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Objectionable Behaviour by Neighbours: Amending the *Residential Tenancies Act 1994* (Qld) to Remove Problem Tenants

A person's objectionable behaviour can impact on their neighbours in a range of ways. For example, a neighbour may experience feelings of resentment, frustration, anxiety, stress, annoyance, loss of sleep or concern for their safety. In some instances, people react to the impact of their neighbour's ongoing objectionable behaviour with anti-social retaliatory behaviour or a violent confrontation. In other cases, the affected person spends a small fortune undertaking major renovations to their home to block their neighbours out. Some people who simply cannot tolerate the behaviour of their neighbours any further decide to sell their home or rent in a different location.

On 24 November 2004, Mr Peter Wellington MP tabled for public comment a copy of amendments to the Residential Tenancies Act 1994 (Qld) that he proposes to introduce in 2005. Essentially, the proposed amendments will allow a person to apply to the Smalls Claims Tribunal for the termination of a neighbouring tenancy on the grounds of the tenant's objectionable behaviour in circumstances where the landlord is unwilling to take similar action.

Renee Giskes

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Research Publications and Resources Section

Ms Karen Sampford, Director	(07) 3406 7116
Mrs Nicolee Dixon, Senior Parliamentary Research Officer	(07) 3406 7409
Ms Renee Giskes, Parliamentary Research Officer	(07) 3406 7241

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Inquiries should be addressed to:

Director, Research Publications & Resources

Queensland Parliamentary Library

Parliament House

George Street, Brisbane QLD 4000

Ms Karen Sampford. (Tel: 07 3406 7116)

Email: Karen.Sampford@parliament.qld.gov.au

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EXECUTIVE SUMMARY

For behaviour to be regarded as ‘objectionable’ by a majority of people, or by people without particular sensitivity to certain emissions such as noise or odour, the behaviour must go beyond that which is generally accepted to be ‘part and parcel’ of everyday life, or which is merely temporarily or occasionally annoying or irritating. In a neighbourhood context, caution is needed before a person’s behaviour is labelled as ‘objectionable’, as a middle ground needs to be drawn between those neighbours with particular sensitivity who are affected by the behaviour (in some cases, to the extent that they suffer anxiety, stress, frustration or loss of sleep), and those who are not disturbed by, or even aware of, its occurrence (**pages 2-3**).

A range of behaviour may be considered ‘objectionable’ by neighbours (**pages 3-4**) and may impact on those neighbours in different ways (**page 4**). More people are complaining about the behaviour of their neighbours (**page 5**) and there are a number of possible explanations for this increase (**pages 5-6**).

On 24 November 2004, Mr Peter Wellington MP tabled for public comment a copy of amendments to the *Residential Tenancies Act 1994* (Qld) (‘Act’) that he proposes to introduce in 2005. Essentially, the proposed amendments will allow a person to apply to the Smalls Claims Tribunal for the termination of a neighbouring tenancy on the grounds of the tenant’s objectionable behaviour in circumstances where the landlord is unwilling to take similar action (**pages 7-8**).

Currently, the Act allows only landlords to apply for the termination of a residential tenancy agreement due to a tenant’s objectionable behaviour (**pages 10-13**). People who are affected by the behaviour of their neighbours are also afforded some protection under Part 2A of the Environmental Protection Regulation 1998 (Qld) (**pages 14-17**), local laws of their relevant council (**pages 17-18**), private nuisance under the common law (**pages 19-20**) and various offences under the criminal law (**page 20**).

In South Australia, similar to the amendments that are proposed by Mr Wellington MP, provision is made for a person to apply for the termination of a residential tenancy agreement for neighbouring premises on the grounds of the tenant’s behaviour (**pages 22-27**).

In New South Wales, people do not have a right to apply for the termination of a neighbouring residential tenancy; however, recent amendments require some public housing tenants to enter into ‘acceptable behaviour agreements’ (**pages 27-32**).

Potential recourse for a neighbour in Victoria is limited to the possibility of an application for an order restraining any action by the tenant in breach of the tenancy agreement or the legislation. Leave is, however, required for such an application and will only be granted in limited circumstances (**page 32**).

In the remaining Australian jurisdictions, no provision is made for a neighbour to make an application for termination similar to that which is proposed in Queensland (**pages 32-35**).

1 INTRODUCTION

‘Objectionable behaviour’ is behaviour that a majority of people, or people without particular sensitivity to certain emissions such as noise or odour, would consider goes beyond that which is generally accepted to be ‘part and parcel’ of everyday life, or which is merely temporarily or occasionally annoying or irritating.

A person’s objectionable behaviour can impact on their neighbours in a range of ways. For example, a neighbour may experience feelings of resentment, frustration, anxiety, stress, annoyance, loss of sleep or concern for their safety. In some instances, people react to the impact of their neighbour’s ongoing objectionable behaviour with anti-social retaliatory behaviour or a violent confrontation. In other cases, the affected person spends a small fortune undertaking major renovations to their home to block their neighbours out. Some people who simply cannot tolerate the behaviour of their neighbours any further decide to sell their home or rent in a different location.

On 24 November 2004, Mr Peter Wellington MP, Independent Member for Nicklin, announced a proposal to introduce amendments to the *Residential Tenancies Act 1994* (Qld) (‘Act’) in 2005 to:¹

[G]ive people the power to take ... neighbours from hell to court for an order to terminate their tenancy agreement. The amendment would enable a person occupying ... premises near a tenant whose behaviour is considered to be objectionable to apply to the [Small Claims Tribunal] for a termination order because the tenant has harassed, intimidated or verbally abused [them]. This amendment will specifically apply to tenants in premises where the landlord is not prepared to take action to evict them because of their offensive or objectionable behaviour.

Currently, only the landlord of residential premises may apply to the Small Claims Tribunal for a termination of a tenancy agreement on the grounds of the tenant’s objectionable behaviour. A landlord also has other grounds for applying for a termination by the Tribunal, including, in serious cases, where the tenant has caused or is likely to cause injury to a neighbour, or in circumstances where the tenant’s behaviour amounts to a breach of the tenancy agreement.

Although most landlords are generally concerned about complaints from neighbours regarding a tenant’s objectionable behaviour, some may be less than willing to take action where the tenant is otherwise complying with the terms of

¹ Mr P Wellington MP, ‘Tenants: Termination of Leases’, *Queensland Parliamentary Debates*, 24 November 2004, p 3797.

their tenancy, particularly when rent is paid punctually and the premises are being adequately maintained.

Mr Wellington MP raised the proposed amendments in the context that:²

Many people suffering at the hands of an irresponsible neighbour find that their own hands are tied in resolving this issue either because the legal system does not provide a speedy method to resolve the dispute or simply because it is less stressful for them just to sell up and move elsewhere. People should not have to feel intimidated to the point that they are forced to leave their once safe and secure residence simply because no-one is able or willing to take action to remove a tenant who harasses, intimidates, abuses or threatens his neighbours.

2 OBJECTIONABLE BEHAVIOUR BY NEIGHBOURS

2.1 WHAT CONSTITUTES OBJECTIONABLE BEHAVIOUR

To some extent, a subjective assessment is involved by each person in deciding whether certain behaviour is ‘objectionable’. The reaction that particular behaviour invokes in a person often depends on a range of factors including their age, gender, culture or particular sensitivity to certain emissions such as noise or odour.

However, to be regarded as ‘objectionable’ on an objective basis (for example, by a majority of people, or by people without particular sensitivities), the behaviour must go beyond that which is generally accepted to be ‘part and parcel’ of everyday life, or which is merely temporarily or occasionally annoying or irritating.

In a neighbourhood context, caution is therefore needed before a person’s behaviour is labelled as ‘objectionable’, as a middle ground needs to be drawn between those neighbours with particular sensitivity who are affected by the behaviour (in some cases, to the extent that they suffer anxiety, stress, frustration or loss of sleep), and those who are not disturbed by, or even aware of, its occurrence.

