kingdom

Places for People is responsible for social housing in the United Kingdom. The Customer Handbook was replaced in November 2012 with a DVD for new customers available on YouTube and provided to customers.¹²² The section of the DVD that deals with 'you and your community' emphasises that the community is diverse but everyone wants to enjoy living in their home. It suggests that most problems can be worked out by getting to know neighbours and discussing problems when they arise but acknowledges that a few people engage in antisocial behaviour and if direct engagement with neighbours does not overcome any difficulties, *Places for People* have trained staff to offer support and advice.

Under the applicable formal policy, antisocial behaviour is defined as 'any activity that impacts on other people in negative way and interferes with a person's right to live peacefully in his/her home and in the surrounding area'. Examples provided include violence, harassment, domestic abuse, criminal activity, noise, verbal abuse, damage, intimidation, nuisance from vehicles, graffiti, nuisance involving children or teenagers and rubbish. Clearly the definition covers a wide range of behaviour.¹²³ Community Safety Managers and Officers are responsible for dealing with complaints of antisocial behaviour. Complaints can be made by telephone 24 hours a day, by email or in person. Different actions are listed including investigating reports of antisocial behaviour; encouraging 'tolerance by trying to balance the needs of individuals with those of their neighbours (and it is noted that activities that result from different lifestyles, or which most people would think reasonable, are not antisocial behaviour)'; encouraging neighbours to participate in face-to-face restorative meetings or mediation;¹²⁴ and implementing and supporting preventative measures.¹²⁵

¹²⁰ Housing New Zealand, *Statement of Intent 2012–2015*, 15–16.

¹²¹ *Suspending Tenants from Housing New Zealand Houses Fact Sheet*.

¹²²

http://www.placesforpeople.co.uk/news.aspx/latest_news/new_dvd_makes_moving_easier_for_customers.aspx

¹²³ Places for People (UK), *Community Safety: A summary of our 'Statement of Community Safety Policy and Procedure'* (2011) 2.

¹²⁴ It is also noted that independent mediation will be arranged if requested, *ibid* 4.

¹²⁵ *Ibid* 3.

The policy emphasises that legal enforcement action is used only for the most serious cases and eviction is the option of last resort. In most cases, where a tenant admits to antisocial behaviour, he or she will be given a verbal warning (and this will be confirmed in writing). It is stated that the action chosen will be the one that is 'reasonable, proportionate and most likely to produce an effective solution'.¹²⁶ Enforcement action is either an application for an injunction order which prohibits the person from carrying out a specified act or requires them to do something. Failure to comply with an injunction order may result in a fine or sentence of imprisonment. Injunction orders can only be made against an adult. Finally, an application can be made for an Order for Possession; however, as noted above, it is stated that:

We will exhaust all alternatives and remedies available to us to address the anti social behaviour and its causes before resorting to possession proceedings and asking the Court for an eviction.¹²⁷

It is also observed that the vast majority of people respond positively to warnings and enforcement action is, therefore, usually unnecessary.

6.9 Commentary on antisocial policies

The majority of jurisdictions discussed above (eg, South Australia, Tasmania, Victoria, the Australian Capital Territory, New South Wales, New Zealand and the United Kingdom) adopt, to some extent, a sustaining tenancies approach to antisocial behaviour. In a comprehensive good practice guide to adopting a sustaining tenancies approach to demanding behaviour¹²⁸ in public housing, it is explained that the phrase 'sustaining tenancies' is broadly used to refer to 'housing management policies and practice designed to assist housing tenants to manage their tenancy successfully and to achieve improvements in their lives'. However, more specifically in relation to the guide the phrase is used to refer to assistance given to 'vulnerable'¹²⁹ tenants to avoid tenancy failure through eviction or exit under duress'.¹³⁰ The guide refers to two distinct types of responses to demanding behaviour in public housing tenancies: disciplinary strategies and supportive strategies.

¹²⁶ Ibid 4.

¹²⁷ Ibid 5.

¹²⁸ 'Demanding behaviour' is used to refer to the 'softer end' of antisocial behaviour (eg, it doesn't include criminal behaviour), see Habibis D et al, *A Sustaining Tenancies Approach to Managing Demanding Behaviour in Public Housing: A good practice guide* (Australian Housing and Urban Research Institute, Final Report No 103, July 2007) 7.

¹²⁹ Vulnerable tenants refers to young people, people with mental illness, people with addiction, people with physical disabilities or ill health, single parents, large families and Aboriginal people.

¹³⁰ Habibis D et al, *A Sustaining Tenancies Approach to Managing Demanding Behaviour in Public Housing: A good practice guide* (Australian Housing and Urban Research Institute, Final Report No 103, July 2007) 2.

It is explained the disciplinary strategies involve 'strategies requiring tenants to conform to normative standards of behaviour or lose their security of tenure'.¹³¹ Examples include probationary leases, written agreements (eg, acceptable behaviour contracts¹³²), and antisocial behaviour orders. Antisocial behaviour orders are used in the United Kingdom. They are civil court orders requiring a person to not behave in a particular way or requiring the person to do certain things. Failure to comply with the terms of the order may result in prosecution and punishment. Antisocial behaviour orders can be given in relation to any person aged 10 years or older. Only the local council or housing authority may apply to the court for an antisocial behaviour order.¹³³ In the context of public housing it has been observed that a breach of an antisocial behaviour order will result in institution of eviction proceedings.¹³⁴

In contrast, supportive strategies involve preventative actions (eg, appropriate housing allocations, appropriate housing design, community development and education and good neighbourhood policies); early intervention (eg, early response to complaints, early warning systems, regular and frequent maintenance); support (eg, provision of information, referral, specialist services and partnerships with other services); negotiation (eg, mediation and encouraging self-help); and appropriate staff training.¹³⁵

In the guide it is argued that disciplinary strategies should, ideally, not form part of a sustaining tenancies approach because such strategies are underpinned by the threat of eviction which is incompatible with the concept of supporting the continued viability of the tenancy. On the other hand, it is contended that disciplinary strategies may be necessary to compel tenants to change their behaviour. It is suggested that at a minimum, to properly fit within a sustaining tenancies approach, disciplinary strategies must be coupled with supportive strategies.¹³⁶

“I understand there are moves to evict [my patient] from her property. She has poorly controlled diabetes and her daughter is currently in hospital with diabetes being stabilised on insulin. It will be profoundly detrimental to the health of her and her daughter if she does not have her current home and accommodation.” – Doctor of Tenant

¹³¹ Ibid 11.

¹³² Acceptable behaviour contracts or agreements are available as an option in New South Wales, South Australia and the Northern Territory.

¹³³ See <https://www.gov.uk/asbo>;

http://england.shelter.org.uk/get_advice/neighbourhood_issues/antisocial_behaviour/antisocial_behaviour_orders.

¹³⁴ Habibis D et al, *A Sustaining Tenancies Approach to Managing Demanding Behaviour in Public Housing: A good practice guide* (Australian Housing and Urban Research Institute, Final Report No 103, July 2007) 11.

