

**NEIGHBOURS BEHAVING BADLY:  
ANTI-SOCIAL BEHAVIOUR, PROPERTY RIGHTS AND EXCLUSION IN  
ENGLAND AND AUSTRALIA**

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If a person who owns their own home is grossly disruptive there is little that neighbours can do short of contacting Police or local councils about particular incidents. A person cannot be evicted from a home, which they own, for being disruptive.

In a rental situation the rules are different.<sup>1</sup>

I BETTER BEHAVIOUR THROUGH EVICTION?

In recent years the issue of anti-social behaviour has attracted considerable attention in England and, more recently, in the Australian States and Territories. Responsive strategies vary across the jurisdictions. However, one common thread among the diverse strands is the centrality of tenure-based responses. The media, policy makers and, ultimately, legislators have tended to identify anti-social behaviour primarily with social housing tenants.<sup>2</sup> Many responses have consequently been framed as responses to tenant default. This co-option of tenure to the service of social control is not entirely unprecedented. However, it emphasises the contingent and precarious aspects of tenancy at a time when more households are obliged to rent their homes and it inevitably raises questions of consistency for policymakers. For example, how (if at all) does it acknowledge the inter-relationship of eviction, homelessness and social exclusion and how does it relate to strategies in place for their reduction?

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<sup>1</sup> Statutory Authorities Review Committee, Parliament of South Australia, *35<sup>th</sup> Report Inquiry into the South Australian Housing Trust* (2003) [15].

<sup>2</sup> By which in England we mean local authorities and housing associations. In England approximately 20% of all housing is provided by social landlords (14% by local authorities, 6% by housing associations). There is a currently a process of quasi-privatisation, under which much local authority stock is being transferred to housing associations.

This paper describes the repertoires of response to anti-social behaviour in England and Australia and considers the exclusionary implications of an increasingly confiscatory legal regime for tenants of social housing. In doing so it draws on research by the authors<sup>3</sup> and suggests a confusion inherent in any attempt to control behaviour through property rights. It questions the likely success of such a response in the private rental market, where issues of antisocial behaviour are now anticipated. Finally, it challenges the construction of anti-social behaviour as a housing issue, suggesting that such a fundamental distortion inevitably results in a flawed response.

## II DEFINING THE PROBLEM

Several labels are applied currently to the behaviour in issue. They range from the relatively neutral phrase 'neighbour disputes' through the more accusatory 'neighbour nuisance' to the blame-freighted 'difficult and disruptive tenants'<sup>4</sup> and the comprehensive and condemnatory 'anti-social behaviour'.<sup>5</sup> This last is increasingly the term of choice for policy discussions in both England and Australia, which in consequence are coloured by its inherent judgement and its implicit indication of appropriate responses. However, it contributes little to assist in defining or identifying the 'offending' activity.

In practice, the scope of 'anti-social behaviour' remains somewhat uncertain. Much of the literature emanating from government departments in England has focused on what may be thought of as essentially criminal.<sup>6</sup> However, the 'criminality' may be more subjectively intuitive than technically sustainable. In any event, the phrase is clearly not limited to behaviour that amounts to a criminal offence. Many housing practitioners, for example, have preferred to look at a broader range of behaviour that can be described as 'behaviour that unreasonably interferes with other people's rights to the use and enjoyment of their home and community'.<sup>7</sup> In Australia a standard statutory formula requires that residential tenants do not 'cause or permit an interference with the reasonable peace, comfort or privacy of another person who resides in the immediate vicinity of the premises'.<sup>8</sup>

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<sup>3</sup> J Nixon, C Hunter and S Shayer, *The Use of Legal Remedies by Social Landlords to Deal with Neighbour Nuisance* (1999); C Hunter, J Nixon and S Shayer, *Neighbour Nuisance, Social Landlords and the Law* (2000); M Slatter and A Beer, *Housing Evictions in South Australia* (2003); A Beer et al, *Evictions and Housing Management* (2006) 73 *AHURI Research and Policy Bulletin*, <<http://www.ahuri.edu.au/publications/projects/p401927>>.

<sup>4</sup> Especially in South Australia: see for example the *Report of the Inquiry into the South Australian Housing Trust* which is primarily focussed on the Trust's management of 'difficult and disruptive tenants': Statutory Authorities Review Committee 2003, above n 1.

<sup>5</sup> P Papps, 'Anti-social Behaviour Strategies – Individualistic or Holistic?' (1998) 13 *Housing Studies* 639, 639-56; K Jacobs and K Arthurson, *Developing Effective Housing Management Strategies to Address Problems of Anti-social Behaviour* (AHURI Final Report) (2003).

<sup>6</sup> See eg Department of Environment, *Anti-social Behaviour on Council Estates: Consultation Paper on Probationary Tenancies* (1995).

<sup>7</sup> Chartered Institute of Housing, *Neighbour Nuisance – Ending the Nightmare* (1995).

<sup>8</sup> *Residential Tenancies Act 1995* (SA) s 71(1)(c).

Some of the difficulty of definition is clearly encapsulated by the South Australian Parliament's Statutory Authorities Review Committee. Its Report into the management of 'difficult and disruptive tenancies' by the State's public housing authority comments:

In any one case of disruption there may be a combination of disruptive behaviours. Each case of disruption has its own idiosyncrasies, but the common theme is that it involves an interference with the reasonable peace comfort and privacy of a neighbour.

The definition of disruption is to some extent subjective because it depends on the perceptions, standards and experience of each of the neighbours involved. In some cases the disruption may arise because of a lifestyle conflict, or because of different social standards. In many cases it may be about different levels of tolerance ...<sup>9</sup>

Perhaps over-optimistically, the Committee opines that differences in tolerance are 'only relevant at the margins'.

Rather than attempting a catch-all definition, Bannister and Scott<sup>10</sup> identified a spectrum of anti-social behaviour comprising three distinct but potentially inter-related phenomena: neighbour problems (eg disputes arising from nuisance), neighbourhood problems (eg rubbish in public places), and crime problems (eg housebreaking). These may be seen to have different spatial connotations: the first concerned with disruption to the space of the home from the immediately surrounding neighbours; the latter two with a much broader and less defined spatial area. Property law remedies have traditionally been concerned only with the first of these phenomena. Nevertheless, as Jacobs and Arthurson<sup>11</sup> comment in their study of Australian public housing management strategies:

the term 'anti-social behaviour' covers a spectrum of activities that adversely affect the social well-being of neighbourhoods even if the activities are not technically in breach of the law. In practice, this means that agencies such as housing authorities are expected to intervene in instances where tenants complain about the behaviour of their neighbours, incivilities in public spaces and all forms of criminal activity.