For example, it was reported that a Brisbane resident’s sleep was affected by, and that he had suffered mood swings and high blood pressure from, the croaking of frogs in his neighbour’s pond. The impact on the resident was such that he had spent more than \$5,000 setting up a new bedroom and double-glazing his windows to reduce noise from the frogs. The neighbour responded to the situation by saying

² Mr P Wellington MP, ‘Tenants: Termination of Leases’.

that others who could hear the frogs had told him that they were not disturbed by the noise.³

In some cases, however, it will be easier to recognise the behaviour as ‘objectionable’, particularly where a number of neighbours are in agreement over the nature of the behaviour, where the behaviour violates certain minimum standards of conduct expected by the community, or where a person is subjected to harassment, intimidation or verbal abuse.

2.2 EXAMPLES OF OBJECTIONABLE BEHAVIOUR

Recent newspaper reports reveal the nature and extent of the complaints that are being made regarding nuisance neighbours, with one article claiming that “we are fast becoming a nation of inconsiderate neighbours [with] raging parties, drunken youths, barking dogs and noisy airconditioners ... raising the hackles of Queensland residents”.⁴

Examples of the more general complaints that are made about neighbours include:⁵

- noise from parties, airconditioners, swimming pool pumps, children and home renovations;
- the use of obscene language;
- smoke from wood-burning stoves and heaters;
- the poisoning of family pets;
- uncontrolled pets;
- using and selling drugs, or abusing alcohol or solvents;
- not maintaining yards and gardens;
- vandalism; and
- harassment, intimidation or verbal abuse.

³ Peter Morley, ‘Just hop it! Frogs wreck sleep’, *Sunday Mail*, 9 May 1999, p 11.

⁴ Jessica Lawrence, ‘30,000 complaints signals an end to suburban tolerance – whatever happened to considerate neighbours?’, *Sunday Mail*, 18 April 2004, p 22.

⁵ For example, see Ryan Heffernan, ‘Loathe thy neighbour’, *Courier Mail*, 17 January 2004, p 29; ‘We’re all mad as hell – authorities duck for cover under barrage of complaints’, *Sunday Mail*, 17 February 2002; Siobhain Ryan, ‘Pets and pests disturbing the peace’, *Courier Mail*, 20 October 2000; Simon Kearney, ‘Police act on street feud’, *Courier Mail*, 15 November 1999; Australian Housing and Urban Research Institute, ‘Developing Effective Housing Management Strategies to Address Problems of Anti-Social Behaviour’, *Positioning Paper*, July 2003, p 2.

Some more specific examples of neighbourhood complaints include:⁶

- neighbours who walk around naked in their backyards;
- a Brisbane family which was subjected to loud music, beer bottles being thrown into their yard, late night/early morning nuisance telephone calls, hysterical screaming, ‘mooning’, stones being thrown into their pool, eggs being thrown at their letterbox and cigarette butts being thrown over their fence;
- drunken neighbours arriving home at 3am, followed by three hours of screaming obscenities, loud banging with planks of wood and general drunken behaviour;
- throwing of broken glass into a pool and slashing the tyres of visitors; and
- having to hose away vomit on a footpath following a drunken rampage.

2.3 IMPACTS OF OBJECTIONABLE BEHAVIOUR

A person’s objectionable behaviour can impact on their neighbours in a range of ways.

At the lower end of the scale, a neighbour may experience feelings of resentment, frustration, anxiety, stress and annoyance. In other cases, the behaviour may affect a neighbour’s sleep or impact on their feeling of wellbeing. In more serious situations, a neighbour who is subjected to harassment, intimidation or abuse may fear for their safety.

In some instances, people react to the impact of their neighbour’s ongoing objectionable behaviour with anti-social retaliatory behaviour or a violent confrontation. Other people spend a small fortune undertaking major renovations or building large walls to block their neighbours out.⁷ Some people who simply cannot tolerate the behaviour of their neighbours any further may decide to sell their home or rent in a different location.

Neighbourhood disputes also contribute to the workload of councils and the police service, and constitute about 40% of the approximately 3,000 files handled each year by the Queensland Department of Justice’s dispute resolution mediation service.⁸

⁶ Jessica Lawrence, ‘30,000 complaints signals an end to suburban tolerance – whatever happened to considerate neighbours?’.

⁷ Ryan Heffernan, ‘Loathe thy neighbour’; Peter Morley, ‘Just hop it! Frogs wreck sleep’.

⁸ Ryan Heffernan, ‘Loathe thy neighbour’.

2.4 COMPLAINTS ABOUT OBJECTIONABLE BEHAVIOUR

2.4.1 More People Complaining about the Behaviour of their Neighbours

During 2002 and 2003, Brisbane City Council received almost 30,000 complaints from residents regarding their neighbours, with most concerning noisy and wandering animals, loud stereos, pool pumps and airconditioners. Other complaints related to residential construction work, with renovation noise reportedly “a big problem in the suburbs”.⁹

Over a 12 month period, it was reported that the Environmental Protection Agency received more than 13,000 noise-related complaints.¹⁰ A Brisbane-based noise management business stated that “business was booming”.¹¹

2.4.2 Possible Explanations for Increased Complaints

A factor that has been said to contribute to the high level of complaints about neighbours is that people are perhaps not as considerate towards their neighbours as they once were:¹²

Once upon a time, we were brought up to be considerate neighbours – but we have since become the ‘me generation’.

Other possible explanations include:

- decreased tolerance levels due to the pace of modern life;
- people not showing the same level of restraint as they once did; and
- an “age-old need to protect territory ... [which] ... has always been present [and a] civilisation ... based upon the protection and the acquisition of property and land”.¹³

⁹ Jessica Lawrence, ‘30,000 complaints signals an end to suburban tolerance – whatever happened to considerate neighbours?’.

¹⁰ ‘Backyard blitz – the noise assault on our homes’, *Sunday Mail*, 19 May 2002.

¹¹ ‘Backyard blitz – the noise assault on our homes’.

¹² Jessica Lawrence, ‘30,000 complaints signals an end to suburban tolerance – whatever happened to considerate neighbours?’.

¹³ Ryan Heffernan, ‘Loathe thy neighbour’.

Practical explanations for the level of complaints relate to such things as the recent trends towards larger houses and smaller lots sizes, open plan living, polished floorboards and poor sound insulation, particularly in new unit blocks.¹⁴

A District Court judge has stated that “people have to learn to live with each other”.¹⁵ With reports that some neighbours have hostile and violent reactions, or make multiple complaints to their council, often before approaching the person who is causing the problem, there have been calls for people to be better educated in conflict resolution rather than relying on councils or the police to resolve their neighbourhood disputes.¹⁶

Mediation programs are said to have a 90% success rate, with about 90% of those successful cases resulting in a permanent end to the dispute.¹⁷

In other instances, the objectionable behaviour and resulting complaints stem from deeper societal problems relating to mental illness, alcohol addiction, parental problems or economic stress.¹⁸

In terms of public housing, some commentators have suggested that problems with objectionable behaviour and the resulting neighbourhood disputes may be explained in terms of social exclusion and deprivation, unemployment, drug and alcohol dependency, mental illness, social fragmentation and a higher concentration of people with those problems than occurs in other sections of the community. The least well-off tend to reside in the least attractive accommodation, with little or no choice as to where they live.¹⁹

¹⁴ ‘Backyard blitz – the noise assault on our homes’; ‘We’re all mad as hell – authorities duck for cover under barrage of complaints’; Wayne Smith, ‘The urban squeeze’, *Courier Mail*, 27 October 2001, p 27.

¹⁵ Ryan Heffernan, ‘Loathe thy neighbour’.

¹⁶ Ryan Heffernan, ‘Loathe thy neighbour’.

¹⁷ Ryan Heffernan, ‘Loathe thy neighbour’.

¹⁸ Ryan Heffernan, ‘Loathe thy neighbour’.

¹⁹ See, for example, *Developing Effective Housing Management Strategies to Address Problems of Anti-Social Behaviour*, p 4.