¹³⁵ Ibid 13.

¹³⁶ Ibid 14.

The guide also discusses a number of key good practice principles that should accompany a sustaining tenancies approach. These are summarised briefly below:

- **Co-location of housing authority with other relevant agencies:** It is suggested that the applicable housing authority should be part of a broader government department/agency that also deals with health, family services and/or community services.¹³⁷ As noted above, Housing SA is a division of the Department of Communities and Social Inclusion, Housing ACT is part of the Communities Service Directorate and public housing is the responsibility of the Department of Human Services in Victoria. In contrast, the Western Australian Housing Authority was located within the Department of Housing and Works and is now the Department of Housing.
- **Good governance:** A number of good governance principles are described in the guide including processes that encourage participation and negotiation; equity and inclusiveness; transparency and accountability; and efficiency and effectiveness.¹³⁸
- **Values and philosophy:** A sustaining tenancies approach should adopt a human rights framework that recognises everyone has the right to safe, stable and affordable housing along with a tenant-centered focus which is non-judgmental and compassionate. It is also highlighted that strategies should be designed to promote social inclusion rather than isolation of demanding tenants.¹³⁹
- **Practice principles:** Key practice principles include respecting confidentiality and privacy; respecting cultural and linguistic backgrounds; and separating the provision of support services from the provider of housing services so tenants are comfortable disclosing social problems while still adopting a joined-up approach.¹⁴⁰
- **Specialist programs and positions:** It is suggested that specialist positions enable the development of expert knowledge and increased efficiency. Further, specialist support positions will enable the separation of routine housing management from the provision of appropriate support to tenants who are at risk.¹⁴¹

¹³⁷ Ibid 22.

¹³⁸ Ibid 23.

¹³⁹ Ibid 25–26.

¹⁴⁰ Ibid 27–28. An example provided is the Supported Tenancy Program in South Australia where Housing SA provides support to tenants who are at risk due to problems such as domestic violence, mental health issues, financial problems and neighbourhood complaints. Support is provided via service agreements with community organisations.

¹⁴¹ Ibid 30.

- **Organisational learning:** Appropriate staff development and training will assist in maintaining organisational knowledge so an organisation's knowledge is not dependent on individuals (who inevitably move on).¹⁴²
- **Management of information:** This entails ensuring that there is proper record keeping, appropriate documentation in relation to complaints and keeping a record of tenants with high and complex needs.¹⁴³
- **Appropriate policies and guidelines:** Under a sustaining tenancies approach there needs to be appropriate policies to deal with such issues as community and neighbourhood relations, media, housing allocations, disruptive tenants and neighbourhood disputes, building and maintenance, tenant transfers, confidentiality and information, staff training and development and discretionary decision making.¹⁴⁴ Guidelines are also needed to ensure consistency of staff decision making.
- **Standards for building and maintenance:** Requiring appropriate standards for building and maintenance assist in avoiding problems for tenants as a result of poor construction, inappropriate locations and inadequate facilities.¹⁴⁵
- **Multi-agency working:** It is stated that this is a key component of a sustaining tenancies approach and may involve agencies such as health, aged care, mental health, disability, police, community, family, Aboriginal, migrant and justice services. Memorandums of understanding and/or joint responsibility agreements are necessary for an effective multi-agency approach.¹⁴⁶ In this regard it is highlighted that the Western Australian Mental Health Commission and the Department of Housing have entered into a Memorandum of Understanding to strengthen the relationship and information sharing between the two agencies in order to 'improve housing outcomes for people with mental health problems who are facing tenancy eviction'. Non-government mental health service providers are also involved; mental health service providers will be notified of any 'strikes' or warnings issued under the DBMS so that there is an opportunity to provide support where necessary.¹⁴⁷

Some examples of appropriate strategies under a sustaining tenancies approach are discussed in the guide and include preventative measures such as ensuring that there is appropriate infrastructure in public housing properties; appropriate housing allocations

¹⁴² Ibid 31.

¹⁴³ Ibid 33.

¹⁴⁴ That is, situations where common sense requires diversion from a rigid written policy, ibid 35-36.

¹⁴⁵ Ibid 37.

¹⁴⁶ For example, see discussion above under South Australia where it is noted that Housing SA has entered into an Operational Protocol with Families SA and there is a Strategic Protocol between SA Housing Trust, the Aboriginal Housing Authority and South Australia Police.

¹⁴⁷ Mental Health Commission Western Australia, *Annual Report 2011–2012* (2012) 32.

including involving tenants in choosing their locations; early intervention; referrals to support services, mediation; support plans, tenant incentive schemes, tenant transfers, and working with other services.¹⁴⁸ There is also reference in the guide to specific issues relevant for Aboriginal public housing tenants including that an appropriate approach requires culturally sensitive policies and practices; community education and development programs; employment of Aboriginal staff; special programs for vulnerable Aboriginal people such as women and children escaping domestic violence; access to appropriate programs; infrastructure to accommodate large households; partnerships with Aboriginal community organizations; and staff development programs on sustaining Aboriginal tenancies.¹⁴⁹

“I have four children aged six, five, four and 22 months. My partner is on disability payment. I am expecting another baby. I have been up and down to my local GP with high blood pressure and a lot of stress. I am not getting a chance for me and my family to speak for our behalf [sic]. My partner and I don’t drink alcohol, we don’t do drugs, we are Indigenous. I feel really frustrated and discriminated against because I’ve been told that I cannot do anything about the complaints,” – Tennant.

Similarly, the Victorian Department of Human Services report on the Support for High-Risk Tenancies Strategic Project reported that the key elements of a successful approach are flexibility; client engagement; early and appropriate referrals and interventions, joint working between agencies and planning and coordination of service delivery.¹⁵⁰

¹⁴⁸ Habibis D et al, *A Sustaining Tenancies Approach to Managing Demanding Behaviour in Public Housing: A good practice guide* (Australian Housing and Urban Research Institute, Final Report No 103, July 2007) 50–76.

¹⁴⁹ Ibid 100–101.

¹⁵⁰ Victorian Department of Human Services, *Support for High-Risk Tenancies Strategic Project, Final Report* (2006) 6–7.

7 Systemic Discrimination

7.1 Race

Race discrimination in the area of accommodation is proscribed under s 47 of the EO Act. Section 47(2) deals with tenancies and it provides:

It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's race

- (a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person;
- (b) by evicting the other person from accommodation occupied by the other person; or
- (c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.

According to a United Nations Housing Rights Programme report, indigenous peoples are more likely to suffer from inadequate housing conditions and often experience systemic discrimination in the housing market.¹⁵¹

Two of the Commission's inquiries, *Finding a Place* (2004) and *Accommodating Everyone* (2009),¹⁵² found that there was evidence of race discrimination in the provision of accommodation and associated services to Aboriginal and other minority racial groups. *Accommodating Everyone* concluded there was evidence of direct and indirect race discrimination within the private rental sector. In the case of the FAP Inquiry into public housing, the evidence of discrimination was more systemic in that the policies and practices did not take into account the particular needs of Aboriginal people.