### III TRADITIONAL LEGAL RESPONSES

The traditional legal responses to activity within the broad and ill-defined ambit of 'anti-social behaviour' are diverse but restricted. The effectiveness of available civil actions is constrained by their history, whose legacy restricts their use to limited classes of plaintiff, and also circumscribes the type of activity they can challenge. Their origins lie in the protection of individual property rights and the courts have

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<sup>9</sup> Statutory Authorities Review Committee, above n 1, [57].

<sup>10</sup> J Bannister and S Scott, *The Feasibility of Assessing the Cost-effectiveness of Remedies to Deal with Anti-social Behaviour* (1997).

<sup>11</sup> Jacobs and Arthurson, above n 5, 8.

been reluctant to modify this. Their appeal is further compromised by the practical problems of litigation: cost, delay, uncertainty and enforcement.

The criminal law may be invoked if the behaviour constitutes a crime and a successful prosecution can be achieved. This response is not tenure specific: it is available irrespective of status (anyone can notify the police of criminal activity or, indeed, lay a complaint themselves) and crimes are not generally defined in terms of the alleged perpetrator's status as landowner, tenant or otherwise. However, despite the existence of offences as broadly drawn as the public order offences (for example, disorderly behaviour),<sup>12</sup> traditional criminal law does not encompass the whole field of anti-social behaviour: excessive noise, for example, could be hard to pursue. In addition, the extensive discretion of police and prosecutors, the practicalities of proof and the burdensome realities of launching a private prosecution erode considerably the availability of this response even where its use might be thought proportionate to the 'offending' behaviour. The development of the anti-social behaviour order ('ASBO') in England<sup>13</sup> may be seen as a criminal law response to the problem; although application for an order is a civil matter,<sup>14</sup> breach of it is criminal.

Private nuisance: the traditional civil response to 'neighbour' issues, this tort may be deployed to obtain an injunction and/or damages where persistent behaviour is shown to be an unreasonable interference with the plaintiff's rights to use and enjoy their land. However, private nuisance is shaped by highly restrictive requirements reflecting its role as a protector of property rights.

'A private nuisance is, in essence, an activity or a state of affairs existing on one part of land or premises which unduly interferes with the use or enjoyment of neighbouring land'.<sup>15</sup> The action may only be used by someone with an interest in land who suffers unreasonable interference with their use and enjoyment of that land. This effectively restricts its use to landowners (with or without a mortgage) and tenants (and possibly licensees with exclusive possession) but not their partners,<sup>16</sup> relatives, household members, boarders, lodgers or guests, even if they also occupy the property.<sup>17</sup> The position was summarised by Lord Goff of Chievely thus:

Since the tort of nuisance is a tort directed against the plaintiff's enjoyment of his rights over land, an action of private nuisance will usually be brought by the person

<sup>12</sup> *Summary Offences Act 1957* (SA) s 7.

<sup>13</sup> *Crime and Disorder Act 1998* (UK) s 1. It is noticeable that, although tenure neutral on its face, both local authorities (initially), and housing associations (by amendment in 2002) have the power to apply for an ASBO - thus giving landlords a power falling outside their landlord/tenant remit.

<sup>14</sup> *Clingham v Kensington & Chelsea RLBC* [2002] UKHL 39; [2003] 1 AC 787.

<sup>15</sup> A Arden and M Partington, *Housing Law* (1994) 848.

<sup>16</sup> *Oldham v Lawson (No 1)* [1976] VR 654.

<sup>17</sup> *Hunter v Canary Wharf* [1997] AC 655, overruling *Khorasandjian v Bush* [1993] QB 727 which had proposed a broadening of the tort's availability.

in actual possession of the land affected, either as the freeholder or tenant of the land in question, or even as a licensee with exclusive possession of the land.<sup>18</sup>

In considering whether there should be a departure from this established rule he dismissed the notion adopted in the Court of Appeal that there is a sufficient link with the land to sue in nuisance by anyone who occupied the premises 'as a home'.

Further limitations also stem from the requirements that the nuisance has to interfere with the claimant's 'rights in land' and emanate from land occupied by the defendants. Where the anti-social behaviour concerns conduct carried out in the street, there will be no remedy. *Hussain v Lancaster CC*<sup>19</sup> illustrates all the difficulties which might be expected in such an action. The Hussains were subject to an undeniable barrage of racially motivated anti-social behaviour. They were owner-occupiers of a corner shop on an estate primarily of local authority tenants. They launched an action against the local authority for failure by the authority to take legal action against the alleged perpetrators. One of the major issues in the case was whether the authority could be liable for the nuisance of their tenants. This in turn depended on whether the tenants had in fact committed a nuisance. Hirst LJ concluded:

[t]he acts complained of unquestionably interfered persistently and intolerably with the plaintiffs' enjoyment of the plaintiffs' land, but they did not involve the tenants' use of the tenants' land and therefore fell outside the scope of the tort.<sup>20</sup>

A distinction was drawn with situations where the term 'nuisance' was not being used in this technical tortious sense.

*Trespass*: Trespass<sup>21</sup> to land can be used to obtain an injunction and/or damages where unauthorised intrusions are made directly onto land, for example by entering the property, or by throwing or dumping items on it. The action can be used by an occupier who has exclusive possession of the land. Although focused on the fact of exclusive possession rather than the technicality of title, this requirement substantially restricts the action to landowners or tenants.<sup>22</sup> Where a tenancy exists, the tenant alone has exclusive occupation: the landlord cannot sue in trespass during the lease.

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<sup>18</sup> [1997] AC 655.

<sup>19</sup> (1998) 31 HLR 164.

<sup>20</sup> (1998) 31 HLR 164.

<sup>21</sup> The trespass to the person actions of assault and battery can be used if someone suffers direct and unauthorised contact with their person (battery: for example being hit, being spat upon) or is made apprehensive of an imminent battery (threats, verbal or physical). While these actions could in principle be relevant, the realities of litigation (including cost, delay, technicality, proof) make their use highly unlikely in anti-social behaviour situations, especially if alternative avenues of relief exist.

<sup>22</sup> Occasionally other parties may enjoy exclusive possession and be entitled to bring a trespass action but such cases are exceptional: *Concrete Constructions (NSW) Ltd v Builders Labourers' Federation* (1998) 83 ALR 385.

