

THE NEW TENANCY FRAMEWORK FOR REMOTE ABORIGINAL COMMUNITIES IN THE NORTHERN TERRITORY

by Nadia Rosenman and Alex Clunies-Ross

Few issues raise problems as complex as the inadequacy of housing for Aboriginal people who live in remote communities in the Northern Territory ('NT'). Chronic overcrowding, poor quality housing and geographical and cultural issues all contribute to the complexity of the situation. In this article we outline the recent history of Aboriginal community housing in the Top End, identifying some of the policy issues we have observed in delivering legal services across the region. There is a clear need for further discussion of an appropriate tenancy model for remote Aboriginal communities.

HISTORICAL CONTEXT OF REMOTE TENANCIES IN THE NT

The social housing system for Aboriginal people living in remote areas in the NT¹ is considerably different to that which operates in other parts of Australia. The arrangements and rules for occupancies and tenancies have been the subject of continual reform over the years. This has resulted in housing management approaches which have ranged from local arrangements using community based organisations, through to centralised control of housing by the NT and Commonwealth governments.²

From the late sixties until the Northern Territory Emergency Response ('NTER') in 2007, the Commonwealth Government generally funded local Indigenous Community Housing Organisations ('ICHOs') to deliver housing services in remote NT communities. ICHOs were responsible for housing management, including rent setting and collection, housing repairs and maintenance and dwelling allocations. In most communities ICHOs were run by or related to the relevant local government council.

In many communities a standard payment for housing, often referred to as a 'poll tax', was paid by residents direct to ICHOs. This was a standard fortnightly amount (eg \$40) paid by all adult residents regardless of the number of people living in a house. Very few tenants signed tenancy agreements and there was no explicit incorporation of tenancy law into renting arrangements. As such,

there was little clarity and consistency in the rights and responsibilities of tenants and landlords.

For most ICHOs, rental returns and government funding were an insufficient source of funds for housing management. Very few organisations were able to effectively carry out the necessary repairs and maintenance for properties, build new houses or undertake major renovations. ICHOs were therefore unable to develop housing stock in most communities to keep up with population growth.³

Responsibility for housing management is further complicated by questions concerning the actual ownership of buildings and dwellings within these communities. Many of Aboriginal communities in the NT sit on land granted to Aboriginal people under the *Aboriginal Land Rights Act (Northern Territory) Act 1976* (Cth). The titles to these areas of land are held by a land trust for the benefit of Indigenous traditional owners. Over time buildings and dwellings have been constructed on this land using a mixture of public, community and private funding. However individual titles for these properties do not exist and the buildings fall within the area of land, title to which is held by the land trust.⁴

The absence of certainty as to ownership has left communities vulnerable to involvement by the government in management of housing on their land. Were there to be a clearer understanding of the legal principles underpinning ownership of the buildings constructed on these land areas, residents and communities would be in a better position to understand and assert their rights.

In light of these issues, it is not surprising that residents are often confused about who owns the house in which they live, who is responsible for management of their housing, what they can expect from their landlord and what is expected of them.

RECENT CHANGES TO REMOTE HOUSING IN THE NT
Since the NTER, there have been significant changes to the administration of housing in remote communities in the NT.

CHANGES TO LOCAL GOVERNMENT ARRANGEMENTS

In 2008, a new system of 'super' shires, with responsibility for a number of communities across large geographical areas, was established in the NT.⁵ Before the reforms, most communities had local governance structures centred on a community council which had responsibility only for the community and surrounding outstations or homelands. These councils usually operated as ICHOs. Since 2008 responsibility for community matters (including housing) has been transferred from community councils to the new shires.

COMMONWEALTH LEASES AND THE STRATEGIC INDIGENOUS HOUSING AND INFRASTRUCTURE PROGRAM

Under the NTER legislation, in 2007 the Commonwealth acquired five year leases over 64 Aboriginal communities in the NT, along with the power to acquire additional leases. The purpose of these leases was said to be to facilitate implementation of the Government's program of reform, including changes to housing management.⁶ While the underlying title to the land is not affected by the leases and traditional owners still retain ownership of the land, the effect of the leases (according to the Commonwealth) is that the Commonwealth stepped into the place of the landlord for buildings. In most cases the existing arrangements for use have continued. However, the rent for the properties within the lease area now goes to the Commonwealth and any variations to the use of the land, including changes to existing tenancies (eg evictions or new allocations) require approval by a delegate of the Commonwealth. These NTER compulsory leases will expire in August 2012.⁷