Some of the recommendations of *Finding a Place* have been discussed earlier in this report. These were focused on complaints against tenants and the processes for dealing with these complaints. Underpinning many of the recommendations is the acknowledgment that there is a level of racism within society, generally, which may be the basis of complaints against public housing tenants. One example is the fact that many Aboriginal households have large numbers of people living in and/or visiting the premises and therefore there may be higher noise levels and a lower level of tolerance because the tenants were Aboriginal. In this regard, it is noted that in the 2011 Census, the average Western Australian household had 1.9 persons and the average Aboriginal and Torres Strait Islander household in WA had 3.5

¹⁵¹ United Nations Housing Rights Programme, *Indigenous Peoples' Rights to Adequate Housing: A global overview*, Report No 7 (2005) 6.

¹⁵² Equal Opportunity Commission, *Accommodating Everyone* (2009).

persons.¹⁵³ The process of how complaints were dealt with and the written communication with Aboriginal tenants went to the more systemic form of discrimination in the Department's processes.

A recommendation which has not been cited previously is the Department's review of its policies relating to the requirement for Aboriginal applicants to prove that they have attempted to find accommodation in the private rental sector. The Department has acknowledged the potential for discrimination in the private rental market and no longer requires Aboriginal applicants to show they have attempted to gain a rental property in that sector.

A 2012 Australian Housing and Urban Research Institute Report dealing with Indigenous House Crowding, specifically identifies the DBMS as contributing to overcrowding in Aboriginal households. In one example in the City of Swan it is noted that the household had six adults and 14 babies and children and the reason for the large number of people living in the house was the fact that the householder had family living with her who had been evicted under the DBMS.¹⁵⁴ It was observed that this pattern appeared elsewhere along with situations where 'aunts and grandmothers' had taken in children who had run away from their parents or 'who were being treated badly by their parents'.¹⁵⁵ The report identified that many Aboriginal households perceived they would be subjected to complaints on the basis of their race.

Different kinds of crowding stress seem to be shown in these contrasting situations. In Mount Isa with its high density of Indigenous people in public housing in the suburb of Pioneer, neighbourhood crowding caused by other Indigenous people becomes an important stressor. In Swan, however, low levels of Indigenous population within a largely private rental and freehold suburb can cause stress as people feel relatively vulnerable to non-Indigenous neighbour's complaints under the Western Australian 'three strikes' policy.¹⁵⁶

In addition, the authors explored some of the cultural drivers which lead to overcrowding in Aboriginal households.

Strong kin ties still operate in both the regional centres of Carnarvon and Mount Isa and the metropolitan areas, such as Swan and Inala. These kin ties have implications for visiting on a regular basis. In particular, kinship ties have a strong influence on the processes that form, shape and reinforce people's identity and sociality.

There is an important role for kin as carers of children providing an outlet for both parents and children who need a break. This manifests in both local daily visiting to see people for meals and to 'catch up', as well as longer distance visiting requiring planning and saving for bus or plane fares. Even people with more distant kin (in Inala up to 2000 km away and beyond to the Torres Strait Islands) are committed to maintaining kin ties and this impacts on housing in terms

¹⁵³ ABS Census Data 2011

¹⁵⁴ Memmott P et al, *Australian Indigenous House Crowding* (Australian Housing and Urban Research Institute, Final Report No. 194, 2012) 120.

¹⁵⁵ Ibid 121.

¹⁵⁶ Ibid 160.

of regular exchanges of kin between distant home places and city locations, with large numbers of people sharing houses during these visits.¹⁵⁷

The report also looked at the factor of sharing of households which frequently places a number of households at risk.

The cultural institution of demand sharing is very strong in these urban areas, despite cultural change and living within Anglo-normative housing. The cultural rules are adhered to at the expense of the house fabric if necessary, not vice versa. With regard to managing demand sharing in housing, we can state (especially from the Western Australian case studies) that there are rules of how to fit large numbers into a house that are strictly adhered to, even though this may appear chaotic to one unfamiliar with such rules.¹⁵⁸

Nonetheless, there may be ramifications for the people in these households.

In Swan (Western Australia), the 'three strikes policy' added to crowding when people were evicted, who then had to find emergency accommodation, possibly in the rental houses of other kin. But this, in turn, also made people stressed about receiving visitors in such circumstances, which may have then led to a 'strike' against their own tenancy should a neighbour lodge a sustainable complaint against them.¹⁵⁹

7.2 Impairment

Section 66A(1)(a) of the EO Act provides that no one should be discriminated against based on an impairment, or a characteristic that generally appertains to persons having the same impairment or a characteristic that is generally imputed to persons having the same impairment.

Section 66L(2) of the EO Act specifically deals with impairment discrimination in the area of accommodation:

It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of the other person's impairment

- (a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person;
- (b) by evicting the other person from accommodation occupied by the other person;
- (c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person;

¹⁵⁷ Ibid 142.

¹⁵⁸ Ibid 146.

¹⁵⁹ Ibid 141.

Impairment may relate to physical, intellectual or mental health incapacity. The EO Act also covers short-term temporary illnesses through to more profound chronic conditions.

Commonly, there is an interconnection between impairment and race for Aboriginal people and this is consistent with the fact that the two grounds are frequently cited together in complaints to the Commission.

“[My client] has suffered an extremely traumatic childhood and early life, being fostered in an abusive situation and he thinks constantly of killing himself. He is especially suicidal at the prospect of being homeless. A fact which he dreads.” – Advocate.

The difficulty for the Department is that due to the high level of deinstitutionalisation of people with mental illness, there is high demand for public housing from this group. It has been observed that deinstitutionalisation of mental health care and the tightening of eligibility criteria for public housing means there are high concentrations of households suffering from mental illness and 'exhibiting characteristics associated with poverty and stress' and that:

Social housing in Australia, like elsewhere, is now the home for those individuals who have little opportunity to exercise choice.¹⁶⁰

An example is a person suffering from Post Traumatic Stress Disorder. They often tend to have heightened responses when they are distressed or scared. This is an example of a behaviour that might be considered disruptive.

7.3 Sex

Sex is another ground of discrimination which may occur on a systemic basis. Although the term 'domestic violence' is gender-neutral 'it encompasses all potential forms of spousal or intimate relationship violence',¹⁶¹ it is primarily experienced against women. Reports have indicated that one in three Australian women have experienced physical violence since the age of 15 years.¹⁶²

¹⁶⁰ Jacobs K & Arthurson K, *Developing Effective Housing Management Policies to Address Anti-Social Behaviour* (Australian Housing and Urban Research Institute, Final Report No. 50, 2003) 4–5.

¹⁶¹ Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children and Sacred* (2007) 43.

¹⁶² United Nations Women Australia, *Violence Against Women*, Fact Sheet, 2.