*Lease covenants:* no covenant regarding the behaviour of the tenant was implied into residential leases at common law, although a covenant to keep and deliver the premises in repair was one of the 'usual covenants', implied if not otherwise expressly addressed. Where a written lease was provided, an express provision forbidding the use of the premises for 'illegal or immoral' purposes was normally included and, in Australia at least, standard form tenancy agreements included a clause prohibiting the tenant from causing a 'nuisance'.<sup>23</sup> Breach of covenant raised the risk to the tenant of forfeiture and possibly eviction. Only the landlord had the legal status to enforce such covenants against the tenant. However, even the inevitable obligation on the landlord to ensure quiet enjoyment to each tenant did not translate into a duty to enforce the lease covenants against a tenant whose breach caused 'nuisance' or annoyance to another tenant of the same landlord.<sup>24</sup>

*Public tenancies:* In England, social housing tenancies first became subject to statutory control in 1980<sup>25</sup> and, while the regimes for local authorities and housing associations diverged in 1988,<sup>26</sup> both grant tenants security of tenure, subject to eviction on grounds which, as originally enacted, included for eviction for behaviour which was a 'nuisance or annoyance to neighbours'. In Australia, State Housing Authority tenancies have been increasingly included within the residential tenancy legislation, albeit with distinctive regimes or subject only to a part of the entire Act.<sup>27</sup>

*Strata titles:* Australian owners of strata-titled property, although landowners, are nevertheless subject to some regulation of their behaviour through the operation of statutorily-prescribed rules and by-laws. These are binding on unit holders and on occupiers who are also obliged to ensure that customers, clients and visitors also observe their requirements. Although the details vary between jurisdictions, the by-laws 'essentially impose obligations of good neighbourliness'<sup>28</sup> on those living in the close proximity characteristic of strata titled developments. Specific matters addressed include noise, parking, pets, the accumulation of refuse and, in New South Wales, the hanging out of washing and cleanliness of windows. Where disputes arise, injunction-like remedies are generally available. Intransigent non-compliance does not run the risk of forced sale and removal.<sup>29</sup>

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<sup>23</sup> A Bradbrook, S MacCallum and A Moore, *Residential Tenancy Law and Practice: Victoria and South Australia* (1983) para 1606. This is probably also true in England, particularly in long leases, although there may be more variation in short leases.

<sup>24</sup> *Malzy v Eichholz* [1916] 2 KB 308.

<sup>25</sup> *Housing Act* 1980 (UK), later consolidated into *Housing Act* 1985 (UK) .

<sup>26</sup> *Housing Act* 1988 (UK), which brought housing association tenants under the same regime as private sector tenants.

<sup>27</sup> The South Australian Housing Trust, for example, is subject only to parts of SARTA 1995. It was not subject at all to the previous legislation, leaving access only to the Supreme Court for the resolution of disputes.

<sup>28</sup> A Bradbrook, S MacCallum and A Moore, *Australian Real Property* (3<sup>rd</sup> ed 2002) 516.

<sup>29</sup> An equivalent of strata title (commonhold) has just be introduced in England, but at present all flats are held on long leases and control is through lease covenants, as described above.

This overview of the traditional legal responses highlights the relative vulnerability of tenants, whose behaviour could lose them their home, and the legal powerlessness of those without any proprietary interest in the property where they live to protect themselves from the impact of 'neighbour nuisance'. In contrast, property owners enjoy the full choice of available actions to protect their amenity, confident that their own behaviour could not jeopardise their ownership.

#### IV DIVERGENT DEBATES; CONVERGING OUTCOMES

While both England and Australia have become concerned with anti-social behaviour in recent years, their respective debates are by no means parallel in time, focus or intensity. The volume of English government publications, legislation and related research indicates an energetic national debate starting in the mid-1990s, focused from the beginning largely on areas of social housing and their inhabitants. In Australia the debate has been slower to start and less exclusively focused on public (state) housing. However, significant changes in the role and function of state housing were introduced in 2000 in line with federal government policy. By then, federal funding for housing assistance had already been substantially redirected away from supply side responses ('bricks and mortar') to the demand side response of income support.

During the 1990s, public housing stock numbers reduced noticeably, as federal support of the Commonwealth State Housing Agreements (CSHA) declined from \$1.9 billion to \$1.4 billion.<sup>30</sup> Meanwhile, funding for Commonwealth Rent Assistance payments, a rental subsidy for private renters, increased from \$0.46 billion in 1987 to \$1.5 billion in 2000.<sup>31</sup> In 2000 a new CSHA directed that public housing was to be targeted at those 'most in need'.<sup>32</sup> This has effected a major change in the demographic of state housing. New tenants are overwhelmingly recipients of welfare incomes and, in the wake of de-institutionalisation strategies, include a disproportionately high number of people suffering from mental illness. Given the reduction in stock numbers since the early 1990s, State Housing Authorities are now managing tenant groups with high and complex needs concentrated in increasingly smaller enclaves of often older and less desirable housing,<sup>33</sup> a combination of circumstances that could have been designed to increase complaints of anti-social behaviour. It is, perhaps, not surprising that there

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<sup>30</sup> Statistics quoted in Department of Human Services SA, *South Australian Housing Trust Triennial Review 1997/8 – 1999/2000* (2001) 20. The figures are higher than those quoted in earlier sources: see B Badcock and A Beer, *Home Truths* (2000) 166.

<sup>31</sup> Ibid 20.

<sup>32</sup> *Commonwealth-State Housing Agreement 1999-2003*, para 1(1)(e)(I).

<sup>33</sup> Public housing rents are subsidised to ensure affordability, usually benchmarked at 25% of the tenant household's income. The changing demographic towards welfare recipients has therefore reduced rental income, a shortfall not compensated by Federal or State funding. As more 'saleable' properties have been sold off and the funds available for maintenance and refurbishment decline, public housing stock may be reduced to the older properties. A similar process of residualisation has been at play in England, although starting from a much larger stock of public housing.

has been more attention paid exclusively to problems within public housing since then.

However, as the following sections of the paper make clear, Australian responses have differed from those in England. English law distinguishes the tenancy rights of social tenants from other residential renters and has manipulated them in attempts to control behaviour. Australian law has not made such a marked distinction. However, the State Housing Authorities are the nation's largest residential landlords. They are managing a distinctive and significant risk of anti-social behaviour. Unlike private landlords, they have been under pressure to develop preventive and responsive tenancy management techniques. They have developed a range of responses mostly by developing new approaches in policy and practice and only using the existing statutory provisions against tenant (mis)behaviour where early intervention or other more holistic approaches has failed.<sup>34</sup> Recently there has been evidence that some tenants, voters or politicians believe this to be inadequate. Law reform on the English pattern has been proposed and, in some instances, adopted.