3 PROPOSED AMENDMENTS

3.1 TEXT OF PROPOSED AMENDMENTS

On 24 November 2004, Mr Wellington MP tabled a copy of his proposed amendments to the Act for public comment.²⁰ The proposed amendments will apply to both public and private residential tenancies²¹ and involve:

- Inserting a **new section 189A**, as follows:

189A Application by person adversely affected by tenant's objectionable behaviour

A person occupying premises nearby may apply to a tribunal²² for a termination order because the tenant-

- (a) *has harassed, intimidated or verbally abused the applicant or other persons occupying, or allowed on, the applicant's premises; or*
 - (b) *is causing, or has caused, a serious nuisance to the applicant or other persons occupying, or allowed on, the applicant's premises.*
- Inserting a new subsection into section 212 (**new s 212(4)**) which requires a landlord to be given a reasonable opportunity to be heard on such an application and provides the tribunal with the ability to also make an order preventing the landlord frustrating the outcome of a termination order by subsequently entering into a new tenancy agreement with the same tenant in relation to the same premises. As amended, section 212 will provide as follows:

212 Objectionable behaviour

- (1) *If an application is made to a tribunal for a termination order because of objectionable behaviour, the tribunal may make the order if it is satisfied-*
 - (a) *the applicant has established the ground of the application; and*
 - (b) *the behaviour justifies terminating the agreement.*
- (2) *In deciding if the behaviour justifies terminating the agreement, the tribunal may have regard to-*

²⁰ Mr P Wellington MP, 'Tenants: Termination of Leases'; Queensland Legislative Assembly, 'A Bill to amend the *Residential Tenancies Act 1994*', Tabled Paper 2289 (Mr P Wellington MP), 24 November 2004.

²¹ *Residential Tenancies Act 1994* (Qld), ss 10, 15 and 16.

²² The application will be made to the Small Claims Tribunal (*Residential Tenancies Act 1994* (Qld), schedule 3 dictionary definition of 'tribunal').

- (a) *whether the behaviour was recurrent and, if it was recurrent, the frequency of the recurrences; and*
- (b) *for behaviour in the form of harassment, intimidation or verbal abuse – its seriousness.*
- (3) *Subsection (2) does not limit the issues to which the tribunal may have regard.*
- (4) *Where an application is made under section 189A-*
- (a) *the tribunal must not make the order unless the landlord has been given a reasonable opportunity to be heard in relation to the matter;*
- (b) *if the tribunal makes the order, it may also order that the landlord must not enter into a residential tenancy agreement with the tenant in relation to the same premises for a period determined by the tribunal, being a period not exceeding 12 months, and any agreement entered into in contravention of such an order is void.*

In line with other terminology currently in the Act, the proposed amendments also require a new subsection to be inserted into section 191 (**new s 191(3)**), such that an application made under the **new section 189A** will be called an “application made because of “objectionable behaviour””.

3.2 GENERAL COMMENTS ON PROPOSED AMENDMENTS

The proposed amendments allow for an additional termination process under the Act which is available in the case of a tenant’s objectionable behaviour and which is initiated by a neighbour of that tenant.

Obvious practical concerns arise in relation to any eviction process, particularly for persons with mental health issues or other serious social problems such as poverty, substance abuse, social dislocation and family relationship problems. A person who is evicted from one location is likely, without further intervention, to repeat the behaviour in a new location.

In addition, the proposed amendments raise a number of legal issues for consideration. These include:

- conflict with the notion that governments should not unduly interfere with private property rights - a landlord should be the only party able to apply for the termination of a residential tenancy agreement and, provided the landlord is otherwise satisfied with the tenant (for example, the tenant pays his or her rent punctually and looks after the property adequately), the continuation of the tenancy agreement should not be burdened by a neighbour who has a right to terminate the agreement; and
- allowing a person (a neighbour) who is not a party to the contractual arrangements to have rights to affect those arrangements, possibly against the wishes of both parties to the contract.

People are, at different times, affected by the objectionable behaviour of their neighbours, irrespective of whether the neighbours are homeowners or public or private tenants. The proposed amendments do not offer any relief to people who are affected by the behaviour of their home-owning neighbours. There is also the possibility that the amendments may be perceived as inferring that the behaviour of people who rent, rather than own, their home are more likely to engage in objectionable behaviour.²³

4 EXISTING PROTECTIONS FOR NEIGHBOURS

Currently, the Act allows a landlord of residential premises to apply to the Small Claims Tribunal for a termination of the tenancy agreement on the grounds of the objectionable behaviour of the tenant. The landlord may be prepared to make such an application either on his or her own volition or as a result of complaints from neighbours in surrounding premises.

In the event that a landlord is not prepared to make such an application, or where the person responsible for the behaviour is a homeowner, a person who is affected by the objectionable behaviour of a neighbour does not have a right, under existing legislation, to apply for the eviction or relocation of his or her neighbours. There are, however, a range of more general protections that are available to all people who are affected by the behaviour of their neighbours. These protections apply equally, irrespective of whether the person whose behaviour is complained about is a tenant or a homeowner, and include:

- provisions under Part 2A of the Environmental Protection Regulation 1998 (Qld), which concerns ‘environmental nuisances’ and is enforced by the Environmental Protection Agency;
- local laws of the relevant council;
- redress for ‘private nuisance’ under the common law; and
- various offences under the criminal law.

4.1 RESIDENTIAL TENANCIES ACT 1994 (QLD)

The Act governs the rental of most residential premises in Queensland (both public and private housing), with a notable exception being premises which are let for holiday purposes (s 21). The requirements of the Act also do not apply to boarders

²³ Similar comments were made in the distinction between public housing tenants and private housing tenants under recent amendments in New South Wales which require some public housing tenants to enter into ‘acceptable behaviour agreements’. For an example of these comments, see part 5.2.2 of this Research Brief.

or lodgers in the rental premises (only to tenants, persons given the right to occupy the premises under the tenancy agreement and any subtenants) (ss 9 and 22).

Provisions of the Act which are relevant to the issue of problem neighbours are discussed below.

4.1.1 Tenant's Use of Premises

Under the Act, a tenant must not:

- use the premises for an illegal purpose;
- cause a nuisance by the use of the premises; or
- interfere with the reasonable peace, comfort or privacy of a neighbour of the tenant (s 102).

The Act does not define what constitutes a “nuisance” or an “interference with the reasonable peace, comfort or privacy of a neighbour”. The standard terms of residential tenancy agreements (Residential Tenancies Regulation 1995 (Qld)), however, provide the following examples of what may constitute a nuisance:

- using paints or chemicals on the premises which go onto or cause odours on adjoining land;
- causing loud noises; or
- allowing large amounts of water to escape onto adjoining land.

In addition to the requirements of the Act stated above, the standard terms of a residential tenancy also provide that a tenant must not allow another person on the premises to interfere with the reasonable peace, comfort or privacy of a neighbour of the tenant.

4.1.2 Termination of Residential Tenancy Agreements

Chapter 4 of the Act provides for the termination of residential tenancy agreements in certain limited circumstances. In the circumstances where there are problems with the behaviour of a tenant, the residential tenancy agreement may terminate if the Small Claims Tribunal makes an order terminating the agreement (s 151(5)(a)).

Termination for Failure to Leave (Unremedied Breach) or for Repeated Breaches

If a tenant's behaviour breaches his or her obligations under the tenancy agreement, and the breach is not remedied, the landlord may give the tenant a 'notice to remedy breach' requiring the tenant to remedy the breach within an allowed timeframe (s 153).

This course of action may be the more appropriate path for a landlord to pursue where the tenant's behaviour is causing a nuisance or an interference which is not considered to be 'objectionable behaviour'.

If the tenant fails to comply with such a notice, the landlord may give the tenant a 'notice to leave' (s 155). Failure by the tenant to vacate as required provides the landlord with grounds to apply to the Small Claims Tribunal for a termination of the tenancy agreement (s 166).

Similarly, where a tenant breaches the same provision on two or more occasions, having previously remedied an earlier breach or breaches of the provision, the landlord may apply to the Tribunal for a termination order (s 171A). This is said to be an 'application made because of repeated breaches'.

Injury

In more serious cases, a landlord may apply to the Small Claims Tribunal for a termination order where a tenant has intentionally or recklessly caused, or is likely to intentionally or recklessly cause, injury to a person occupying, or visiting, premises nearby (s 169). This is said to be an 'application made because of injury'.

Further, if the landlord has made such an application, and believes on reasonable grounds that the tenant is likely to cause further injury for which a termination order could be sought, the landlord may also apply for an order restraining the tenant from causing the further injury (s 172).

What constitutes 'injury' for the purposes of such an application is not defined. It should also be noted that such applications may only be made by the landlord and not the person (such as a neighbour) who is the target of such injury.