Domestic violence has been recognised as a major cause of women and children becoming homeless. The fear of becoming homeless may also compel women to stay in abusive relationships, in order not to lose their housing.¹⁶³ Under the Department's rental policy there is a specific policy dealing with family and domestic violence. It provides that applicants who are applying for priority assistance as a consequence of family and domestic violence will be treated as priority cases.¹⁶⁴

“[The tenant’s ex-partner] has been told repeatedly by [the tenant] to leave the house as she is afraid of losing her house, but he keeps returning and causing serious disturbances. He has threatened to abduct her child and she is terrified he will carry out this threat.” - Advocate

As will be discussed in the following section, female tenants have been issued with strikes under the DBMS where the problem is caused by an ex-partner and where the tenant has no control over the situation. This is a systemic issue that female tenants face.

The other systemic implication for women arising out of the DBMS, is that the stress of actual or threatened eviction on women is often more intense given their role as primary carer of children. Furthermore, the resulting homelessness from an eviction places women and children in positions where they are very vulnerable to physical and sexual violence.¹⁶⁵ More specifically in relation to Aboriginal women it has been observed that:

Indigenous Australian women are 35 times more likely to experience domestic and family violence than non-Indigenous Australian women (Council of Australian Governments (COAG) 2010). They are also much more likely to suffer socio-economic deprivation. These two factors have convinced jurisdictions of the need to provide culturally appropriate initiatives to reduce the incidence of violent relationships and the incidence of homelessness attributed to domestic and family violence.¹⁶⁶

¹⁶³ UNHCR and UNHABITAT, *The Rights to Adequate Housing Report*, Fact Sheet No 21, 18.

¹⁶⁴ Department of Housing, *Rental Manual* (2013) 136.

¹⁶⁵ United Nations Office of the High Commissioner for Human Rights, *Women and the Rights to Adequate Housing* (2012) 65.

¹⁶⁶ Spinney A, *Home and Safe: Policy and practice innovations to prevent women and children who have experienced domestic and family violence from becoming homeless* (Australian Housing and Urban Research Institute, Final Report No 196, 2012) 51.

7.4 Age

Age is another ground where systemic discrimination may occur against tenants of public housing and it may manifest itself in the behaviour of young children or alternately against older tenants who have limited ability to exercise control over their tenancy (in particular, visitors to their tenancy).

In the case of the latter, this may be particularly relevant for Aboriginal tenants. These tenants in accordance with their cultural obligations may allow younger family members or young members of their community to visit or stay in their homes. In some cases, the tenant has not been able to take control over gatherings or other events at his or her tenancy because of their frailty which is due to advanced age. As discussed below, instances of loud and disruptive behaviour have resulted in such tenants receiving strikes under the DBMS

“The complaints made relate to anti social behaviour by people visiting [the tenant’s] accommodation. He is an elderly man with serious health issues and it is difficult for him to be in control of people who visit him.” – Advocate.

8. The Experiences of Department of Housing Tenants with the DBMS

This section of the report primarily focuses on the analysis of the complaints which are based on the DBMS and were filed in the Commission from June 2011 January 2013 . There is also reference to cases that have been brought to the Commission’s attention by advocates but not formalised as complaints. These are referenced accordingly.

8.1 The analysis of complaints linked to the DBMS

In the period June 2011 to January 2013, the Commission received 46 complaints from tenants of the Department which were based on the DBMS. Forty five of these complaints were from tenants who had received strikes and/or termination notices under the strategy. The remaining complaints referenced the DBMS; however, the tenant had not been formally issued with any strikes or notices under the strategy. The majority of the complainants had received

either a Notice to Terminate or had already been issued with an eviction order from the Magistrate's Court.

This section of the report provides a summary of the systemic issues that have been identified from an examination of the complaint files. The examination of the files considered three issues:

- the nature of the complaints made against the tenant;
- the process followed by the Department in investigating the complaint including the nature of the tenant's right of reply and whether the process followed was appropriate given the tenant's circumstances; and
- the consequences on the tenancy (eg, termination of tenancy)

Overview of files assessed

Of the 46 complaint files examined, 43 cited race as a ground for the complaint and 43 referred to some form of impairment. Forty four of the complainants identified themselves as being Aboriginal and/or Torres Strait Islander.

Of the 43 complaints that nominated impairment, seven were related to mental health issues. Eleven cases cited domestic violence as being the underlying issue which led to the issuing of strikes, yet only one complainant nominated sex as the ground of discrimination. Two of the complaints filed were from women who had become homeless as a result of their family with whom they were living being evicted under the DBMS.

Of the 46 files considered, 34 had been closed. Eight had been resolved through conciliation and, for the most part, these were cases where termination notices had not been issued. Four cases were withdrawn, two of these tragically due to the death of the complainant. Six complaints lapsed which is not unexpected when the complainant has become homeless. The remaining 14 were dismissed. In most of these cases there was no evidence of a direct link between the Department's decision to issue a strike and/or a termination of tenancy notice and the allegation of race and/or impairment discrimination.

However, in a number of the cases there were systemic issues identified that contributed to the circumstances giving rise to the situation that the tenant found him or herself in under the DBMS. The following is a summary of these systemic issues which were raised in a number of the case files under the categories of discrimination outlined in the previous section.

Race

Inference of racist based complaints

A number of the complainants indicated that they had been placed in neighbourhoods where they felt the neighbours demonstrated racist attitudes towards Aboriginal people and also showed a lack of understanding of Aboriginal culture. A couple of complainants alleged that complaints under the DBMS were filed by neighbours because they had a number of visitors during sorry time after a death.

This issue of racial slurs was at the core of many of the complaints. In one case a neighbour had allegedly been making racist comments towards the tenant and her husband, to the point that the tenant had requested and been approved for a transfer. However prior to being transferred, an exchange took place which led to a very explicit racial slur made by the neighbour and also an allegation that the neighbour physically pushed the tenant. The tenant retaliated with a punch to the neighbour's face and the incident was reported to the police. The tenant was charged and subsequently convicted but did not receive a custodial sentence. The Department then issued the tenant with a termination notice using the third category of the DBMS – dangerous behaviour.

The complaint was dismissed as misconceived by the Commission because there was not a direct causal link between the tenant's race and the Department's termination of the tenancy. However, it does not appear that the impact of racial abuse was investigated by the Department. The tenancy had been in place for over seven years and while the Department did allege other instances of reprimand there had never been a threat of pending eviction. The context of the incident and the potential provocation of racial abuse do not seem to have been taken into account. This issue was raised in the Commission's FAP report.

In another case, a complaint from a tenant expressed concern that persistent complaints from a neighbour were racially based and the tenant felt the Department only considered the neighbour's position and issued strikes accordingly. The first strike was on the basis of the behaviour of children of visitors to the tenancy property. In this case a subsequent strike was removed as it was conceded it had been incorrectly issued because the breach related to property standards and not disruptive behaviour. It is noted that in this particular incident the Department did initiate mediation with the neighbours when this strike was revoked. Since no further complaints from this tenant have been filed with the Commission, it may be surmised that the mediation was effective. This case was considered resolved.