The Strategic Indigenous Housing and Infrastructure Program ('SIHIP') was also introduced in 2007. SIHIP is a joint Commonwealth and NT Government initiative. Among other objectives, SIHIP aims to address overcrowding in remote NT communities and promote healthy living.⁸ SIHIP aims to deliver 750 new houses, 230 rebuilds and 2,500 refurbishments across 73 remote Indigenous communities in the NT. New houses are set to be built in 16 communities, with rebuilds and refurbishments to take place in the remaining 57 communities.⁹

Controversially, the Commonwealth has required secure tenure in the form of long term leases as a precondition to constructing new housing in the 16 identified communities.¹⁰ Many communities have negotiated long term leases with the Commonwealth to facilitate the work.

For example, the community of Nguiu in the Tiwi Islands has signed a 99 township year lease.¹¹

While the large scale investment in housing has been welcomed, it has become clear that the new and refurbished houses to be provided will not fully address the extent of overcrowding in remote communities. For example, in late 2010 the ABC reported on the expected results of the SIHIP project in Ngukurr, a community of 1300 people approximately 500 kilometres from Darwin:

It's been a year since the people of Ngukurr signed over their township to the government under a 40 year lease. In return, the government's committed to spend 30 million dollars at Ngukurr under the Strategic Indigenous Housing and Infrastructure Program - known as SIHIP. But that money is not going to greatly increase the total number of houses at Ngukurr, as the community had expected. That's because the contractors have now realised at least 39 existing houses are beyond repair and have to be demolished. So, after 53 new houses are built there will be a net gain of only eight extra bedrooms across the town.¹²

THE NEW REMOTE TENANCY FRAMEWORK

In 2008, the aforementioned changes culminated in the Australian and NT Governments announcing a new remote housing system in the NT. The NT's public housing authority, Territory Housing, now manages housing in remote communities.¹³ Where a five year NTER lease or a longer negotiated lease is in place, Territory Housing acts as an agent for the Commonwealth landlord. Repairs and maintenance services are routinely contracted out to the shires.¹⁴

Territory Housing has developed graded tenancy arrangements to deal with the varying quality of housing within and across communities. The arrangements are set out in the Department's *Remote Housing Policy*¹⁵ ('the Policy'). The Policy refers to three categories of housing in remote communities:

- Improved dwellings
- Legacy dwellings
- Remote public housing

The management approach for all three types of housing raises questions about residents' rights and what they can expect from their landlords. It is not clear what role NT tenancy legislation¹⁶ plays in the relationship between Territory Housing and tenants.

IMPROVISED DWELLINGS

Improvised dwellings such as humpies and sheds¹⁷ are

not considered to be public housing. Under the new remote housing system residents do not pay rent or any other occupancy charges to Territory Housing to reside in these dwellings. It is not clear if Territory Housing or any other government agency will take responsibility for repairs and maintenance.

LEGACY DWELLINGS

The Policy defines legacy dwellings as 'premises not deemed to be of an acceptable standard under the *Residential Tenancies Act*' (RTA).¹⁸ In practice, these are houses that have not been rebuilt or refurbished under the SIHIP program. The Policy says that occupants have an existing right to continue to occupy the dwellings unless they are deemed unsafe by Territory Housing.

Territory Housing has collected payments for these properties since taking over responsibility for housing in remote communities. The amounts generally correspond to the amount of rent paid under the prior 'poll tax' arrangements. Territory Housing characterises this payment as a 'maintenance levy', rather than rent. Payments for each house are capped, hopefully reducing rents in very overcrowded properties.

Residents of 'legacy dwellings' have not been required to sign tenancy agreements with Territory Housing. The Policy outlines some basic rights and responsibilities for residents and Territory Housing. Residents are required to keep premises 'clean and tidy' and 'to a reasonable standard'. Territory Housing is responsible for 'ensuring ongoing maintenance and support', however residents are held responsible for any damage deliberately caused by themselves or their guests. There is no mention of the provisions of the RTA and the issue of whether the RTA applies to these properties has not been tested before the Commissioner of Tenancies.