Objectionable Behaviour

A landlord may apply to the Small Claims Tribunal for a termination order if the tenant:

- has harassed, intimidated or verbally abused a person occupying, or allowed on, premises nearby; or
- is causing, or has caused, a serious nuisance to persons occupying premises nearby (s 170).

This is said to be an 'application made because of objectionable behaviour'.

What constitutes a "serious nuisance" in this context is not defined.

In a separate chapter of the Act (Ch 7, which specifically addresses the causing of nuisance in caravan or manufactured home parks), the following examples are provided of a "serious nuisance":

- where a person *assaults* a resident or someone else;
- where a person *uses threatening or abusive language* towards a resident or someone else;
- where a person *behaves in a riotous, violent, disorderly, indecent, offensive or threatening way* towards a resident or someone else;
- where a person causes *substantial, unreasonable annoyance* to a resident or someone else;
- where a person causes *substantial, unreasonable disruption to the privacy* of a resident or someone else; or
- where a person *wilfully damages property* of a resident or someone else (s 278).

4.1.3 Making Termination Orders

There are certain matters that the Small Claims Tribunal must be satisfied of before it makes a termination order (Ch 4, Part 6).

Where an application has been made for a termination order in any of the instances above, the Tribunal may make the order if it is satisfied that the landlord has established the ground of the application (ss 209, 211, 212 and 213A).

Application because of Objectionable Behaviour

Where an application is made because of objectionable behaviour, the Tribunal must also be satisfied that the behaviour justifies terminating the agreement (s 212(1)(b)). In deciding whether this requirement is met, the matters that the Tribunal may have regard to include:

- whether the behaviour was recurrent and, if so, the frequency of the recurrences; and
- for behaviour in the form of harassment, intimidation or verbal abuse – its seriousness (ss 212(2) and (3)).

There is no guidance on the circumstances in which the Small Claims Tribunal may be satisfied that the behaviour “justifies” terminating the agreement; however, it is interesting to note the explanation of a similar provision which applies if the owner of a caravan or manufactured home park applies to the Tribunal for an order excluding a person from the park (Ch 7). In that case, the Tribunal may have regard to the following factors in deciding whether the person’s behaviour justifies their exclusion from the park:

- the *nature of the person’s behaviour*, including, in particular, whether the behaviour involved *violence* and, if so, the *degree of the violence*;

- whether the behaviour was *recurrent* and, if so, the *frequency of the recurrences*;
- the *number of persons adversely affected* by the behaviour, and *whether those persons have acted in a reasonable way*;
- the *time of day* the behaviour was engaged in; and
- whether any *nuisance directions* have been given to the person about their behaviour in the park and, if so, the *nature of the behaviour* for which the directions were given, *the number and type of directions given* and the *frequency of the directions* (s 284(3)).

Application because of Repeated Breaches

Where an application has been made because of repeated breaches, the Small Claims Tribunal must also be satisfied that the tenant committed each breach stated in the notices to remedy breach on which the application is based (s 213A(1)(b)).

In deciding the application, the Tribunal must also have regard to:

- the seriousness of each breach associated with the application, considering the extent of any inconvenience or financial or other disadvantage suffered by the applicant;
- the period for which the tenancy has been in place;
- the period in which the breaches were committed;
- for a fixed term agreement – the remaining period of the tenancy; and
- anything else the Tribunal considers relevant (s 213A(2)).

4.1.4 Public Housing Tenants

Public housing provides secure and affordable housing to low and moderate income individuals and families, with more than 50,000 households currently being assisted across Queensland.²⁴

As already mentioned, the obligations of public housing tenants are largely governed by the Act, as they are for tenants in the private rental market.

The Department of Housing's website specifies the following in relation to the obligations of public housing tenants and the occurrence of neighbourhood disputes:

²⁴ This information is obtained from the Public Rental Housing page of the Queensland Department of Housing website, http://www.housing.qld.gov.au/renting_a_home/dept_housing/applying_ph/overvw_public_housing.htm.

- Public housing tenants must ensure that they, and their household members, do not disturb the peace, comfort or privacy of their neighbours.
- Written complaints about public housing tenants will be accepted by the Department; however, unless it is required to do so under the Act, it is not normally departmental policy to actively intervene in disputes between neighbours.
- The Department is unable to act where a criminal offence is being committed, for example if a neighbour is being either physically or verbally harassed by another neighbour, and the Police Service must instead be contacted.
- The Department recommends that public housing tenants attempt to settle any disagreements or disputes with their neighbours before they become serious, or, if necessary, seek dispute resolution assistance through the Department of Justice and Attorney-General or report the matter to the police.
- Public housing tenants are responsible for the behaviour of other occupants and visitors by, for example, ensuring that they do not abuse or harass neighbours or create excessive noise.

4.2 ENVIRONMENTAL PROTECTION REGULATION 1998 (QLD)

Part 2A of the Environmental Protection Regulation 1998 (Qld) ('Regulation'):

- provides for abatement notices to be given in response to 'unlawful environmental nuisances';²⁵ and
- creates offences for specific types of noise of a minor nature (reg 6C).

Under the Regulation, noise may constitute either an unlawful environmental nuisance or an offence.

4.2.1 Noise Offences

The following are specified by the Regulation as noise offences:

²⁵ An 'unlawful environmental nuisance' is essentially an unreasonable interference caused by such things as noise, dust, odour, light, or an unhealthy, offensive or unsightly condition, that is not authorised under an emergency direction, a standard environmental condition of a code of environmental compliance, a condition of a development approval or an environmental protection policy, management program, protection order or authority (*Environmental Protection Act 1994* (Qld), s 15 and *Environmental Protection Regulation 1998* (Qld), reg 6F).

- building work which causes noise any time on a Sunday or public holiday, or before 6.30am or after 6.30pm on any other day;
- using a regulated device (a compressor, ducted vacuuming system, generator, grass-cutter, impacting tool, leaf-blower, mulcher, oxyacetylene burner, or an electrical, mechanical or pneumatic power tool like a chainsaw, drill, grinder, sander, welder or nail-gun) which causes noise on a Sunday or public holiday before 8am or after 7pm, or before 7am or after 7pm on any other day;
- operating a spa blower or pump for a swimming pool or spa which causes any noise before 7am or after 10pm on any day, or noise above prescribed limits at other times;
- operating airconditioning equipment which causes noise above prescribed limits at various times of the day;
- operating refrigeration equipment which causes noise above prescribed limits at various times of the day;
- noise at indoor venues (other than licensed premises, and premises which are used for musical, sporting or other entertainment, or for cultural or religious activities) and open-air events before 7am on any day, and above prescribed limits at other times;
- operating an amplifier device (a loudhailer, megaphone, public address system, remote telephone bell or telephone repeater bell) which causes noise on a Saturday, Sunday or public holiday before 8am or after 6pm, or before 7am or after 10pm on a business day, with prescribed noise limits within these times;
- using a power boat or jet ski in certain waterways which causes noise at a place for more than a continuous period of two minutes on a Saturday, Sunday or public holiday before 8am or after 6.30pm, or before 7am or after 7pm on a business day;
- using a power boat or jet ski for certain sports which causes noise at a place for more than a continuous period of two minutes above a prescribed limit; or
- operating a power boat or jet ski engine (for example, flushing the engine out) such that it causes noise on a Sunday or public holiday before 8am or after 6.30pm, or before 7am or after 7pm on any other day (Part 2A, Division 4).

Note that a noise offence will be taken not to have been committed if a local law of the relevant council provides or allows for:

- the noise to be made or caused to be made; or
- the carrying out of an activity in a way that makes the noise or causes it to be made (reg 6ZK).

4.2.2 Complaints

Proceedings for Noise Offences

For a proceeding to be commenced in relation to a noise offence, a complaint must first be made about the noise (reg 6ZL). The complaint must not be frivolous, vexatious or based on a mistaken belief (reg 6M).

Unlawful Environmental Nuisances

A person who believes an emission has caused, or is causing, an unlawful environmental nuisance may make a complaint (reg 6L). The 'emission' may be ash, dust, fumes, light, noise, odour or smoke (reg 6D).