Cultural Obligation

The other systemic issue arising under the category of race discrimination is that of cultural obligations to accommodate family. Many of the complaints received by the Commission refer to complaints made against them as a consequence of them having visitors. One case of note

arose from the tenant taking into care the children of her brother. Whilst it is not certain that these children were officially under a statutory care order, the tenant had taken responsibility for the children because a child protection order was at least imminent. The Aboriginal and Torres Strait Islander Child Placement Principle under s 12 of the *Children and Community Services Act 2004* (WA) (which must be adhered to by the Department for Child Protection and Family Support) provides that the placement of an Aboriginal or Torres Strait Islander child 'must, so far as is consistent with the child's best interests and is otherwise practicable, be in accordance with the following order of priority':

- (a) placement with a member of the child's family;
- (b) placement with a person who is an Aboriginal person or a Torres Strait Islander in the child's community in accordance with local customary practice;
- (c) placement with a person who is an Aboriginal person or a Torres Strait Islander;
- (d) placement with a person who is not an Aboriginal person or a Torres Strait Islander but who, in the opinion of the CEO, is sensitive to the needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, the child's family.

The tenant's brother attempted to visit his children in an intoxicated state and she refused him entry. She believed this was appropriate as part of her responsibility for caring for the children. The brother's behaviour was outside of the control of the tenant and she had not initiated the contact; however, it appears that no consideration of the context of the situation was made when strikes were issued.

Another tenant felt that a strike issued against her was particularly unfair because she had left her metropolitan property to attend a funeral in a regional area, which she considered she was culturally obliged to do. Whilst she was away, her son visited her house and had other people visit him which caused the disruption. She had no control over the situation and believes this was not taken account by the Department.

Overcrowding/Children

In a number of the complaint cases there were large numbers of people living in the public housing property at the time the strikes and/or termination notices were issued. In most of these cases, there were large numbers of children living in the premises. Some of the complaints against the tenants were based on the noise levels from within the house, but many were also about the behaviour of the children in the street.

In the majority of the complaints where children were part of the household, the number of children living in the household was well in excess of those in the ABS cited average households. The most significant issue in relation to children is the dire consequences of eviction. The Commissioner for Children and Young People has written to the Commissioner expressing her concern about the number of children she believed were now homeless as a result of the implementation of the DBMS. These were the exact concerns expressed in 2010

by the Commissioner in her submission to the Department. In one case examined for this report, a female tenant with six children and two grandchildren under her care was evicted and became homeless. In another case, a 24-year-old mother with three young children was forced to live on the streets after her own mother was evicted from her public housing property under the DBMS.

Impairment

Most of the complaints of impairment are on the basis that the Department did not reasonably take account of the tenant's impairment and the impact that eviction would have on that impairment. More specifically, in the matters where mental health was cited as the impairment, the complaints note that the behaviour of the tenant which has given rise to the neighbours' complaints is directly attributable to the impairment yet the tenant has limited control over these episodes.

In one case, a tenant who had a psychiatric illness would have his brother stay with him on occasions to provide care. The brother, however, was the basis of complaints because he was having fights with the tenant and also with the neighbours.

In another case the tenant stated that she felt that her impairment gave rise to her being marginalised within her tenancy:

I am feeling bullied (sic) by the other three tenants and they constantly make jokes and comments about me in a derogatory way. They are all older than me and they have made comments about my mental health condition - Borderline Personality Disorder and the many scars I have on my body when I am unable to control a manic episode.

Another complaint involved a woman with a depressive disorder who had had oral surgery and was on strong pain killing medication. This led her to 'wailing' on a particular night which caused a complaint to be made against her. She too cited feelings of being marginalised in her tenancy as a result of her mental health issues.

Gender

Whilst sex was only explicitly referred to once as a ground in the 46 complaints, 11 of the cases reported that there were issues of domestic violence as one of the core issues underpinning the disruptive behaviour. In all of these cases the complainants were women.

Typically, the circumstances involved the ex partner coming to the tenancy property and an argument occurring (most frequently late at night). In many cases the Department would take the tenant's confirmation of the incident as substantiating the allegation of disruptive behaviour and a strike would issue. In one case, a 32-year-old woman with five children in her care was issued with a strike after an incident where the father of her youngest child attempted to kill her

and she ran outside seeking assistance. A further strike was issued against this tenant when she was attending her grandmother's funeral and was therefore not present at the tenancy property at the time of the disruptive behaviour.

It is acknowledged, however, that the Department has mitigated this practice and there have been a number of cases where the strike was subsequently revoked. In a number of cases strikes have also been revoked after the tenant has applied for a violence restraining order against the ex partner.

Age

In one matter, an older Aboriginal tenant had befriended a younger Aboriginal man who she thought she could assist, so this includes an aspect of cultural obligation as well as age. The man, however, took advantage of the tenant's hospitality and would stay for extended periods and invite friends over for drinking sessions. Because she was an older woman she felt that she could not exert any control over the situation and neighbours subsequently filed complaints. The third strike was issued against the tenant in this case on the basis of a police report which resulted from the tenant ringing the police to remove the man from her house. This matter was ultimately settled prior to hearing.

In another case, a 66-year-old woman with health issues experienced repeated problems as a result of different people using her home as a 'drop-in-centre'. Some people would come to her property even when she wasn't home, sit on her veranda and drink alcohol. In one instance, the fact that police were called by the tenant was the basis for the issuing of a strike under the DBMS. Prior to her third strike notice being issued, the tenant had repeatedly requested a transfer because of the difficulty she experienced with other people's behaviour. However, the Department determined that eviction action would proceed.

8.2 Shelter WA community forums

As referred to earlier, Shelter WA has recently published a report on its community forums held in relation to the DBMS. Shelter WA held five forums in the metropolitan area in October and November 2012. The report is based on the feedback received during these forums as well as responses received by Shelter WA in a subsequent survey.¹⁶⁷ The following is a summary of the issues raised during the forums and the information has been collated from Shelter WA's report as well as notes taken by Commission staff who attended some of the forums.

¹⁶⁷ Shelter WA, *Disruptive Behaviour Management Strategy Community Forums*, Report (May 2013) 1.