## V CHANGING LAW: THE AUSTRALIAN EXPERIENCE

### *A A New Common Law*

In 1975 the Commonwealth Commission of Inquiry into Poverty in Australia (the Henderson Commission) published two Reports<sup>35</sup> which detailed why and how the common law governing residential tenancies should be reformed. Bradbrook's major Report described the existing Australian law as 'a scandal', full of 'overwhelming deficiencies' which 'made good sense in the fifteenth century' but which were currently 'far removed from reality', especially for urban tenants.<sup>36</sup> Rights had to be deduced from a synthesis of scattered caselaw and statutory sources. Jurisdiction was fragmented through a range of courts and available only by means of the formalistic, slow and expensive procedures of the common law. Real property's fundamental principle of caveat emptor established a minimal entitlement for the tenant and an expectation that a suitable balance between the parties would be struck by negotiating the terms of the lease. The reality was inequality of bargaining power and standard-form leases. The law served both landlords and tenants badly, although the Report was clear that the plight of tenants was much worse than that of landlords and therefore needed more attention. Detailed recommendations in the Report provided a template for statutory reform – all that was needed was a reforming government. The South Australian *Residential Tenancies Act 1978* was the first statute in Australasia based on the recommendations of Bradbrook's Report.

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<sup>34</sup> Jacobs and Arthurson, above n 5, ch 3.

<sup>35</sup> A Bradbrook, *Poverty and the Residential Landlord Tenant Relationship* (1975). This Report was largely adopted into R Sackville, *Law and Poverty in Australia* (1975) ch 3.

<sup>36</sup> Ibid 2.

Although there is no national Uniform Law, over time all States and Territories have introduced broadly parallel residential tenancy legislation, governing at a minimum the parties' basic rights and responsibilities, procedures for dispute resolution and the termination of tenancies. Public housing tenants are included within the ambit of these Acts to varying degrees: most jurisdictions operate a single residential tenancy regime; some operate a mixed regime under which some tenant obligations and the provisions regarding termination apply across the board.<sup>37</sup>

## B *Increasing Control*

Provisions controlling tenant behaviour were included in the first residential tenancy legislation in 1978. Although all States and Territories legislate independently, introducing reforms, extensions and revisions in the light of local policy, a clear trend can be seen towards increased control of tenants' behaviour through the operation of their tenancy rights.<sup>38</sup> Three aspects of this trend can be identified. They are equally applicable, in principle, to public and private tenancies. However, it seems that State Housing Authority tenants, not those in the private or community tenancy sectors, are bearing the brunt of them.<sup>39</sup>

### 1 *Extending Control Through Tenancy Obligations*

In the 1978 South Australian Act, s 43 provided that it should be a term of every residential tenancy agreement (the term used to overcome the distinction between lease and licence) that the tenant should 'not cause or permit the premises to be used for any illegal purpose'; that the tenant should not 'cause or permit a nuisance' and that:

[w]here the premises are adjacent to other premises occupied by any other tenant of the landlord, or by the landlord, the tenant shall not cause or permit any interference with the reasonable peace, comfort or privacy of that other tenant or the landlord in the use by the other tenant or the landlord of the other premises.

While not elegant, this drafting was specific, describing a precise requirement. It embodied a provision current in standard-form leases of the period and it complemented exactly s 47, discussed below, which restated the law relating to landlord's liability and clearly abandoned *Malzy v Eichholz*.

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<sup>37</sup> For example, South Australia, where parts only of the *Residential Tenancies Act 1995* (SA) apply to the South Australian Housing Trust and its tenants.

<sup>38</sup> For an outline of the controls available over tenants through their tenancies, see M Slatter and A Beer, *Evictions and Housing Management: Towards More Effective Strategies (AHURI Positioning Paper)* (2004) 4-14.

<sup>39</sup> However, it must be said that statistical evidence is almost impossible to obtain as data identified by cause (behaviour) rather than action (possession) has not been kept, either by courts and tribunals or by State Housing Authorities until very recently and now not consistently across jurisdictions. However, the scarcity of litigation on these issues may be gauged from the intense interest in cases discussed, especially among tenants' advisors and welfare law specialists.

When the South Australian Act was revised in 1995, the equivalent section was broadened to prohibit interference with ‘another person’ who ‘resides in the immediate vicinity of the premises’, in line with the style of wording now generally adopted across jurisdictions. In similar vein, the current Victorian legislation prohibits use of the rented premises that causes a nuisance and also prohibits the tenant or ‘his or her visitors’ from using the ‘premises or common areas’ so as to interfere with ‘any occupier of neighbouring premises’.<sup>40</sup> Other Australian jurisdictions similarly make explicit the tenant’s vicarious liability for visitors’ acts.<sup>41</sup>

In addition to broadening the statutory covenant, several States now also include a specific ‘behaviour’ ground for termination of the tenancy, as an implicit elaboration of the ‘behaviour’ covenant. Queensland’s *Residential Tenancies Act* 1994, for example, provides that the landlord may urgently seek an order of termination if the tenant has harassed, intimidated or verbally abused the landlord, an agent or ‘a person occupying, or allowed on, premises nearby’ or ‘is causing, or has caused, a serious nuisance to persons occupying premises nearby’.<sup>42</sup> A later explanatory note<sup>43</sup> on ‘serious nuisance’ includes assault, using threatening or abusive language, behaving in a riotous, violent, disorderly, indecent, offensive or threatening way towards ‘a resident or someone else’, causing substantial unreasonable disruption to the privacy of ‘a resident or someone else’ and wilfully damaging property of a ‘resident or someone else’.<sup>44</sup>

In the recent case of *Smith v Director of Housing* Victoria’s Office of Housing served one of their older and longstanding tenants, Mrs Alice Smith, with a notice to vacate under s 244 of the *Residential Tenancies Act* 1997. Mrs Smith, a war veteran in her 80s, had lived in her public rental unit for almost ten years. She was apparently known to be a ‘really good tenant (who) cared for her property as well as working regularly in her garden’ and at the time of the notice was unwell and receiving medical treatment.<sup>45</sup> Section 244 provides that a tenant can be required to move out immediately if the safety of a neighbour has been endangered by an act or omission of the tenant or the tenant’s visitor. Mrs Smith’s behaviour was not in issue. The notice alleged that Mrs Smith’s grandson, who had never lived at her address but was visiting her, had threatened two employees of the Office of Housing with a knife. On appeal, it was held that the notice to vacate was invalid because of misalignment between the alleged facts and the scope of s 244, therefore ‘the process initiated by the notice to vacate had irretrievably miscarried’.<sup>46</sup>

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<sup>40</sup> *Residential Tenancies Act* 1997 (Vic) s 60(2).