Investigations

The Environmental Protection Agency ('EPA') and local governments share responsibility for investigating such complaints, and there is a duty to investigate a complaint unless it is frivolous, vexatious or based on mistaken belief (regs 6M, 6N and 6O). Typically, the relevant local government will investigate complaints relating to residential land, such as those between neighbours, involving domestic animals, noisy airconditioners and pool pumps.²⁶

An investigation may result in a finding that a noise offence has been committed or, if the nuisance does not relate to noise or if a noise offence has not been committed, a nuisance abatement notice being issued to the responsible person (reg 6P). The abatement notice may require the nuisance to be stopped or reduced to an acceptable level (reg 6U).

In deciding whether to issue an abatement notice, reference is made to 'general emission criteria' (for example, the characteristics or qualities of the emission, its amount and rate, whether it is continuous or fluctuating, the characteristics and qualities of the environment into which it is received, the impact on that environment and the views of each complainant) (regs 6Q and 6S). Certain criteria also apply in relation to the emission of noise (reg 6T). For example, in relation to domestic animal noise (including barking dogs), the following noise is considered excessive:

- noise that is made for more than a total of six minutes in any hour from 7am to 10pm; or

²⁶ Queensland. Environmental Protection Agency, *Queensland's Nuisance Laws*, Fact Sheet, January 2004.

- noise that is made for more than a total of three minutes in any 30 minute period after 10pm or before 7am (reg 6T(3)).

4.2.3 Annoyances not covered by the Regulation

It is important to note that the Regulation does not cover the following annoying activities of neighbours:

- noise from loud music, parties or burglar alarms (this is handled by the Police Service);
- domestic cooking odours; and
- noise from non-domestic animals.

4.3 LOCAL LAWS OF LOCAL GOVERNMENTS

The local laws of a council may cover some objectionable behaviour of neighbours. The areas most commonly covered relate to animal management, noise and smoke.

By way of example, the local laws of the Brisbane City Council are discussed below.

4.3.1 Animal Management

The Brisbane City Council's Animal 2003 Local Law and Subordinate Local Law regulate the keeping of animals. Examples of some particularly relevant provisions include that:

- a person must not keep an animal if, in the opinion of an authorised person, that animal causes a nuisance, exposes the health and safety of other persons and animals to significant risk or creates a reasonable apprehension in the minds of other persons of a significant risk to the health and safety of persons and animals (cl 32); and
- animal noise is a nuisance if it is made by a domestic animal and, in the opinion of an authorised person, it unreasonably disrupts or inhibits an activity ordinarily carried out on residential premises, it is made for more than a total of six minutes in any hour between 7am and 10pm or for more than a total of three minutes in any thirty minute period on any day after 10pm or before 3pm (cl 33).

4.3.2 Neighbourhood Nuisances

The Brisbane City Council will investigate complaints about environmental nuisances in residential areas that are caused by:

- dirt and dust (for example, from construction or clearing works);
- light or glare (such as flood lights or sensor lights, or reflective material used in building construction);
- odours (common examples are odours from compost or wheelie bins, or from garden fertiliser);
- smoke (such as from wood-fired heaters), ash (such as from a prohibited backyard burn of garden materials) or fumes (such as from certain fuel sources); and
- spray drift.

4.3.3 Noise

As mentioned in part 4.2.2 of this Research Brief, the Council will investigate complaints about noise in residential areas. Its website also contains suggestions on how to limit noise from various sources so as to avoid disturbing neighbours.²⁷

4.4 PRIVATE NUISANCE

‘Private nuisance’ is a concept under the common law which allows an unreasonable interference with the rights of a person to enjoy their land to be pursued as a civil action in the courts. Common examples include interferences due to water, odour, smoke, fumes, light, vibrations and noise.

It is not necessary for a neighbour’s health to be affected; it is sufficient that the neighbour’s enjoyment of their land is unreasonably interfered with. The law of nuisance does not, however, cover all interferences. A notable example, and one which causes significant contention in the community, is that there is no liability in nuisance if a person, even deliberately, blocks their neighbour’s view. The position at law is that no-one has a right to an uninterrupted view.²⁸

²⁷ http://www.brisbane.qld.gov.au/BCC:STANDARD:641238522;pc=PC_283.

²⁸ This position, and accompanying case law, is discussed, for example, in RP Balkin and JLR Davis, *Law of Torts (2nd Ed.)*, Butterworths, Australia, 1996, p 451.

4.4.1 Unreasonable Interference

A number of factors will determine whether a neighbour's behaviour amounts to an 'unreasonable interference'. These include:

- the conduct of the defendant (particularly if they are motivated by malice or spite);
- the duration of the interference and the extent and nature of the harm caused (actual physical harm, discomfort or personal annoyance, damage to property);
- whether the defendant's actions constitute no more than an ordinary use of their land (activities which are generally 'part and parcel' of everyday life should not be complained about);
- the locality where the behaviour occurs (for example, noise of a certain level at a property located on a main road may not be as substantial an interference as if it occurred in a quiet cul-de-sac); and
- the practicality or impracticality of preventing or avoiding the interference.

The conduct of the neighbour who brings an action in nuisance will also be examined. For example, it will be expected that the complainant took reasonable steps to mitigate the effects of any objectionable behaviour. Special provision is also not made for unusually sensitive complainants.

4.4.2 A Matter of Balance

The courts recognise the need to balance the right of a person to do what he or she likes on his or her own property with the right of his or her neighbour not to be interfered with. An often quoted explanation of this approach is as follows:²⁹

Now nearly all of us ... have to put up with a certain amount of annoyance from our neighbours. ... The question [on which liability depends] is whether the neighbour is using his property reasonably, having regard to the fact that he has a neighbour. The neighbour who is complaining must remember, too, that the other man can use his property in a reasonable way and there must be a measure of give and take, live and let live.

4.4.3 Injunctive Relief

The remedy for nuisance which is generally sought by a plaintiff is an injunction, particularly where it is likely that the nuisance will continue. An injunction

²⁹ The origin of this explanation is discussed in RP Balkin and JLR Davis, *Law of Torts* (2nd Ed.), Butterworths, Australia, 1996, p 455.

restrains the further conduct of the behaviour giving rise to the nuisance. Damages may also be recoverable.

4.4.4 Responsibility of Landlord

In circumstances where the tenant of a property causes a nuisance, the cases have held that the landlord does not have responsibility for any nuisance that is created by the tenant.³⁰ An exception would be where premises have been let for a purpose which is intended to cause a nuisance. It has been said that:³¹

Nothing less than at least a high degree of probability (“virtual certainty”) that the tenants would misbehave will suffice; nor will the landlord’s mere failure to intercede and terminate the tenancy after becoming aware of the nuisance.

4.5 CRIMINAL OFFENCES

Objectionable behaviour by neighbours may also constitute a range of criminal offences, such as assault, stalking, or threatening violence. In any of these instances, the matter should be reported to the Police Service.

5 OTHER AUSTRALIAN JURISDICTIONS

In the other Australian jurisdictions, similar to the position in Queensland, the rights and obligations of both public and private housing tenants are governed by the terms of their tenancy agreement and the applicable residential tenancies legislation.³²

By way of summary:

- In South Australia, provision is made for a person to apply for the termination of a residential tenancy agreement for neighbouring premises on the grounds of the tenant’s behaviour (this is available irrespective of whether the tenant is in public or private housing). The landlord of the premises has a right to be heard in the matter and, if the landlord objects to the making of the order, ‘exceptional circumstances’ must exist for the

³⁰ John Fleming, *The Law of Torts (9th Ed.)*, Law Book Company, Sydney, 1998, p 483.

³¹ Fleming, p 483.

³² *Residential Tenancies Act 1995 (SA); Residential Tenancies Act 1987 (NSW); Residential Tenancies Act 1997 (Vic); Residential Tenancies Act 1987 (WA); Residential Tenancy Act 1997 (Tas); Residential Tenancies Act 1999 (NT); Residential Tenancies Act 1997 (ACT).*

order to be made. There are further practical difficulties in the enforcement of such an order where the landlord did not support the application.