There is a strong argument that the arrangements for legacy dwellings would be considered tenancies under the RTA. The Act defines 'tenancy agreement' as 'an agreement under which a person grants to another person for valuable consideration a right (which may be, but need not be, an exclusive right) to occupy premises for the purpose of residency'.¹⁹

However, the RTA provides that it does not apply to 'agreements under which no rent is payable in return for the granting of a right to occupy premises'.²⁰ As such, Territory Housing could argue that because it characterises fortnightly payments as 'maintenance levies', no rent is payable for the premises and therefore the RTA doesn't

apply. This approach is borne out in the example below:

Case Study

Territory Housing had not provided transitional housing during a period of three to four weeks for a tenant whose house (a legacy dwelling) was being refurbished. The tenant was forced to camp in his brother's yard. During the period the tenant had continued to pay rent to Territory Housing, so he sought a refund for the period when Territory Housing had not provided accommodation. Territory Housing refused a refund, arguing that the tenant's payments were a Housing Maintenance Levy charge and as such should have been paid throughout the period his house was refurbished.

If the RTA does not apply, residents have very limited recourse if Territory Housing does not properly repair and maintain houses or otherwise disturbs a resident's enjoyment of the property. Territory Housing does have an appeals process: if aggrieved by a Territory Housing decision, residents can seek internal review. If they are still unsatisfied, decisions can be reviewed by the Territory Housing Appeals Board.²¹ However residents would not have access to the RTA's prescribed system of notices and the Commissioner of Tenancies, which offers a timely, certain and independent system of resolving tenancy disputes.

The application of the RTA to legacy dwellings could have negative implications for residents. Section 48 of the RTA requires a landlord to ensure that the premises are habitable, meet health and safety requirements and are reasonably clean when the tenant enters occupation. Section 86 gives the landlord the right to terminate a tenancy with two days notice if continued occupation of the premises is a threat to the health and safety of the tenant. It is arguable that the condition of many legacy dwellings would constitute a sufficient threat to enliven s 86, leading to a concern that people will be evicted from their homes.

REMOTE PUBLIC HOUSING

Remote Public Housing refers to new houses and those that have been renovated or rebuilt under the SIHIP program and are deemed to meet RTA requirements as to safety and habitability.²²

Tenants of remote public housing sign tenancy agreements with Territory Housing. These agreements refer to the RTA and incorporate Territory Housing's Remote Public

Housing Tenancy Rules.²³ These agreements and the rules associated with them are lengthy documents which are written in complicated English. In most communities in the NT, Aboriginal people speak English as a second or third language, with widely varying English literacy levels. Our lawyers spent time in many communities explaining the agreements in detail, including some of the more onerous (and arguably inappropriate) conditions that are described below. Of great concern is that these agreements impose obligations on tenants that go well beyond those imposed by the RTA and by most tenancy agreements.

For example:

- If tenants receive Centrelink benefits – they must pay their rent directly from their benefits (unlike other public housing tenants who have the option of paying in cash or by cheque);²⁴
- Tenants are not entitled to light a fire on or near the premises or ancillary property. This appears to take in fires used for cooking outside;²⁵
- Tenants must not allow any anti-social behaviour in or around the premises or ancillary property;²⁶
- Tenants are not allowed to keep unregistered or defective vehicles on their property, use the premises to make “substantial repairs” to vehicles, or keep any caravan on the premises without the landlord’s permission;²⁷
- Tenants are prohibited from bringing or allowing residents or visitors to bring toxic or inflammable items (such as petrol, diesel or oil) onto the premises. This would prevent tenants from storing spare cans of petrol, diesel or oil on the premises for use in vehicles or boats. Often communities do not have their own petrol station and storage of these items is necessary.²⁸

Arguably, these rules are being used to engender behavioural change by imposing conditions upon residents outside of the RTA framework. However, many of the rules undermine the idea of the right to quiet enjoyment and exclusive possession that are the legal hallmarks of a tenancy.²⁹ They also impose conditions that are impractical or in some cases impossible to fulfil.

For example, agreements provide for a maximum number of residents in each house. As noted above, even with additional housing provided through SIHIP, most communities are chronically overcrowded. In obeying the mandated maximums, tenants will be forced to turn people away who may have nowhere else to live. This is further complicated by cultural and family obligations in many Aboriginal communities.