<sup>41</sup> *Residential Tenancies Act* 1987 (WA) s 50(1).

<sup>42</sup> *Residential Tenancies Act* 1994 (Qld) s 170.

<sup>43</sup> Not definitional: these examples are included to illustrate s 278 of the Act, a parallel provision relating to residents of caravan parks: *Residential Tenancies Act* 1994 (Qld) s 278.

<sup>44</sup> *Residential Tenancies Act* 1994 (Qld) s 278.

<sup>45</sup> Tenants Union of Victoria (Media Release 18 January 2005).

<sup>46</sup> VCAT had allowed amendments to the notice so that it included reference to acts against ‘neighbouring occupiers’ as well as the original allegations concerning housing workers,

## 2 A Duty on the Landlord to Enforce 'Neighbour' Covenants

As one of the initial reforms, South Australia's 1978 Act provided that the landlord 'shall take all reasonable steps to enforce the obligation of any other tenant of the landlord in occupation of adjacent premises not to cause or permit any interference'.<sup>47</sup> This neatly abolished the English common law rule, seen in *Malzy v Eichholz*, which restricted the scope of the landlords' covenant of quiet enjoyment to their own 'offending' actions. While landlords are obliged to ensure quiet enjoyment to each of their tenants, *Malzy v Eichholz* denied they were under a duty to take action against a tenant in breach for the benefit of their adjacent tenants, even though the landlord alone has status to enforce lease covenants.<sup>48</sup> This apparently technical reform clearly opened the way for tenants to pressure their landlord to act against a 'problematic' tenant.

The South Australian provision does not apply to the South Australian Housing Trust.<sup>49</sup> However, in New South Wales the Residential Tribunal has held that even without such a provision, the landlord's statutory covenant not to 'cause or permit an interference with the reasonable peace, comfort or privacy of the tenant' can be breached if no action is taken against tenant nuisance. In *Ingram and Ingram v NSW Department of Housing*<sup>50</sup> the Tribunal held that such a covenant is broader than the common law covenant of quiet enjoyment and that failure to act after 'nuisance' behaviour has been reported by another tenant may amount to 'permitting' interference with that tenancy. Mr and Mrs Ingram complained consistently to the Department about the behaviour of a neighbouring tenant, which was investigated but not significantly challenged by the Department. The Tribunal held that considerable distress to Mr Ingram would have been avoided if the Department had taken legal action to enforce the 'nuisance' covenant when his complaints had been sufficiently substantiated. Although it acknowledged the 'invidious position' of the Department, the Tribunal found it liable to compensate Mr Ingram for his distress and his expenses.

## 3 Enforcement by Third Parties

The final aspect of the general residential tenancy legislation impacting specifically on behaviour is a provision unique to South Australia. If a residential tenant (public or private) is in breach of covenant by reason of illegal use of the premises, creating nuisance or interfering with the peace, comfort or privacy of another person who resides in the immediate vicinity, s 90 of the South Australian *Residential*

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whose safety is not referred to in s 244. The Supreme Court found that VCAT had no jurisdiction to consider or allow amendment to the original application, which should have been struck out *in limine*: *Smith v Director of Housing* [2005] VSC 46 (20 January 2005).

<sup>49</sup> s 47(c), now *Residential Tenancies Act* 1995 (SA) s 65.

<sup>48</sup> [1916] 2 KB 308.

<sup>49</sup> *Residential Tenancies Act* 1995 (SA) s 5.

<sup>50</sup> [2002] NSWCTTT 84 (8 May 2002).

*Tenancies Act* 1995 provides that an application to evict that tenant may be made by an 'interested party'. This broad phrase is defined as including not only the landlord, but also 'a person who has been adversely affected by the conduct of the tenant on which the application is based'.

Section 90 seems to represent an innovative, potentially drastic combination of controls drawn from two separate streams of property law. On the one hand, it extends the status to enforce tenancy covenants by replacing the orthodox property (or even contract) limitation of privity by a nexus of impact: anyone 'affected' may institute proceedings to terminate the tenancy for behaviour. On the other hand, it extends the 'impact' status inherent in the tort of nuisance by removing any requirement that the plaintiff has a proprietary interest in neighbouring land that is being compromised. Most significantly, however, it transforms the injunctive remedy of nuisance into a confiscatory action for eviction, an outcome completely denied in nuisance actions against landowners, whose security of possession is unassailable. Section 90 seems to have been introduced to provide an accessible forum for neighbour disputes, with particular concerns expressed in debate about tenants of the Housing Trust.<sup>51</sup> The Residential Tenancies Tribunal was felt to be a more desirable venue to address such issues than the Supreme Court or electorate offices, the two existing options identified by Members. Section 90 clearly reflects and extends the legal vulnerability of tenancy status. In practice it has had limited use and limited success in providing a 'credible threat' of eviction to control behaviour.<sup>52</sup>

4 *A New Targeted Response*: All the responses above have been directed across the rental market and are in principle available in public and private tenancies. In late 2004 however New South Wales introduced 'acceptable behaviour agreements', exclusively for public housing tenants. Failure or refusal to enter such an agreement or breach of it may be grounds for eviction.<sup>53</sup> This specific focus on public housing tenants has been followed in Western Australia, which introduced Acceptable Behaviour Acknowledgements for new tenants in April 2005. These are separate agreements to be signed at the same time as the tenancy, designed to underline the tenant's responsibilities in respect of 'neighbourly behaviour':

In return for the Government providing good quality, affordable rental housing, our tenants have an obligation to be co-operative and helpful in their behaviour and contribute to strong and peaceful communities.<sup>54</sup>

Such rhetoric is increasingly finding favour in Australia. The report of the *Parliamentary Inquiry into the South Australian Housing Trust* believed that:

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<sup>51</sup> South Australia, *Parliamentary Debates*, House of Assembly, 5 July 1995, 2499.

<sup>52</sup> Statutory Authorities Review Committee, Parliament of South Australia, *35<sup>th</sup> Report Inquiry into the South Australian Housing Trust* (2003) [20].

<sup>53</sup> *Residential Tenancies Act* 1987 (NSW) s 57A.

<sup>54</sup> Ministerial statement, Department of Housing and Works WA, *Crackdown on Unruly Tenants*, 22 April 2005.