- In New South Wales, people do not have a right to apply for the termination of a neighbouring residential tenancy. Some public housing tenants may, however, be required to enter into 'acceptable behaviour agreements'. If a tenant fails or refuses to enter into such an agreement or, after entering into such an agreement, seriously or persistently breaches the terms of the agreement, the New South Wales Land and Housing Corporation may give notice of the termination of the tenancy agreement.
- In Victoria, potential recourse for a neighbour is limited to the possibility of an application for an order restraining any action by the tenant in breach of the tenancy agreement or the provisions of the legislation. Leave is required for such an application, and will be granted only in limited circumstances.
- In the remaining Australian jurisdictions, no provision is made for a person to apply for the termination of a neighbouring residential tenancy agreement on the grounds of the tenant's conduct.

5.1 SOUTH AUSTRALIA

5.1.1 Tenant's Conduct

It is a term of a residential tenancy agreement in South Australia that a tenant must not:

- use the premises, or cause or permit the premises to be used, for an illegal purpose;
- cause or permit a nuisance; or
- cause or permit an interference with the reasonable peace, comfort or privacy of another person who resides in the immediate vicinity of the premises (*Residential Tenancies Act 1995 (SA)*, s 71).

A tenant is also vicariously responsible for any acts or omissions of their visitors that would, had they been acts or omissions of the tenant, constitute a breach of the agreement (s 75).

5.1.2 Termination of Residential Tenancy Agreements

Similar to the current position in Queensland, the South Australian Residential Tenancies Tribunal may terminate a residential tenancy agreement on application by either the landlord or the tenant.

In line with the amendments by Mr Wellington MP, however, the Tribunal may also terminate such an agreement on application by an “interested person” in circumstances where the tenant’s conduct has been unacceptable.

Termination on Application by Landlord

On application by a landlord, the Residential Tenancies Tribunal may terminate a residential tenancy agreement and make an order for possession of the premises if it is satisfied that the tenant has breached the agreement and the breach is sufficiently serious to justify termination (s 87(1)).

Where the tenant or their visitor has intentionally or recklessly caused or permitted personal injury to a person in the vicinity of the premises (such as a neighbour), the Tribunal may, on application by the landlord, terminate the agreement and make an order for immediate possession of the premises (s 87(2)).

Termination of Application by an “Interested Person”

On application by an “interested person”, the Residential Tenancies Tribunal may terminate a residential tenancy agreement and make an order for possession of the premises if it is satisfied that the tenant has:

- used the premises, or caused or permitted the premises to be used, for an illegal purpose;
- caused or permitted a nuisance; or
- caused or permitted an interference with the reasonable peace, comfort or privacy of another person who resides in the immediate vicinity of the premises (s 90(1)).

Such an application may be made in relation to a tenant in either public or private housing.

“Interested person” is defined to mean either the landlord or a person who has been adversely affected by the conduct of the tenant (such as a neighbour or the landlord of a neighbour) (s 90(3)).

If the Tribunal terminates an agreement and makes such an order for possession, the Tribunal:

- must specify the day from which the order operates (which must be not later than 28 days after the day on which the orders are made); and
- may order that the landlord must not enter into an agreement with the same tenant in relation to the same premises for a period determined by the Tribunal (not exceeding three months). Any agreement entered into in contravention of such an order is void (s 90(2)).

Before any order is made, the landlord must be given a reasonable opportunity to be heard in relation to the matter. If the landlord objects to the making of such an order, the Tribunal must not make the order unless it is satisfied that exceptional circumstances exist justifying it to do so (s 90(2a)). What constitutes “exceptional circumstances” is not defined.

In a November 2002 discussion paper for the review of the *Residential Tenancies Act 1995* (SA), the question was put whether the Act should retain the mechanism for an interested party such as a neighbour to obtain an order terminating the tenancy agreement.³³

The Landlords Association of SA agreed with the mechanism and stated that:³⁴

...[B]ad tenants can affect third parties, but a landlord may be unwilling to take action if the tenant is paying the rent and not causing any damage to the property. In cases like this, the third party needs to have some option available to them.

5.1.3 Practical Considerations for a Neighbour Seeking Termination

Enforcement of Order

It is interesting to note that where the Residential Tenancies Tribunal has made an order for possession of premises, only the person in whose favour the order was made (i.e. the landlord) may advise the Tribunal of any non-compliance with the order in terms of seeking enforcement of the order (s 99).

That is, eviction under an order made by the Tribunal on application of an ‘interested person’ such as a neighbour is only enforceable by the landlord. Accordingly, even if an order is made by the Tribunal, the landlord can then decide whether or not to proceed with evicting the tenant, and the Tribunal cannot seek to enforce the order itself.

The end result is that a person who is affected by the unacceptable behaviour of a neighbouring tenant may be unsuccessful in ultimately having the tenant evicted, even if the Tribunal was satisfied that there were ‘exceptional circumstances’ justifying it making the order, in circumstances where the landlord did not support the application.

³³ South Australia. Tenancies Branch, Office of Consumer and Business Affairs, *Discussion Paper for the Review of the South Australian Residential Tenancies Act 1995*, November 2002, p 14.

³⁴ Landlords Association of SA, *Response to the Discussion Paper for Review of the South Australian Residential Tenancies Act 1995*, February 2003, p 6.

The discussion paper mentioned above also asked how the mechanism allowing an interested party such as a neighbour to apply to the Tribunal for termination of a tenancy agreement should be enforced.³⁵

The Landlords Association of SA responded that:³⁶

A third party should be able to apply to the Tribunal to have a bad tenant removed in the same way a landlord can. If, after a Hearing at which all parties are permitted to attend and present evidence, the Tribunal finds in favour of the third party and orders that the tenancy be terminated, then the Tribunal should enforce the order in the same way as it would if the landlord had requested the action. In effect the third party has the same rights as a landlord in having a tenancy terminated. Where the Tribunal terminates a tenancy agreement as a result of the unacceptable conduct of the tenant, the tenant will be deemed to have terminated the tenancy agreement and will be liable for costs associated with the landlord reletting the property... . An order made by the Tribunal should be binding on all parties and if the landlord does not take the appropriate action to enforce the order, the landlord should be penalised.

Neighbours must Represent Themselves at the Tribunal

A further consideration for persons seeking the termination of a neighbour's residential tenancy agreement is that they must represent themselves at hearings of the Residential Tenancies Tribunal.

In cases where an application is unlikely to be supported by the landlord, the practical effect, irrespective of the decision of the Tribunal, may be that the neighbour has to continue to reside next to the tenant. In these circumstances, the animosity between the parties is likely to escalate and some neighbours would, understandably, fear the consequences of the increased resentment.

The discussion paper on the *Residential Tenancies Act 1995* (SA) had raised a proposal allowing persons wishing to register a complaint regarding the unacceptable behaviour of a neighbouring tenant to use a "professional witness" to represent them at the Tribunal. It was said that some neighbours are discouraged from registering a complaint for fear of retribution. Professional witnesses (such as staff of the public housing authority) would take witness statements from the affected person and represent them at the Tribunal hearing.³⁷ The Landlords

³⁵ Discussion Paper for the Review of the South Australian Residential Tenancies Act 1995, p 14.

³⁶ Response to the Discussion Paper for Review of the South Australian Residential Tenancies Act 1995, p 6.

³⁷ Discussion Paper for the Review of the South Australian Residential Tenancies Act 1995, p 15.

Association of SA agreed with this proposal,³⁸ however the Act has not been amended to reflect this approach.

5.1.4 Guidance for Persons Seeking Eviction of a Neighbouring Tenant

The South Australian Office of Consumer and Business Affairs, which administers the *Residential Tenancies Act 1995* (SA), has issued a fact sheet containing guidance for people who are considering applying to the Residential Tenancies Tribunal for the eviction of a neighbouring tenant.³⁹

The fact sheet provides the following examples of the circumstances in which past applications have succeeded:

- substantial and unreasonable interference with the enjoyment of a neighbour's property by excessive noise or smell;
- threats, intimidation and offensive behaviour from the tenant toward near neighbours (similar behaviour to people who do not live within the immediate vicinity of the premises will not be relevant);
- assault;
- continual trespass onto neighbours' property, theft, vandalism and graffiti;
- excessive and unusual noise from stereos and late night visitors;
- noise and disturbance from domestic arguments; and
- street fighting and verbal abuse between tenants and their visitors which causes regular interference to the use of a neighbour's property.