Nature of Complaints

The most significant concerns expressed during the forums were the nature and number of complaints in the category of 'minor' which led to strikes being issued and, in some cases, eventually to a Notice of Termination. Examples referred to included noise and activities of children that advocates characterised as being little more than general play. In one case it was stated that a strike was issued when a child was crying during the night. In its report Shelter WA confirms that participants at the forums mentioned a number of cases where strikes were issued as a result of babies crying, loud music and children playing. It is further stated that the DBMS 'could be seen as counter-productive when applied to minor nuisances, particularly in the current housing market typified by very low vacancy rates (in both public and private rental housing), high demand and a public housing waiting system which is in crisis'.¹⁶⁸

Another issue raised was parties giving rise to strikes without details about noise levels, persistency and times were specified. A major concern in these instances is that police may have been called and the fact that police attended is both the basis and the substantiation of the complaint made to the Department. Comments from attendees at the forum included that police call-outs to late night parties would not, as a matter of course, be reported to a private property owner and hence a different standard is being applied to public housing tenants.¹⁶⁹

Process of contacting clients

Under the Department's stated process, if a strike has not previously been issued against a particular tenant, the complaint is to be handled by the designated Housing Services Officer (HSO). Complaints where a strike has previously been issued to the tenant are to be dealt with by the Disruptive Behaviour Management Unit. A concern expressed in some forums was that if there is not a good relationship between the tenant and the HSO there is the potential for an apprehension of bias where the HSO deals with the complaint. As Shelter WA explains 'the HSO knows the tenant, the history of the tenancy and possibly previous tenancies and may have prejudices which could unfairly impact on the decision whether or not to issue a strike'. However, it is highlighted that it is understood that from 1 July 2013 the Disruptive Behaviour Management Unit (which includes 35 new staff members) will be responsible for investigating all complaints under the strategy.¹⁷⁰

Advocates also noted cases where strikes had been issued but the tenant had not had any contact with the investigating officer. That is not to say that a letter had not been sent or a telephone call made, but the tenant had stated they had not been aware that they needed to respond to any allegation. The wording of the standard letters issued during the process was

¹⁶⁸ Ibid 4–5.

¹⁶⁹ See also ibid 4.

¹⁷⁰ Ibid 9.

also mentioned. For many tenants the wording of the letter, let alone whether the language was applicable to the tenant, meant that tenants were unclear about what they were required to do.

Process of investigation

Once contact has been made with the tenant in regard to a complaint under the DBMS, the process is for the tenant to acknowledge whether the incident leading to the complaint occurred or not. It appears from the feedback in the forums that an acknowledgement that an incident occurred is accepted by the Department as sufficient evidence to substantiate the complaint. It was also mentioned that in one case the tenant denied the incident but admitted a different incident and this led to a strike being issued. There was concern expressed that the Department does not actively seek an explanation for, or background in, relation to the incident before determining whether the complaint is substantiated. In addition, the fact that police attended, irrespective of the reason for police attendance or outcome of a police investigation, had been relied on as the sole basis for substantiating a complaint was mentioned. For example, as explained in the Shelter WA report, police may have attended a house in response to a complaint by a neighbour about noise levels but no action was taken because the police formed the view that the noise was not excessive.¹⁷¹ Shelter WA observed that forum participants (both service providers and tenants) were strongly of the view that the Department 'should be obligated to examine all mitigating factors which may have led to the alleged incident, before determining whether to issue a strike'.¹⁷² Furthermore, the public housing tenant may have instigated police attendance in order to remove a disruptive visitor or seek assistance and this should not be held against the tenant or discouraged.¹⁷³

Another issue raised by Shelter WA in its report is that there may be instances where neighbours contact the Department because of concern about a situation and where they do not necessarily intend making a formal complaint under the DBMS. In one case, a neighbour contacted the Department about children entering his property – his intention was simply to try to get the children to stop rather than wanting to lodge a formal complaint.¹⁷⁴ In another case, a neighbour contacted the Department to advise that the tenant was behaving 'erratically' and this was treated as a complaint rather than a notification that a public housing tenant required urgent support'.¹⁷⁵

¹⁷¹ Ibid 5.

¹⁷² Ibid 5.

¹⁷³ See further *ibid* 10.

¹⁷⁴ Ibid 7.

¹⁷⁵ Ibid 7.

Unsubstantiated complaints

This was a repeated issue raised at the Shelter forums by advocates. It is known that a number of complaints made against tenants have not been progressed as the Department decided that they were either vexatious or not substantiated. However, there is concern that the fact of and details about the complaint remain on the tenant's file and may be referred to or taken into account if subsequent complaints are made.

Information provided to tenants

While the stated policy of the Department is to advise tenants of their rights when issued with the letter to advise that a complaint has been received, or when they were issued with a strike and/or termination notice, advocates reported there were cases where this had not been done or the advice was given in such a manner that it was not appropriate for the tenant.

The principal concern raised in this area was that tenants were issued with a third strike and were told they were best placed to hand over their keys immediately rather than having to be evicted. This omission to inform the tenant of their right to contest the termination notice at the Magistrate's Court is a breach of natural justice. This is acknowledged as not being Departmental policy but adherence to process needs to be ensured in all cases.

Appeal rights

A major concern of advocates at the Shelter WA forum sessions (and which have been raised with the Commission independently) is the inability for tenants to appeal against the issuing of a strike under the Housing Appeals Mechanism. Advocates pointed out that it would be beneficial to both the tenant and the Department if contested strikes could be dealt with when they arise rather than having to wait to deal with all strikes before a Magistrate once an application for a termination order has been sought.

Examples of good practice

Throughout the sessions, a range of positive initiatives of the Department were reported which mainly involved the extended training given to HSOs about mental health issues and domestic violence. This is welcomed and will hopefully provide staff with improved understanding about the types of underlying circumstances that may give rise to complaints of disruptive behaviour.

It was also reported at one session that the Department had engaged with providers of Mental Health Care to ensure that where a tenancy was at risk given strikes arising from the tenant's behaviour and there was a diagnosed mental health issue, that appropriate care was being

provided. As noted above, the Department has entered into a Memorandum of Understanding with the Mental Health Commission in this regard.

Advocates also reported that in a few cases there had been the use of mediation by the Department and this had helped alleviate some neighborhood issues. There was a general agreement that such services could be used a lot more widely but would need to be done so in the early stages of conflict between tenants.

Unreported Disruptive Behaviour

At one forum an attendee who was a private rental owner stated he had experienced a high turnover of tenants in his property due to the behavior of the neighbours who were public housing tenants. His tenants had been reluctant to file complaints and he had attempted to take the matter up with the local office but felt he did not get a reasonable response.

Another attendee indicated he was a Department tenant and had had ongoing issues with another Departmental tenant. He had attempted to get other neighbours (who he knew were also adversely affected by the behaviour of this household) to complain, but they would not file a complaint for fear of retribution. The Shelter WA report notes that some tenants in these circumstances would simply move out of their homes.¹⁷⁶

¹⁷⁶ Ibid 6.

9. Recommendations

The Department's brochure on the DBMS states that the 'Government has introduced a Disruptive Behaviour Management Strategy to address public concern about disruptive behaviour in public housing'.¹⁷⁷ The purpose and focus of the strategy should not be addressing or responding to public concern as an end in itself, but instead the strategy should aim to reduce the incidence of disruptive behaviour among public housing tenants. As Shelter WA points out:

In reality, the strategy does not necessarily stop or address the unwelcome behaviour, but rather moves the problem elsewhere to impact on other tenancies and neighbourhoods.¹⁷⁸

The Commission strongly believes that the Western Australian Department of Housing should refocus its efforts on sustaining public housing tenancies by providing support for tenants who are vulnerable in order to enable them to maintain their tenancy, avoid homelessness and reduce the incidence of antisocial behaviour in the community. This is clearly in the interests of the whole community. Discussed below are the Commission's recommendations for reform to the DBMS. These recommendations are underpinned by the key principles outlined earlier in this report and the abovementioned conclusion that the aim of the DBMS should be to reduce antisocial behaviour overall. It is also noted that the Commission supports the recommendations of Shelter WA as contained in its recent report and these recommendations are referenced below where relevant.