[b]eing housed in Trust accommodation at a guaranteed rate of rent, when some 25,000 other applicants remain on the waiting list, made being housed a privilege, not a right. Moreover, it felt that as such, it was an abuse of that privilege to create severe or extreme disruption in a public housing tenancy.<sup>55</sup>

This points to an increasing adoption of strategies already established in England, as the next section describes.

## VI CHANGING LAW: THE ENGLISH EXPERIENCE

### *A A Separate Reality*

English responses have distinguished social tenancies from those in the private rented sector. This is made easier by the fact that separate legislation applies to tenants of local authorities. While housing associations are subject to the same legislation as private landlords, in practice they offer a distinct type of tenancy with full security,<sup>56</sup> compared to the much lesser security offered by private landlords who use what is known as a shorthold tenancy.

Significant change can be dated back to 1996. The first proposals addressing anti-social behaviour were contained in the Department of Environment consultation paper in 1995 entitled *Anti-social Behaviour on Council Estates: Consultation Paper on Probationary Tenancies*. In due course, the Government's proposals were translated into legislation in the *Housing Act 1996*. This contained three elements which directly addressed the issue of neighbour nuisance in the social rented sector.

#### *1 Provision of Introductory Tenancies*

These allow local authorities to adopt a scheme under which all new tenants of the authority are granted an introductory tenancy rather than a secure tenancy. The effect of this is that if the authority wishes to evict, there is no requirement to prove any ground for possession, nor is there any discretion on the part of the judge. Certain procedural requirements, including offering an internal review of the decision to evict, must be completed before possession can be sought in court. The introductory tenancy lasts for 12 months and, providing possession proceedings have not been commenced, converts automatically to a secure tenancy after 12 months.

It should be noted that such tenancies are only available to local authorities and are not available to housing associations. The Housing Corporation has, however, developed guidelines when dealing with 'problem' estates, for the use of assured

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<sup>55</sup> Statutory Authorities Review Committee, above n 1, [16].

<sup>56</sup> Use of maximum security is a requirement of registration with the Housing Corporation.

shorthold tenancies (which similarly give minimal security), known colloquially as 'starter tenancies'.<sup>57</sup>

## 2 *Extended Grounds for Possession*

As noted, tenants of social landlords are generally either secure or assured and accordingly subject to the provisions of either the *Housing Act 1985* or the *Housing Act 1988*. To obtain possession on the basis of anti-social behaviour the landlord has to rely on a ground for possession. Both Acts contain two relevant grounds: breach of a term of the tenancy and a specific ground relating to nuisance and illegal behaviour. The specific grounds (2 in the 1985 Act, 14 in the 1988 Act) were extended by the *Housing Act 1996*. The amendments made four main changes:

- including visitors to the dwelling amongst those whose conduct was to be considered;<sup>58</sup>
- including conduct 'likely to be a nuisance', so that it was not necessary to prove that anyone had actually suffered a nuisance or an annoyance and accordingly intended to make it easier to use 'professional' witnesses and thus to prove the behaviour;
- extending those who were suffering the nuisance from 'neighbours' to any persons 'residing, visiting or otherwise engaging in a lawful activity in the locality';
- adding to relevant convictions those of an arrestable offence committed in, or in the locality of, the dwelling house.

## 3 *New Forms of Injunction*

One of the perceived problems with injunctions was that, while tenants could be enjoined on the basis of a breach of the tenancy agreement, it was very difficult for landlords to take action against non-tenants - because of the limits of the common law set out above. The 1996 Act introduced a new statutory basis for injunctions which could be sought by local authorities against both tenants and non-tenants where the person against whom it was sought had committed or threatened to commit violence. In certain circumstances, a power of arrest could also be attached to such injunctions.

In addition, the courts were given the power to add a power of arrest to injunctions based on breach of both local authorities' and housing associations' tenancy agreements, again in cases of violence or threatened violence. This meant that the

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<sup>57</sup> Housing Corporation, *Performance Standards, Addendum 4 to the Social Housing Standards for General and Supported Housing: Anti-social Behaviour* (1999); Housing Corporation, *Tenancy Management: Eligibility and Evictions* (2004).

<sup>58</sup> Thus mirroring the changes in Australia.

police could arrest immediately for breach of the injunction without having first to obtain a warrant for arrest, from the courts.

*Further changes:* Further legislation followed in 2003, following a government consultation paper.<sup>59</sup> The *Anti-social Behaviour Act 2003* introduced a raft of measures designed to tackle a range of anti-social behaviour. A number of these were specifically housing measures, although the Act also contained new criminal offences, and measures to improve parenting. In relation to the landlord/tenant relationship, the Act gave social landlords the power to apply for tenancies to be 'demoted'. If granted, demotion reduces the security of tenants for a 12 month period, so that they can be evicted in the same way as introductory or assured shorthold tenancies.

The injunction powers in the *Housing Act 1996* were also extensively amended. They were extended to permit housing associations, as well as local authorities to apply for injunctions. The grounds were also extended so that both local authorities and housing associations can seek an injunction in relation to behaviour which 'is capable of causing nuisance or annoyance to any person and which directly or indirectly relates to or affects the housing management functions of a [social] landlord'.<sup>60</sup>

As this summary shows, English law in recent years has seen a significant strengthening of social landlords' powers to take action to deal with anti-social behaviour. The change has been effected through specific, targeted statutory provisions that alter the property rights of social landlords and tenants, shifting the balance increasingly away from the tenant and towards the landlord. Of these changes the majority have been directed exclusively at tenants of social landlords and initially some only at tenants of local authorities, rather than housing associations. They have also primarily been achieved through strengthening the property rights of landlords against those tenants.

Some have lost the benefit of full security, by becoming introductory or demoted. For those tenants who remain secure or assured, the strengthening of the relevant ground for possession was also intended to make it easier for landlords to obtain possession by both widening the basis on which it could be sought (thus, eg, covering exactly the type of behaviour - threats to staff - which led to the rejection of the claim against Mrs Smith in Victoria) and making the evidential basis easier to satisfy.

It might be argued that the free-standing injunction power which can be sought against non-tenants moves away from the direct landlord/tenant relationship. Although this power is not linked to property rights (it can be sought against non-tenants) it does not completely divorce itself from property. As originally enacted, it

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<sup>59</sup> Department of Transport, Local Government and the Regions, *Tackling Anti-social Tenants: a Consultation Paper* (2002).