The fact sheet also questions whether the person actually wishes to see their neighbour evicted, or whether what is really sought is a resolution of the differences between them.

To make an application, the person must live in "close physical proximity" to the tenant. In addition, the fact sheet makes the following points:

- in any community there must be a certain amount of 'give and take' between neighbours;
- the fact that a tenant is an "unpleasant neighbour", that their conduct is "strange" or does not comply with a person's tastes or standards is not, in itself, sufficient grounds for an order;

³⁸ Response to the Discussion Paper for Review of the South Australian Residential Tenancies Act 1995, p 7.

³⁹ South Australia. Office of Consumer and Business Affairs, 'Section 90 Applications', *fact sheet*.

- the Tribunal is not concerned with the ordinary noise that can arise when people live in close proximity. Noise will only be regarded as sufficient grounds for an order if it “materially interferes” with the ordinary comfort of neighbours according to reasonable standards. The noise must be “unusual or excessive” and the Tribunal will consider whether it is deliberate, ongoing or repetitive; and
- the fact that a neighbour finds certain noise or conduct annoying does not necessarily mean that it constitutes an unreasonable use of the premises warranting eviction of the tenant.

Neighbours who are considering seeking termination of a tenancy agreement by the Tribunal are advised that, under natural justice requirements, the tenant is entitled to be informed that the neighbour is seeking the order and will be provided with a copy of the application. The tenant will also be entitled to view any evidence that the neighbour provides to the Tribunal.

Neighbours are advised that they will be required to present sufficient material to the Tribunal to persuade it that an order should be made. The evidence must detail specific incidents and an order will not be made on the basis of suspicion or generalised statements.

5.2 NEW SOUTH WALES

5.2.1 Use of Premises by Tenant

It is a term of every residential tenancy agreement in New South Wales that the tenant must not:

- use the premises, or permit the premises to be used, for any illegal purpose;
- cause or permit a nuisance; or
- interfere, or cause or permit any interference, with the reasonable peace, comfort or privacy of any neighbour (*Residential Tenancies Act 1987* (NSW), s 23(1)).

A tenant is also vicariously responsible for any act or omission by any visitor that would have been a breach of the tenancy agreement if it had been an act or omission by the tenant (s 30).

5.2.2 Acceptable Behaviour Agreements

In 2004, the *Residential Tenancies Act 1987* (NSW) was amended⁴⁰ to introduce ‘acceptable behaviour agreements’ for public housing tenants (s 35A). These agreements do not extend to tenants in private housing.

The New South Wales Land and Housing Corporation (‘Corporation’) may request a public housing tenant to give a written undertaking (an ‘acceptable behaviour agreement’) not to engage in anti-social behaviour on any of the following:

- the premises to which the tenancy agreement relates; or
- any adjoining or adjacent property (including common property).

‘Anti-social behaviour’ is defined to include an emission of excessive noise, littering, dumping of cars, vandalism and defacing of property.

The operation of an acceptable behaviour agreement extends to the behaviour of any other person lawfully occupying the premises, such that if the other person engages in any anti-social behaviour specified in the agreement, the tenant is taken to have engaged in the behaviour and breached the agreement.

A tenant may be requested to enter into an acceptable behaviour agreement only if the Corporation is of the opinion that, based on either the tenant’s history with the Corporation, the tenant or a lawful occupier at the premises is likely to engage in anti-social behaviour.

Reasons for Introduction

The introduction of ‘acceptable behaviour agreements’ for some public housing tenants was explained on the following basis:⁴¹

At the most basic level, access to public housing carries an expectation that tenants will live in peace and harmony with their neighbours. The Department of Housing works with other agencies such as police and mental health teams to resolve neighbourhood disputes among public housing tenants. The effectiveness of their efforts is greatly reduced by antisocial behaviour.

The sort of behaviour we are concerned about includes dumping of cars, petty vandalism, graffiti, noise nuisance, throwing of firecrackers, rocks on the roof, and abuse. It also includes more serious criminal behaviour: assault and burglary. Antisocial behaviour does not include people going about their legitimate business.

⁴⁰ The amending legislation was the *Residential Tenancies Amendment (Public Housing) Act 2004* (NSW).

⁴¹ Hon A Megarrity MP, Residential Tenancies Amendment (Public Housing) Bill 2004 (NSW), Second Reading Speech, Legislative Assembly, *New South Wales Parliamentary Debates*, 3 June 2004, p 9640.

A child playing in the streets, or adults using power tools at the proper times is not of itself antisocial behaviour. The measures ... are not aimed at curtailing people's daily activities. Nor are we intending to persecute people who are already vulnerable. ...

However, there is a small number of individuals who, for various reasons, are unable to get along with their neighbours, and who are unwilling to accept responsibility for their behaviour and its impacts on the surrounding community... .

...

The proposed amendments and other strategies that the Government will be putting in place represent a measured response; one that imposes some responsibility on tenants but provides support and assistance to tenants who lapse into antisocial patterns of behaviour.

...

The power to evict based on a breach of an acceptable behaviour agreement ... will be used sparingly The emphasis is not on evicting tenants but rather on trying to change unacceptable behaviour, and the department will make every effort to assist with behavioural change.

Opposition to Acceptable Behaviour Agreements

The introduction of antisocial behaviour agreements for some public housing tenants has been criticised.

An example of such criticism is in the response of the Multicultural Disability Advocacy Association of NSW ('MDAA') to the proposal to introduce the agreements.⁴² The MDAA makes the point that it:

[I]s not aware of any research demonstrating that public housing tenants are any more antisocial than private rental tenants and private housing owners. In the absence of such research it is impossible to say whether public housing tenants are any more likely to be the 'neighbours from hell' than people who rent private housing or own their homes. In our view it is very unfair to make major changes to the residential tenancy law specifically directed at public housing tenants without any research information to warrant it.

...

In the absence of research demonstrating that public housing tenants behave worse than other householders ... we believe this proposal is grossly unjust and unfair. In a democratic society based on social justice principles it should not make any difference whether a person rents public or private housing in determining whether they should be evicted. The standards of behaviour for tenants and the sanctions for

⁴² Letter from Multicultural Disability Advocacy Association to the Hon C Scully MP, Minister for Housing, dated 7 June 2004 in relation to the 'proposals to reduce antisocial behaviour in public housing including changes to the Residential Tenancies Act 1987'.

breaching them should be the same, regardless of whether the landlord is a private citizen, a company or the state.

Similar Approach Considered but Not Adopted in South Australia

It is interesting to note that antisocial behaviour agreements were also raised as a possibility under the South Australian legislation, but were not adopted.

The discussion paper on the review of the *Residential Tenancies Act 1995* (SA) recognised that a tenant whose tenancy agreement was terminated on the grounds of unacceptable behaviour would then move somewhere else, simply shifting the problem to a new address and a new set of neighbours, rather than their unacceptable behaviour being addressed. The discussion paper asked whether:

- an ‘acceptable behaviour contract’ (being an additional term of the tenancy agreement outlining what behaviour is unacceptable and which, if broken, would result in termination of the agreement); or
- ‘tenure demotion’ (where a tenancy can change from a secure ongoing tenancy to a limited term conditional tenancy on account of unacceptable behaviour),

should be introduced.⁴³

The Landlords Association of SA rejected this proposal, stating:⁴⁴

It is extremely unlikely that bad tenants will become good tenants simply through the introduction of “Acceptable Behaviour Contracts” or the threat of “tenure demotion”. The Tenancies Branch, through the Tribunal, knows the identity of these bad tenants who are evicted from properties because of their unacceptable behaviour. When the tenant attempts to rent another property, the Tenancies Branch should have the power to insist on a “Good Behaviour Bond” over and above the security bond and the new landlord should be advised of the tenant’s poor record. The Good Behaviour Bond would be held by the Tenancies Branch and repaid to the tenant gradually over time (months not weeks) if their behaviour was acceptable.

⁴³ Discussion Paper for the Review of the South Australian Residential Tenancies Act 1995, p 15.

⁴⁴ Response to the Discussion Paper for Review of the South Australian Residential Tenancies Act 1995, pp 6-7.