Even where maximums are obeyed, a large number of people will be living in small houses. Overcrowding can lead to damage to property simply through overuse, as well as actual or apparent anti-social behaviour, which could be a breach of the tenancy agreement.³⁰ For the first time, those in communities will have their tenancies put at risk for damage or behaviour that may have more to do with overcrowding than any intentional wrongdoing or neglect by the tenant.

Unlike urban public housing tenants who are offered fixed term leases, tenants in remote houses are offered only periodic (monthly) tenancies with no security of tenure. The agreements contain a ‘no cause’ termination clause, which allows Territory Housing to terminate the agreement with 42 days notice. No explanation for the termination is required.³¹

ADMINISTRATIVE ARRANGEMENTS UNDER THE NEW SYSTEM

It has been our experience that the administrative arrangements for housing vary from community to community. Allocations of remote public housing dwellings are decided in consultation with a Housing Reference Group (‘HRG’). The process of application to, and review by, Territory Housing and the HRGs, appears to differ between communities and residents are often confused about how the system works. HRGs are to be made up of traditional owners and representatives from different family and cultural groups within a community. Members of HRGs are not paid for their time.

In many communities, there is no Territory Housing officer based in the community, and tenants and applicants are variously instructed to talk to Territory Housing over the phone, to await a Territory Housing visit, or to approach their local HRG. The varying administrative arrangements are of particular concern where people are trying to apply for housing or to provide notice to their landlord of repairs they require. There is a risk that applications or repair requests will be misplaced and not acted upon.

A number of NT legal services including the Northern Australian Justice Agency (‘NAAJA’), have been meeting with NT and Commonwealth government representatives to raise the inconsistencies between the Remote Public Housing Tenancy Rules and the RTA and our concerns as to the administration of remote public housing. We hope this forum will be productive.

CONCLUSION

It is clear that the overarching problem of chronic housing overcrowding in remote communities remains despite the recent significant investment by the Commonwealth and NT governments. Subject to our reservations outlined above, the more consistent approach to housing offered by Territory Housing, and the potential clarification of tenancy obligations in remote communities is welcomed. However, for the new remote housing system to have a chance at success, Territory Housing needs to ensure that its rules are realistic for remote tenants. Otherwise, tenants are being set up to fail. Territory Housing also needs to ensure that rules and conditions can be understood by residents, taking geographical, literacy and language difficulties into account in their administrative arrangements.

Remote tenants urgently need access to an independent legal assistance and advice service. Currently there is only one specialised tenancy service in the NT, based in Darwin. The service does not have the resources to undertake remote work. NAAJA is attempting to fill the gap in the Top End, but has limited capacity to do so within existing funding. At this stage, despite long running advocacy from NT legal services and the NT Law Society, neither the Commonwealth nor the NT governments have committed to fund a legal service to provide specialist tenancy advice and casework to remote tenants. This commitment is well overdue.

In this article we have attempted to provide a brief overview of the history and current context of remote tenancies in the NT, based on our observations while providing general legal services to remote communities. The question of what model of tenancy protection is most appropriate to remote communities is a complex one. We hope that this article will serve as a starting point for a much more detailed discussion.

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1 79 per cent of the Indigenous population in the NT live in remote areas; Australian Bureau of Statistics, 4713.0 - Population Characteristics, Aboriginal and Torres Strait Islander Australians (2006) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4713.0Chapter182006>>.