9.1 *Adoption of a sustaining tenancies approach*

Shelter WA has recommended that the Disruptive Behaviour Management Unit should be 'focused on sustaining positive tenancies and problem solving conflict among neighbours including mediation services, linking with support agencies and considering transfers for intractable tensions between public housing tenants'.¹⁷⁹ The Commission agrees, based on its analysis of complaints received by tenants and the research conducted as part of this inquiry, that a sustaining tenancies approach whereby tenants are provided with support and eviction is considered the action of last resort is the best way forward. Specific recommendations in line with this approach are discussed below.

¹⁷⁷ Department of Housing WA Disruptive Behaviour Management Strategy Brochure accessed from http://www.dhw.wa.gov.au/HousingDocuments/DBM_brochure.pdf on 8 April 2013.

¹⁷⁸ Shelter WA, *Disruptive Behaviour Management Strategy Community Forums*, Report (May 2013) 3.

¹⁷⁹ Ibid 14.

Early intervention and identification of at risk tenancies

In order to support a sustaining tenancies approach it is recommended the Department should adopt, as part of a strategy to reduce disruptive behaviour, a system for the early identification of at risk tenancies and appropriate responses to reduce the risk of antisocial behaviour. It is acknowledged that the Department currently refers some clients to the Supported Housing Assistance Program but as noted earlier this program has limited spaces. Appropriate early identification and referral could be achieved by undertaking an appropriate risk assessment prior to a tenancy commencing or early on in the tenancy. As explained above, this approach has been used in Victoria – at risk tenants are identified and provided with appropriate support services before any complaints are made. It is clearly preferable to intervene early in terms of providing support than waiting until a vulnerable tenant is subject to a complaint under the DBMS.

Recommendation 1: Early intervention and identification of at risk tenancies

The Western Australian Department of Housing should develop a system for assessing public housing tenants as early as possible in the tenancy about their level of risk of engaging in antisocial behaviour and about their overall needs. Where that level of risk is considered significant, strategies should be put in place to ensure that the tenant and other members of the tenant's household are provided with appropriate supports to manage the risks and address needs. These measures should not be dependent upon the presence of any reported allegations of disruptive behaviour.

Coordination between government and non-government agencies to provide support to at risk tenancies

It is recognised that the Department of Housing itself has limited capacity to provide all of the necessary support services to public housing tenants who have complex and high needs and are at risk of engaging in antisocial behaviour. The memorandum of understanding entered into between the Department and the Mental Health Commission and mental health service providers is a welcome initiative to assist public housing tenants with mental health issues. Similar joint approaches between the Department and other government and non-government agencies should be considered to ensure that vulnerable public housing tenants are provided with appropriate supports at the earliest possible opportunity.

Recommendation 2: Coordination between government and non-government agencies to provide support to at risk tenancies

The Department of Housing should develop a joined-up approach to the provision of support services to public housing tenants who are identified as at risk of engaging in disruptive behaviour. Where relevant, the Department should enter into agreements with other government agencies and non-government agencies about such issues as funding, referral mechanism, eligibility criteria and the provision of support services.

A different approach to minor disruptive behaviour

Shelter WA advocates for the removal of the minor category of disruptive behaviour from the DBMS.¹⁸⁰ Instead of issuing a strike, it is recommended that verbal and written warnings and concrete referrals to support services should be made in relation to minor disruptive behaviour.¹⁸¹ The Commission agrees that minor complaints such as excessive noise or children playing should not immediately lead to the issuing of a strike under the strategy. Instead, warnings and/or the use of Acceptable Behaviour Agreements is the preferred option (coupled with appropriate support strategies as identified above). For example, a tenant could be requested to enter into an Acceptable Behaviour Agreement as a consequence of minor disruptive behaviour and failure to comply with the terms of agreement could then result in the possibility of a first strike being issued.

Currently, three substantiated incidents of minor disruptive behaviour in a 12-month period will result in eviction proceedings. Consideration should be given to a more flexible and moderate process for minor disruptive behaviour. For example, a first incident should only result in a warning (coupled with appropriate referrals including support services and mediation). A second incident within a 12-month period could result in a requirement to enter into an Acceptable Behaviour Agreement (again coupled with appropriate support). A further incident within the same 12-month period, and which constitutes a failure to comply with the Acceptable Behaviour Agreement, may then result in the issuing of first strike (but there should always be flexibility to take into account all of the mitigating circumstances). If such an approach is adopted, then the accumulation of three formal strikes could not occur until there have been at least five substantiated incidents of minor disruptive behaviour in a 12-month period with three of these occurring after support structures have been put in place. In this regard it is noted that the Northern Territory 'three-strikes' policy incorporates considerably more 'chances' in relation to disruptive behaviour than is currently the position in Western Australia.

¹⁸⁰ Shelter WA, *Disruptive Behaviour Management Strategy Community Forums*, Report (May 2013) 5.

¹⁸¹ *Ibid*, Recommendation 1.

Recommendation 3: More flexible approach to minor disruptive behaviour

The Department of Housing should reformulate its approach to minor disruptive behaviour¹⁸² under the DBMS by providing for more flexible options such as verbal and written warnings and Acceptable Behaviour Agreements. The approach to minor disruptive behaviour should ensure that a formal strike cannot be issued under the DBMS unless and until the public housing tenant has been provided with necessary support services and/or provided with an opportunity to participate in mediation.

Greater use of mediation

As noted earlier in this report the Department uses mediation to some extent but it is the Commission's understanding that mediation is only used when specifically requested by a tenant. Mediation should be more widely available and encouraged as a first step in the process for neighbourhood disputes and complaints about disruptive behaviour. Whenever possible, mediation should be conducted by independent agencies/persons in order to maximise its effectiveness. Additionally, if mediation is successful and no further disruptive behaviour is evidenced in a specified period formal strikes under the policy should not be issued.

Recommendation 4: Greater use of mediation.

The Department of Housing should establish a clear process for referring public housing tenants who are found to have engaged in disruptive behaviour to independent mediation and where such a tenant successfully participates in mediation (ie, attends mediation and does not engage in further incidents of disruptive behaviour within a specified period of time) he or she should not be liable to a strike being issued under the DBMS.

