

Use of Section 85 by Community Housing Providers under the Residential Tenancies Act 2010 (NSW)



What is this report about?

The NSW Registrar of Community Housing (the Registrar) conducted a campaign to identify if Tier 1 and Tier 2 community housing providers (CHPs) are using or have previously used section 85 to evict tenants on 'no cause' bases, and, if so, what this means for tenant outcomes more broadly within the community housing sector. This campaign was a result of the Registrar receiving a notification from a representative body relating to an apparent increase in the use of section 85 by CHPs to evict tenants.

The context of this research

In 2017, a number of concerns were raised with the Registrar that CHPs may be over utilising section 85 of the *Residential Tenancies Act 2010 (NSW)* (the RTA) to evict tenants on 'no-cause' grounds. Such action would run contrary to NSW Family and Community Services (FACS) policy, bring the scheme into disrepute, generate poor outcomes for tenants and be therefore non-compliant with CHP registration requirements.

The Registrar subsequently conducted a targeted campaign into the use of section 85 evictions and found no evidence of misuse of section 85 in terminating a tenancy. The section appears to be rarely used and is considered on a case-by-case basis by CHPs. The provision appears to be applied in line with NSW housing policy; in circumstances where all other avenues to sustain the tenancy have been exhausted. The Registrar has identified some areas of policy guidance and systems improvements necessary for the use of section 85 outlined further below.

Methodology used

The Registrar assesses the compliance performance of the larger (Tier 1 and 2) CHPs annually. The October 2017 – March 2018 assessment process was used by the Registrar to test the use of section 85 evictions. The Registrar used audits, interviews and documentary evidence collection to support enquiries.

Prior to the compliance round, CHPs were advised that the Registrar would be seeking further information and evidence about their use of section 85.

The Campaign findings

The campaign found that all 25 CHPs assessed are conforming to the NSW Community Housing Access Policy (2014), and do not routinely terminate tenancies under section 85.

Note: These findings are an interpretation of a sample of provider performance at a point in time.

More specific findings include:

- Almost a third of all CHPs assessed indicated they would not ever use (four CHPs) section 85 or had not used it (three CHPs) in 2016-17.
- A further two CHPs had no policy position on the use of section 85; on which the Registrar continues to engage the providers to rectify.
- A large proportion (44%) were found to use section 85 termination processes under head leasing or transitional housing arrangements, reporting this was the only mechanism available to move tenancies on under these arrangements; hence there is scope for policy adjustments to provide CHPs with tools that do not have the negative connotations of eviction when the results reflect a more positive outcome for the tenant.
- A quarter of CHPs assessed indicated a policy intent to use section 85 for fixed term lease tenants but were mindful of conforming to the NSW guidelines on its use.
- The Registrar further tested four CHPs with a higher reported usage of section 85, and in each case examined, all tenants had been rehoused, with the CHP finding alternative accommodation for those evicted.

Positive practices

Almost all of the Tier 1 and Tier 2 CHPs have an accessible policy and/or procedure on the use of section 85. The Registrar determined that some policies would benefit from clearer definition of the circumstances under which CHPs would use these provisions.

During the course of the enquiries by the Registrar, a Tier 1 CHP altered its processes to ensure that only the CEO in consultation with the Board could provide final approval in issuing a section 85 notice to a tenant.

Areas for improvement

The Registrar has identified some areas of policy guidance and system improvements necessary for the use of section 85. FACS and NSW Fair Trading may wish to consider advising on more appropriate avenues than section 85 for programs (like leasing and affordable housing) that need to move tenants on as use of the term 'evictions' does not emotively reflect the more positive tenant outcomes in such circumstances.

There are also implications for how CHPs report to the Registrar. Improvements could be made to reporting fields for example.

Further monitoring and review by the Registrar post transfer of public housing stock to the CHP sector, including engagement with peak bodies, would allow for comparative analysis and provide insights on whether or not the transfer program had any bearing on tenancy outcomes.

Improving communication with tenants was noted as an area for improvement and also better record keeping in terms of CHPs' support service providers issuing section 85 notices in the transitional housing setting.

FURTHER INFORMATION

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