



## Tenants' Union of NSW

### Public housing rebate fraud and the Housing Amendment (Tenant Fraud) Bill 2008

8 April 2008

The TU believes that it is important to ensure the integrity of the systems administered by the NSW Land and Housing Corporation (the corporate aspect of Housing NSW) for eligibility to public housing and public housing rental rebates.

We acknowledge that to ensure the integrity of its systems the Corporation has to be able to detect and deal with fraudulent applications and receipts of benefits. We submit that integrity also means that the Corporation's decisions about persons' eligibility and rebates must be subject to a strong system of review and appeal.

The Government has publicised a number of instances of rebate fraud in support of the Bill. These instances are, in the view of the TU and the Tenants Advice and Advocacy Services, extraordinary. In our experience, most cases pursued by the Corporation as cases of alleged 'fraud' are not nearly so spectacular or egregious.

Sometimes they are cases of persons of very limited means who have tried, dishonestly, to gain some small advantage. Sometimes they are persons who have made an honest mistake in their dealings with the Corporation, or whose circumstances simply do not fit well with the policies of the Corporation: for example, their income varies from week to week because of casual employment, or they have a boyfriend, girlfriend or ex-partner who stays some nights of the week. Sometimes it is the Corporation that has made a mistake.

The TU considers that the Bill does not represent a well-balanced approach to improving the integrity of the Corporation's systems. In particular, we consider that the Corporation should not be given the power to prosecute criminal offences; nor should the Corporation be able to recover debts by cancelling or varying rent rebates to which a tenant is otherwise eligible. We also consider that the terms of the amnesty contain a flaw that should be corrected.

A better-balanced approach would also establish, in legislation, a stronger system for reviews of decisions about eligibility and rental rebates, including determinative review by an appeals committee external to the Corporation.

This briefing paper comprises three sections: first, a brief review of rebate fraud and the TU's concerns about the Corporation's practices; secondly, a commentary on the provisions of the Bill; and thirdly, a brief outline of proposal for a stronger system for reviews and appeals of the Corporation's decisions.

## 1. About rebates and 'rebate fraud'

As well as providing rental housing, the Corporation also provides rental rebates to eligible public housing tenants. Rental rebates reduce the amount of rent payable from the market rent for the premises to an amount equivalent to (in most cases) to 25 per cent of the tenant's household income.

Rent rebates are credited to a tenant's rental account, not paid to the tenant. Rebates are, in effect, paid by the Corporation to itself, so are not a 'cost' to government in the usual sense of the word.

In the experience of the TU, where the Corporation considers that a tenant has received a rebate to which they are not entitled, the Corporation's usual practice is to cancel the rebate with retrospective effect, even if the tenant would have been entitled to some other amount of rebate. The Corporation then adjusts the rental account so that the tenant is immediately put into rent arrears, and commences proceedings for the termination of the tenancy through the Consumer, Trader and Tenancy Tribunal (CTTT).

At the same time the tenant can ask for the Corporation's decision to cancel the subsidy to be reviewed, first internally by the Corporation, and secondly externally by the Housing Appeals Committee (HAC). The HAC's findings are recommendations only: they are not binding on the Corporation.

The following are some recent cases involving alleged 'rebate fraud' that the Corporation has pursued through the Tribunal, and for which the Tribunal's determinations are publicly available. The TU considers that these cases show serious problems in the way the Corporation pursues allegations of rebate fraud and deals with tenants who seek review of the Corporation's decisions.

The first two cases raise questions about the Corporation's judgment as to what constitutes rebate fraud.

- *Department of Housing v Payne* [2004] NSWCTTT 443. In this case the Corporation alleged rebate fraud on the basis of two unauthorised additional occupants. One was the tenant's ex-partner. He did not live at the premises. He was a homeless drug addict who made the tenant's life a misery. He slept on the carport roof and in the garden; occasionally the tenant felt sorry for him and let him sleep on a lounge and use the bathroom. He died in the tenant's toilet. The second occupant was a foster child, a minor who did not contribute to the household income.

The Corporation cancelled the rebate retrospectively, immediately creating arrears of more than \$20 000, and applied to the CTTT to terminate the tenancy. The CTTT determined that it had to uphold the arrears, but declined to terminate the tenancy because of the circumstances of the case.

- *NSW Land and Housing Corporation v Bruce* [2005] NSWCTTT 300. In this case the alleged rebate fraud arose because of the tenant's ex-partner was an unauthorised additional occupant. The ex-partner was the father of the tenant's children and the perpetrator of long-term domestic violence against her. He lived on and off at the premises and oppressed the tenant to the extent that he directed the tenant's wages into his own accounts. Eventually she remarried and took control of her life again.

The Corporation cancelled the rebate retrospectively and applied to the CTTT to terminate the tenancy. The CTTT declined to terminate the tenancy because of the circumstances of the case.

The following two cases show some of the deficiencies of the Corporation's current approach to review of its decisions.