- 2 Commonwealth intervention in this area since the 1970s has contributed to the separate development of Commonwealth funded Indigenous community housing programs and jointly funded state run Indigenous public and Indigenous community housing programs. The program arrangements and service delivery practices that have resulted are generally characterized by duplication, inconsistency and confused accountability; Vivienne Milligan, Rhonda Phillips, Hazel Easthope, Paul Memmott 'Service directions and issues in social housing for Indigenous households in urban and regional areas' (Positioning Paper No 130, Australian Housing and Urban Research Institute, June 2010) 42.
- 3 See, eg, the 2004/05 Annual Report of the Indigenous Housing Authority of the Northern Territory (IHANT) which stated that IHANT supported approximately 6,000 houses in more than 700 recognised rural and remote communities in the Northern Territory. Referred to in K. Eringa, F. Spring, M. Anda, P. Memmott, S. Long, M. West 'Scoping the capacity of Indigenous Community Housing Organisations', (Final Report 125, Australian Housing and Urban Research Institute, December 2008) 29.
- 4 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss4, 5, 12 and 19.
- 5 See, eg, the Central Desert Shire covers an area of 282,093 square kilometres and has a population of approximately 4,591 people living within the shires boundaries. The region takes in the nine major communities of Atitjere (Harts Range), Engawala, Ti-Tree, Laramba, Yuelamu, Nyirripi, Willowra, Yuendumu, Lajamanu and numerous outstations; Central Desert Shire, *About the Shire* (2010) <<http://www.centraldesert.nt.gov.au/AbouttheShire/Overview/tabid/614/language/en-AU/Default.aspx>>.
- 6 See Australian Government, *Leases on Aboriginal Land in the Northern Territory*, <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/housing_land_reform/Pages/five_year_leased_aboriginal_land.aspx>.
- 7 *Northern Territory National Emergency Response Act 2007* (Cth) Part 4.
- 8 The Northern Territory has the highest rate of overcrowding in Australia; , John Fien, Esther Charlesworth, Gini Lee, David Morris, Doug Baker, Tammy Grice - 'Flexible guidelines for the design of remote Indigenous community Housing' (Positioning Paper No 98, Australian Housing and Urban Research Institute, June 2007) 28.
- 9 NT Government, *Strategic Indigenous Housing and Infrastructure Program* (SIHIP), <<http://www.housing.nt.gov.au/remotehousing/sihip>>.
- 10 This approach was agreed to by the relevant Governments as part of the COAG National Partnership Agreements on Remote Indigenous Housing and Indigenous Remote Service Delivery; Department of Families, Housing, Community Services and Indigenous Affairs, 'Closing the Gap in the Northern Territory' (Monitoring Report January to June 2010 - Part Two, Department of Families, Housing, Community Services and Indigenous Affairs 2010) 54.
- 11 This lease was granted under s 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). See also Australian Government, *Leases on Aboriginal Land in the Northern Territory*, <http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/housing_land_reform/Pages/five_year_leased_aboriginal_land.aspx>.
- 12 Australian Broadcasting Corporation, 'Remote Indigenous Housing', *Stateline NT*, 19 November 2010 (Anna Henderson).
- 13 In some locations, housing continues to be managed by local community housing organisations or the shire; however they act as agents for Territory Housing and manage houses according to Territory Housing guidelines.
- 14 NT Government, *Remote Housing NT* (2009). <<http://www.territoryhousing.nt.gov.au/remotehousing/publications2>>.

- 15 Available by request.
- 16 The *Residential Tenancies Act 1999* (NT) sets out rights and responsibilities of tenants and landlords as well as a dispute resolution mechanism through the Commissioner of Tenancies and the Local Court.
- 17 An 'improvised dwelling' is defined as; 'a structure used as a place of residence that does not meet the building requirements to be considered as a permanent dwelling, including caravans, tin sheds without internal walls, humpies, dongas, etc.' Australian Institute of Health and Welfare, 'Indigenous Housing Indicators 2007-08' (Indigenous Housing Series No 3, Australian Institute of Health and Welfare, 2009) 6.
- 18 *Residential Tenancies Act 1999* (NT).
- 19 *Residential Tenancies Act 1999* (NT) s 4.
- 20 *Residential Tenancies Act 1999* (NT) s 6(b).
- 21 NT Government, *Complaints and Appeals*, <http://www.territoryhousing.nt.gov.au/corporate/complaints_and_appeals>.
- 22 *Remote Public Housing Operational Policy* cl 13.
- 23 *Remote Public Housing Tenancy Rules*. Available by request.
- 24 *Remote Public Housing Tenancy Rules*, cl 4.
- 25 *Remote Public Housing Tenancy Rules*, cl 11.26.
- 26 *Remote Public Housing Tenancy Rules*, cl 11.32.
- 27 *Remote Public Housing Tenancy Rules*, cl 11.33.
- 28 *Remote Public Housing Tenancy Rules*, cl 11.25.
- 29 *Residential Tenancy Act 1999* (NT) s 65.
- 30 *Remote Public Housing Tenancy Rules*, cl 11.32.
- 31 *Remote Public Housing Tenancy Rules*, cl 21.4.

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