<sup>60</sup> *Housing Act 1996* (UK) s 153A(1).

could only be granted in relation to conduct in and around dwelling houses held under by local authorities and let under secure or introductory tenancies, or as temporary tenancies to the homeless.<sup>61</sup> As subsequently amended in 2003, the test became one of nuisance behaviour which 'affects the housing management functions' of the landlord.<sup>62</sup>

Thus the response in the *Housing Act* 1996 and the *Anti-social Behaviour Act* 2003 was primarily one of adjusting property rights to give greater power to the landlord to control the behaviour of tenants or to evict them altogether from the property.

#### VII USING THE NEW CONTROLS: THE AUSTRALIAN EXPERIENCE

In Australia much of the response to anti-social behaviour that is evident comes from developments of policy and practice within the State Housing Authorities. This has mostly been achieved within existing legal frameworks. A brief summary of these responses reported by Jacobs and Arthurson in 2003<sup>63</sup> shows an emphasis on increased information and early intervention strategies, emphasising to public housing tenants the obligations on them and their visitors to act as 'good neighbours' and brokering support or access to mediation services for vulnerable cases. The positive impact of urban regeneration projects and the importance of multi-agency collaboration is also highlighted. On the other hand, the need to establish a 'credible threat' of eviction for serious cases is also recognised by housing managers even though eviction is seen by most, if not all, as a response of last resort.

Although it is easy to identify the trend towards increased control of behaviour in the Australian tenancy statutes, it is almost impossible to accurately estimate the use of these powers. Consistent data seems to be unavailable, either across or within the various State and Territory jurisdictions, and no study has yet investigated the impact of increasingly restrictive controls. This perhaps reflects the difference in pace of the debates about anti-social behaviour. The heightened level of concern in England has generated considerable investigation, outlined in the following section. At the present time it is possible only to offer some fragmentary insights into the Australia position.<sup>64</sup>

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<sup>61</sup> *Housing Act* 1996 (UK) s 152(2), as unamended.

<sup>62</sup> *Housing Act* 1996 (UK) s 153A(1).

<sup>63</sup> Jacobs and Arthurson, above n 5, *passim*.

<sup>64</sup> The absence of research is frequently mentioned when further reforms are proposed: see, eg, the submission of the Multicultural Disability Advocacy Council of New South Wales in response to the proposed introduction of Acceptable Behaviour Agreements at <<http://www.mdaa.org.au/service/systemic/04/housing.html>>.

Two recent studies in South Australia<sup>65</sup> have confirmed the preponderance of landlord-initiated actions under the residential tenancy legislation, with the vast majority of those actions being for possession. They also confirm the disengagement of tenants, with only a small percentage appearing at tribunal hearings or engaging in any way with the process. Most possession actions are based on arrears of rent. This may disguise other problems, as an arrears action is relatively easy to prove and straightforward to mount. They may also disguise to some extent the landlord's motive in formalising the dispute, since there is evidence that in many cases landlords and agents seek payment rather than possession. In practice, applications are likely to result in conditional orders for possession, suspended as long as the tenant pays a stipulated amount towards arrears along with future rental payments.

Disappointingly, there has been no monitoring of the operation of s 90 to date.<sup>66</sup> Since its inception it has contributed only slightly (less than two percent) to the number of cases heard by the Residential Tenancies Tribunal<sup>67</sup> but the cases are demanding in time and resources. It is not clear what proportion is brought by third parties rather than landlords but it is clear that no explosion in litigation has resulted from the introduction of this potentially wide-ranging option.<sup>68</sup> Practical problems include witness fears of intimidation and retaliation, difficulties of enforcement and problems of proof, leading to uncertainty and unpredictability of outcome. Some of these problems, as experienced by tenants wishing to use s 90, were explored by the Inquiry into the South Australian Housing Trust, which urged the introduction of injunctive anti-social behaviour orders in the Tribunal. This recommendation has not been adopted to date, although it would clearly resonate with the approaches in New South Wales and Western Australia, described above.

#### VIII USING THE NEW CONTROLS: THE ENGLISH EXPERIENCE

As outlined earlier, the English response to anti-social behaviour has been significantly targeted at specifically social tenants. The responses of social landlords to these reforms are difficult to measure, because of a lack of accurate recording. For example, a third of local authorities (34%) and over half of housing associations (54%) failed to keep any records of the number of complaints received, and only a

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<sup>65</sup> M Slatter et al, *Report on the Residential Tenancies Tribunal Listings Project* (2000); Slatter and Beer, above n 5. Annual reports from the three dedicated residential tenancy tribunals in 2002 showed landlord-initiated actions as 60% of applications in New South Wales; 95% in Victoria; 75% in South Australia. Such statistics no longer seem to be publicly available, partly as a result of changes in tribunal structure in New South Wales and Victoria.

<sup>66</sup> A current study, funded by Flinders University (Competitive Small Grant no 3045), is underway looking initially at the original expectations of s 90: M Slatter, *Neighbour Evictions for Anti-social Behaviour under s 90 Residential Tenancies Act 1995 (SA): Popular, Populist or Problematic?* (forthcoming).

<sup>67</sup> See Slatter et al, above n 65.

<sup>68</sup> For an overview of the section's early use, see S Raymond, 'Third Parties Involvement in Residential Tenancies Law: Lessons from Recent Experience' in T Burke (ed), *Responsive Jurisdictions for Changing Times* (1998).

quarter of housing associations were able to provide detailed information on action taken to deal with individual cases.<sup>69</sup>

Thus although we are able to provide some data here, a recent House of Commons committee stated:

We welcome the introduction of the new housing-based powers, in particular, the powers of injunction and demotion. However, it is unsatisfactory that the Government has created these powers but not collected the data necessary to know whether they are being used or used effectively. Despite the fact that several of the powers, such as possession orders and housing injunctions, have been in force for several years, the Government does not know how or how often they are being used, whether eviction is being used appropriately, or the impact of its ASB measures on homelessness.<sup>70</sup>

However, it is clear that there has been an increasing use of legal powers amongst both local authorities and housing associations, with almost the same rate of service of Notices of Seeking Possession ('NSPs'), the first step to possession proceedings) and conversion of these notices to actual proceedings.<sup>71</sup> However, between landlords there were wide differentiations in the use of NSPs. Because of the lack of proper recording it was impossible to gauge how much the use of possession proceedings had increased amongst housing associations, but for local authorities there had been an increase of 127% in the number of court actions commenced per 1000 tenancies in the period 1996/7 to 1997/8.<sup>72</sup>

Because court statistics do not differentiate between the grounds on which social landlords seek possession, it is not possible to get a clear picture as to whether applications for eviction have further increased since that time. The 2005 study by Pawson *et al*<sup>73</sup> suggests increasing numbers of NSPs served, actions entered and evictions implemented between 2001/02 and 2002/03, with eviction rates being slightly higher among housing associations than local authorities.