9.2 Improvements to processes

Improved information to tenants

It is understood that tenants are provided with a letter from the Department advising them that a complaint of disruptive behaviour has been made. The letter sets out the nature of the alleged incident and requests the tenant to contact the Department within seven days to provide an explanation. The letter also indicates that if it is found that the alleged incident occurred, action under the DBMS will be taken. While it is acknowledged that there are

¹⁸²

instances where the HSO also contacts the tenant by phone or in person to discuss the complaint it is recommended that the policy should explicitly require this. If a tenant is unable to read English properly or suffers from a significant impairment he or she may fail to understand the implications of the letter. Additionally, interpreters and/or support persons should be available to the tenant when the HSO or member of the Disruptive Behaviour Management Unit speaks to the tenant about the alleged incident.

Recommendation 5: Improved information to tenants

The Department of Housing's DBMS should expressly require a member of the Disruptive Behaviour Management Unit to contact the tenant in person to discuss the alleged incident and, further, that the tenant should be advised that he or she can request the presence of an interpreter and/or a support person during this interview/meeting.

Investigations to be carried out by Disruptive Behaviour Management Unit

The Commission notes the observation of Shelter WA that as from July 2013 the Disruptive Behaviour Management Unit will be responsible for investigating all complaints made under the DBMS. This development is welcomed. In order to reiterate the importance of maintaining independence and transparency in the investigation process, this approach is formally recommended.

Recommendation 6: Investigations to be carried out by the Disruptive Behaviour Management Unit

The Department of Housing should ensure that all investigations and decisions made under the DBMS are carried out by specialist and trained staff from the Disruptive Behaviour Management Unit.

Disruptive Behaviour Management Unit required to consider all mitigating factors before determining whether a strike is to be issued

While it is understood by the Commission that the mere fact of police attendance is no longer sufficient to substantiate a complaint under the strategy, it is vital that police attendance is not used against a tenant. In the absence of a full investigation about why police attended, who called the police and the outcome of the police attendance it is unfair to the tenant for police attendance to be used against the tenant in any way. This is especially relevant in cases where a public housing tenant needs police assistance (eg, domestic violence, threatening behaviour by a visitor to the tenancy property). Public housing tenants should be assured that they will not be disadvantaged because they have contacted police for assistance during an incident and must be encouraged to call the police when needed.

It is also highlighted that the mere admission by a tenant that an alleged incident occurred should not be sufficient to justify the substantiation of a complaint and the issuing of a strike or commencement of termination proceedings. A tenant may agree that an incident occurred; however, if the investigating officer does not actively seek to discover why the incident occurred and any relevant mitigating circumstances the tenant may be seriously disadvantaged.

The investigation of a complaint should be focused on considering why the behaviour occurred (if it is found that the behaviour did in fact occur). If it is determined that there are reasons for the disruptive behaviour (eg, mental illness, domestic violence, a background of racism) and strategies can be put in place to reduce the potential for further disruptive behaviour then formal action (eg, issuing a strike or commencing termination proceedings) should not be instituted.

Recommendation 7: Investigations under the DBMS to take into account all mitigating factors

The Department of Housing ensure that the processes used to investigate alleged disruptive behaviour under the DBMS require the investigating officer to consider not only whether the alleged behaviour took place but also any reasons for the behaviour including any mitigating circumstances. The decision-making process under the strategy in relation to whether a strike should be issued or termination proceedings commenced must have sufficient flexibility to enable all of the circumstances to be taken into account (including any remedial measures that can or have been put in place to reduce further incidents of disruptive behaviour).

Right to appeal

Shelter WA has recommended that the issuing of strikes under the strategy should be able to be appealed in the same way as another Department of Housing decision.¹⁸³ The Commission agrees that tenants should have the right to appeal a decision to issue a strike at the time or soon after that decision is made rather than having to wait until termination proceedings are commenced in the Magistrates Court and arguing that earlier strikes should not have been issued a long time after the event.

Recommendation 8: Right to appeal

A decision to issue a strike under the DBMS should be expressly covered under the Department's Housing Appeals Mechanism.

¹⁸³ Shelter WA, *Disruptive Behaviour Management Strategy Community Forums*, Report (May 2013) 14, Recommendation 6.

Unsubstantiated complaints not to be recorded on the tenant's file

As noted by Shelter WA, more than 90 percent of complaints made under the DBMS do not result in a strike being issued.¹⁸⁴ However, it is understood that the details of unsubstantiated complaints remain on the tenant's file. Given the high number of unsubstantiated complaints this is a significant concern. It is acknowledged that details of a complaint recorded on a tenant's file cannot subsequently be removed because of the requirements of the *State Records Act 2000* (WA). It is, therefore, recommended that the process for recording complaints made under the DBMS should be changed. There should be a separate recording process when a complaint is first made. Only when a complaint is substantiated should the details of that complaint and the actions taken in response to the complaint be formally recorded on the tenant's file.

Recommendation 9: Recording keeping in relation to unsubstantiated complaints

The Disruptive Behaviour Management Unit should develop a record keeping process in relation to complaints made under the DBMS that is separate from the tenant's public housing file. The details of a complaint should not be recorded on the tenant's file unless the complaint is substantiated. The record of an unsubstantiated complaint can be kept separately by the Disruptive Behaviour Management Unit.

Requirement for a direct link between antisocial behaviour and the tenancy

The Commissioner understands that in some instances strikes have been issued as a consequence of behaviour that is only vaguely connected to the tenancy (eg, 'hoon' driving by a visitor who has left the property). More generally, the fact that tenants face the possibility of eviction as a consequence of the behaviour of visitors who may not have been invited to the property and, in circumstances where the tenant is unable to effectively exercise any control over the visitor's behaviour, (eg, where the tenant is elderly or is the victim of domestic violence) is worrying. It is recommended that consideration be given to excluding disruptive behaviour that is caused by non-tenants in circumstances where the tenant could not be seen to have allowed, permitted, encouraged or contributed to the disruptive behaviour.

Recommendation 10: Requirement for a direct link between the disruptive behaviour and the tenancy

The DBMS should exclude disruptive behaviour caused by visitors to the tenancy unless it can be established that the tenant (or a member of their household) allowed, permitted, encouraged or contributed to the disruptive behaviour.

¹⁸⁴ Ibid 3.

9.3 Data Collection

It has been stated in Parliament that between April 2011 and 29 February 2012, 53 public housing tenancies have been terminated following a termination notice, court order or bailiff eviction.¹⁸⁵ However, the Minister for Housing was unable to provide data in relation to either the number of people subject to terminated tenancies or the number of children affected by these terminated tenancies. It was stated that the Department does not keep statistics about the number of people within each tenancy or the number of tenancies with or without children. It is vital that accurate data about the number and characteristics of people living in public housing tenancies is recorded so that the full impact of the DBMS can be monitored over time.

Recommendation 11: Data collection

The Department of Housing should collate accurate data in relation to the number of people living in each public housing tenancy and their characteristics including age, gender, cultural background, language, employment status and any known or disclosed impairment issues as well as accurate data in relation to the tenants and members of their households who are dealt with under the DBMS.

¹⁸⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 May 2012, 2993–2994 (Mr TR Buswell, Minister for Housing).

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