5.2.3 Termination of Tenancy Agreements

Terminations in relation to Acceptable Behaviour Agreements

In addition to the usual circumstances in which a residential tenancy agreement may be terminated, the Corporation may also give notice of the termination of a public housing tenancy agreement if the tenant:

- has failed or refused to enter into an acceptable behaviour agreement as requested by the Corporation; or
- has seriously or persistently breached the terms of such an agreement (s 57A) – in this case, the onus is on the tenant to satisfy the Tribunal that he or she has not seriously or persistently breached the terms of the agreement (s 64(2A)).

Terminations of Public Housing Tenancies

Where an application has been made to the Tribunal for the termination of a public housing tenancy (other than in relation to an acceptable behaviour agreement), the Tribunal must, in addition to having regard to the circumstances of the tenant and the other circumstances of the case, consider the following matters to the extent that they are relevant:

- any serious adverse effects the tenancy has had on neighbouring residents or other persons;
- whether the breach of the agreement was a serious one and whether, given the behaviour or likely behaviour of the tenant, a failure to terminate the agreement would subject, or continue to subject, neighbouring residents or any persons or property to unacceptable risk;
- the landlord's responsibility to its other tenants;
- whether the tenant is or has been in breach of an order of the Tribunal; and
- the history of the tenancy (s 64(4)).

The position of the New South Wales Department of Housing is that eviction action will be taken only when all other reasonable options have been exhausted, unless the breach has been extremely serious. In most instances, therefore, the Department will make every attempt to ensure that the tenancy continues.⁴⁵

⁴⁵ New South Wales. Department of Housing, *Good Neighbour Policy*.

No Termination Rights for Neighbours

Similar to the current position in Queensland, no provision is made in the *Residential Tenancies Act 1987* (NSW) for a neighbour who is affected by the objectionable behaviour of a tenant to apply to the Tribunal for a termination order.

5.2.4 Other Initiatives

Acceptable behaviour agreements form part of a larger strategy of the New South Wales Department of Housing to tackle antisocial behaviour which impacts on neighbourhood relations. The strategy also includes initiatives such as:

- ‘renewable tenancies’, which allow tenancies to be reviewed and satisfactory tenants to be given long-term tenancies, while tenants causing problems will be given shorter tenancies;
- increased support for front-line departmental staff who are subjected to serious or persistent harassment, abuse or intimidation; and
- ‘specialist response teams’, consisting of human service agencies, to support tenants who have entered into acceptable behaviour agreements.

The Department has also released fact sheets with information on ‘being a good neighbour’; problems with harassment, noise, pets or nuisance and annoyance; and a ‘good neighbour’ policy.

5.3 VICTORIA

Under the *Residential Tenancies Act 1997* (Vic), tenants have a duty not to:

- use the premises, or permit their use, for any illegal purpose (s 59);
- use the premises, or permit their use, in any manner that causes a nuisance (s 60(1)); and
- use, or permit any visitors to use, the premises or any common areas, in any manner that causes an interference with the reasonable peace, comfort or privacy of any occupier of neighbouring premises (s 60(2)).

Potential recourse for a person who is affected by the objectionable behaviour of a neighbouring tenant is limited to the possibility of an application to the Victorian Civil and Administrative Tribunal for an order restraining any action by the tenant in breach of the tenancy agreement or the provisions of the *Residential Tenancies Act 1997* (Vic) (s 472(1)).

Leave of the Tribunal is required for such an application to be made, which will not be granted unless the Tribunal “is satisfied that the person has an interest and

personal involvement in the tenancy agreement ... that is sufficient to justify the granting of leave” (ss 452(5) and (7)).

5.4 REMAINING JURISDICTIONS

Public and private housing tenants in the remaining Australian jurisdictions have similar duties as those in the jurisdictions already mentioned not to use the premises for an illegal purpose or cause or permit a nuisance:

- Western Australia (*Residential Tenancies Act 1987* (WA), s 39);
- Tasmania (*Residential Tenancy Act 1997* (Tas), s 52);
- the Northern Territory (*Residential Tenancies Act 1999* (NT), s 54) – there is also a duty on tenants not to cause or permit ongoing or repeated interference with the reasonable peace or privacy of another person in the other person’s use of premises or land in their immediate vicinity; and
- the Australian Capital Territory (*Residential Tenancies Act 1997* (ACT), schedule 1, cl 70) – there is also a duty on tenants not to interfere, or permit interference, with the quiet enjoyment of the occupiers of nearby premises.⁴⁶

5.4.1 Western Australia

A person does not have grounds under the *Residential Tenancies Act 1987* (WA) to apply to the Magistrates Court⁴⁷ for a termination order in relation to a neighbouring tenant’s objectionable behaviour (Part V).

The *Residential Tenancies Act 1987* (WA) also does not provide a person with grounds to apply to the Magistrates Court for an order restraining a neighbouring tenant’s objectionable behaviour where this amounts to a breach of the tenancy agreement (s 15). The ability to do so is restricted to the landlord of the premises.

In terms of public tenancies, the Western Australian public housing authority (Homewest) states that:⁴⁸

⁴⁶ The *Residential Tenancies Act 1997* (ACT) was recently substantially amended by the *Residential Tenancies Amendment Act 2004* (ACT), the relevant provisions of which, for the purposes of this Research Brief, will commence not later than 8 March 2005. This Research Brief refers to the *Residential Tenancies Act 1997* (ACT) as amended by the *Residential Tenancies Amendment Act 2004* (ACT).

⁴⁷ From 1 May 2005, the Magistrates Court will be the forum in which termination orders will be made (*Courts Legislation Amendment and Repeal Act 2004* (WA)).

⁴⁸ Western Australia. Department of Housing and Works website, ‘Living in a Homewest home’.

Anti-social behaviour is regarded as a breach of tenancy and is treated very seriously by Homewest. Examples include fights and unruly behaviour, parties that get out of hand, playing very loud music, abusive language, entering neighbourhood properties without permission and interfering with other people's possessions.

5.4.2 Tasmania

Under the *Residential Tenancy Act 1997* (Tas), only a landlord may serve a notice on a tenant requiring the tenant to vacate the premises on the ground that the tenant has caused substantial nuisance at the premises (s 42(1)(g)). If the notice is not complied with, the landlord may apply to the Magistrates Court for an order for vacant possession (s 45). A similar right is not provided under the Act for a person who is affected by the objectionable behaviour of a neighbouring tenant.

Housing Tasmania has an 'eviction policy' for public housing tenants that provides as follows:⁴⁹

- eviction from public housing will only be considered as a final option where a serious breach has occurred;
- serious breaches include actual or threatened violence to others, severe damage to the home by the tenant or visitors, repeated and persistent failure to pay rent on a regular basis, causing extreme or repeated nuisance or annoyance to neighbours, or persistent failure to keep the property clean and tidy;
- in each case, when assessing how appropriate an eviction is, the circumstances of the breach will be taken into account, as will the health and well-being of the tenant's household, linkages to support services and the availability of alternative housing; and
- Housing Tasmania will encourage the tenant to remedy their breaches after eviction action has been commenced and, if at any time eviction becomes inappropriate, the action will be stayed or withdrawn.

5.4.3 Northern Territory

A court may terminate a residential tenancy agreement and make an order for possession of the premises only on the application of the landlord and only if it is satisfied that the tenant has:

⁴⁹ Tasmania. Department of Health & Human Services, Housing Tasmania, *Eviction Policy*, September 2000.

- used the premises, or caused or permitted the premises to be used, for an illegal purpose;
- repeatedly caused a nuisance on or from the premises or repeatedly permitted a nuisance to be caused on or from the premises; or
- repeatedly caused or repeatedly permitted an interference with the reasonable peace or privacy of another person who resides in the immediate vicinity of the premises (*Residential Tenancies Act 1999* (NT), s 100).

A similar application cannot be made by a person who is affected by the behaviour of a neighbouring tenant.

5.4.4 Australian Capital Territory

No provision is made under the *Residential Tenancies Act 1997* (ACT) for a person who is affected by the objectionable behaviour of a tenant to apply for a termination of the tenancy.

An application for termination may only be made by a landlord in circumstances where the tenant's behaviour amounts to a breach of the tenancy agreement and the landlord has served a notice to vacate the premises (s 48; schedule 1, cl 93).

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