- *NSW Land and Housing Corporation v Gazal* [2005] NSWCTTT 821. In this case the Corporation cancelled the rent rebate and brought termination proceedings while the tenant's appeal of the cancellation to the HAC was still on foot. The Corporation declared to the Tribunal that it would not implement any recommendation by the HAC that was in the tenant's favour. The Tribunal terminated the tenancy.
- *NSW Land and Housing Corporation v Franklin* [2007] NSWCTTT 467. In this case, the Corporation cancelled the rent rebate and brought termination proceedings while the tenant's appeal to the HAC was still on foot. The tenant sought an adjournment of the proceedings pending the outcome of the appeal. The Tribunal granted the adjournment despite the 'strong objection' of the Corporation.

## **2. The provisions of the Bill**

The Bill would provide new investigative powers for the Corporation; a new offence; new penalties, including imprisonment; a new role for the Corporation in prosecuting offences; new powers for the recovery of monies that are determined to be debts, including through the cancellation or variation of rebates to which a person is otherwise entitled; and an amnesty.

The TU is most concerned with the last three of these provisions: that is, the proposed role in prosecutions; the recovery of monies through the cancellation of rebates; and the amnesty. Here we will consider each of these three provisions in turn.

### *The Corporation as prosecutor of offences*

The TU considers that it is not appropriate for the Corporation to be made a prosecutor of criminal offences, especially where those offences attract a penalty of imprisonment.

We are concerned that such a role would affect the way in which the Corporation conducts civil proceedings relating to alleged fraud, and that this would cause abuse and injustice. In particular, we are concerned that the Corporation would use the threat of criminal prosecution and imprisonment to force tenants to consent to unfair terminations or financial settlements. Furthermore, the Corporation has no experience as a prosecutor, and our experience of its conduct of civil proceedings relating to alleged rebate fraud does not leave us confident that it could conduct criminal prosecutions appropriately.

Consider, for example, what might have happened in the *Payne* or *Bruce* cases if the Corporation had also had the power to undertake criminal prosecutions. Instead of the tenant having her day in the Tribunal and the Tribunal hearing the circumstances of her case, the Corporation could have presented her with an offer: consent to termination on the Corporation's terms, or face criminal prosecution by the Corporation, including with the possibility of imprisonment.

### *Recovery of monies through cancellation of rebates*

The TU considers that this means of recovering monies would be neither fair nor effective. It would not be fair because it would allow the recovery of monies without consideration of the tenant's financial circumstances. When the courts make garnishee orders or orders for installment payments, they consider the debtor's financial circumstances. Instead, amounts recovered by cancellation of a rebate would depend on the market rent of the premises. It is not an effective means of recovery because persons who qualify for a rebate are of very limited means and cannot pay market rents for any period of time. The effect of the provision would not be to recover monies so much as to force tenants into rent arrears.

This could undermine the determinations properly made by the Tribunal. Again, consider how this provision might have been used had it been available in *Payne* or *Bruce*. After the Tribunal determined that, notwithstanding the debt created by the retrospective cancellation of the rebate, the circumstances of the case were such that the tenancy should not be terminated, the Corporation could have cancelled the tenant's rebate, knowing that she could not afford the market rent and that she would shortly accrue rent arrears and face termination on that ground.

### *The amnesty*

The TU supports an amnesty, but is concerned that the concept is undermined by the specific terms proposed. It appears that a person must satisfy a double requirement to qualify for the protection of the amnesty: making a notification before the prescribed date

(that is, 1 October) *and* making it before the Corporation commences an investigation (see cl 3(b) of the relevant part of schedule 3). It may not be clear to a person whether the second requirement can be satisfied, because it may not always be clear whether an investigation has commenced. This, we submit, would undermine the amnesty. For example, say a tenant gives information to the Corporation intending to avail themselves of the protection of the amnesty, only to be told that the Corporation was already looking into the tenant's affairs so the protection did not apply; the trust on which the amnesty depends generally would evaporate.

### **3. A stronger system for reviews of decisions**

The TU submits that a better system for review of decisions is required to balance the approach represented by the Bill and help ensure the integrity of the Corporation's systems for decision-making.

The TU considers that legislation should establish a regime of review according to the following principles:

- The processes, principles and criteria applied in the Corporation's decisions should be clear and publicly available
- The Corporation should provide to a tenant or applicant a full written account of the reasons for any decision made
- A tenant or applicant should be able to have a decision about them reviewed, on its merits, according to a clear structure of review (see below)
- Where, as a consequence of a decision, the Corporation instigates civil proceedings (for example, termination proceedings in the CTTT, or debt proceeding in a court), the Corporation should consent to the adjournment of the proceedings pending the determination of any reviews or appeals of its decision.

Legislation for this regime of review should not derogate from existing common law rights to judicial review of social housing decisions, nor from existing common law principles of procedural fairness.

The TU submits that the structure for review of decisions should comprise:

- a first, internal tier, being review by a Decisions Review Officer (that is, a senior officer of the Department who is outside the client service teams and who specialises in review of decisions);
- a second, external tier, being review by the HAC;
- a third, external tier, being the Appeals Panel of the Administrative Decisions Tribunal (ADT).

In relation to the HAC, the TU submits that its findings should be binding on the Corporation and, where a tenant or applicant is not satisfied with the finding by the HAC, they should be able to apply to the Appeals Panel of the ADT. If, on the other hand, the HAC is to continue to make recommendations only, it is even more important that there should be a third, external tier of review, being the Appeals Panel of the ADT. A further variation on this would be to make available this third tier of review where the Department has declined to follow a recommendation of the HAC.