Nixon *et al*'s study<sup>74</sup> showed that local authorities were more likely to use injunctions than housing associations. 61% of local authorities, as compared with only 45% of associations stated that they sometimes or always used injunctions. Surveys of the Social Landlords Crime and Nuisance Group (SLCNG) also indicated differences in use between housing associations and local authorities.<sup>75</sup> Thus in 2000/01, 62% of local authorities as compared to 39% of associations had taken out one or more injunction for breach of tenancy during the year. However, in

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<sup>69</sup> Nixon *et al*, above n 3.

<sup>70</sup> Home Affairs Select Committee, House of Commons, *Anti Social Behaviour 5<sup>th</sup> Report of 2004-05* (2005) [268].

<sup>71</sup> Nixon *et al*, above n 6, ch 9.

<sup>72</sup> Nixon *et al*, above n 6, 42.

<sup>73</sup> H Pawson *et al*, *The Use of Possession Actions by Social Landlords* (2005).

<sup>74</sup> Nixon *et al*, above n 3.

<sup>75</sup> C Hunter and J Nixon, *Initiatives by Social Landlords to Tackle Anti-social Behaviour* (2003).

the subsequent years the numbers have fluctuated and been more even between the two, indicating a greater take-up in their use by housing associations (at least by those who are members of SLCNG, who might be presumed to be those with a particularly active interest in anti-social behaviour issues). In 2002/03 53% of local authorities had obtained at least one injunction and 41% of associations.

The take-up of the use of introductory and starter tenancies was initially relatively slow. By 1998 30% of local authorities had adopted a scheme, with a further 7% indicating that they were intending to do so in the next 12 months.<sup>76</sup> More recent figures on the uptake of the use of introductory tenancies can be found by analysis of the ODPM 2004 Housing Strategy Statistical Appendix,<sup>77</sup> which indicates that in fact growth has been slower than might have been predicted from that earlier study. By 2001/02 the percentage of authorities allocating introductory tenancies was still at 30% with a small growth to 35% by 2003/04.

The limited evidence available indicates that for housing associations take-up has always been more patchy. Nixon *et al*<sup>78</sup> found that 13% of associations were using starter tenancies with a further 14% indicating that they intended to adopt them in the next 12 months.

#### A *The Response of the Courts*

Contrary to landlords' perception that the courts were unwilling to grant possession, in cases involving anti-social behaviour an outright order for possession was the most likely outcome of court action. Equally, Nixon *et al*,<sup>79</sup> showed that the courts are sympathetic to granting injunctions as a method of dealing with anti-social behaviour. Pawson *et al*'s study in 2005<sup>80</sup> demonstrated that commencement of legal action for anti-social behaviour (by service of a NSP) is four times more likely to result in an eviction than in cases involving rent arrears. This may of course reflect the practices of landlords as to how they pursue cases following service of an NSP, but also seems to contradict the impression of landlords.

An examination of case law confirms that the Court of Appeal is increasingly willing to support social landlords in taking action against anti-social tenants.<sup>81</sup> It has

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<sup>76</sup> Nixon *et al*, above n 3.

<sup>77</sup> ODPM *Housing Strategy Statistical Appendix* (2004) <[http://www.odpm.gov.uk/stellent/groups/odpm\\_housing/documents/page/odpm\\_house\\_033202.xls](http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_033202.xls)>.

<sup>78</sup> Nixon *et al*, above n 3.

<sup>79</sup> Nixon *et al*, above n 3.

<sup>80</sup> Pawson *et al*, above n 72.

<sup>81</sup> There has been a plethora of cases concerning possession actions, nearly all of which have ended in defeat for the tenant, and where the landlord's duties to the other residents have been emphasised: see, eg, *Kensington & Chelsea RLBC v Simmonds* (1996) 29 HLR 507; *Darlington BC v Sterling* (1996) 29 HLR 310; *Newcastle-upon-Tyne CC v Morrison* [2002] 32 HLR 891; *West Kent HA v Davies* (1999) 31 HLR 415. A further statutory amendment made by the *Anti-social Behaviour Act 2003* (UK) required judges to take into account those interests when considering whether to make a possession order: see *Anti-social Behaviour Act 2003* (UK), s 16.

couched this support in terms of the landlord's duties towards its other tenants in the area. Thus, in *Northampton BC v Lovatt*,<sup>82</sup> the court was concerned with the conduct of the tenants' sons. The conduct (burglary, vandalism, racial abuse) had occurred on the estate, but not within 100m of the tenants' home. In refusing the tenants' appeal against an outright possession order, Henry LJ said:

I have already rejected the submission that under the [*Housing Act 1985*] the landlord is only concerned with conduct caused by the use to which the tenant puts the demised premises. But I accept that there must be a link between the behaviour of the tenants and their sons which constitutes a nuisance or annoyance and the fact that they live in the area. ... That link is the legitimate interest the landlord has in requiring their tenants to respect the neighbourhood in which they live and the quiet enjoyment of their homes by those who live there.

Agreeing, Chadwick LJ said:

The neighbourhood, for this purpose, is the area with which the Council is identified, by reason of its status as local housing authority and landlord, as having responsibility for the amenities and quality of life; that is to say the area within which persons affected may fairly regard the Council as having some responsibility for those whose conduct is causing the nuisance or annoyance.

These quotes illustrate confusion in the role of local authorities. Is it their status as housing authority which gives them the role of protecting other occupiers, rather than that as landlord? If it is the former, there would seem to be some public policy at play here which goes beyond that of the landlord/tenant relationship. If it is the latter, then questions arise as to how far landlords have a genuine interest in protecting anything beyond their own investment in the property. This issue arises even more starkly in relation to the private sector discussed below.

In a dissenting judgment in *Lovatt*, Pill LJ rejects the construction of the *Housing Act 1985* which permits 'a statute dealing with the landlord and tenant relationship' to be used 'as an instrument for the control of behaviour generally' (although it may be noted that he does not rule out altogether such statutes being used in that way). What seems to be at play in the decision making of the Court of Appeal is an acceptance that the landlord/tenant relationship can be used to provide a tool to control behaviour beyond the immediate neighbour dispute, and not to deal with criminal behaviour in the wider area.

## IX FROM THE SOCIAL SECTOR TO THE PRIVATE SECTOR

In Australia, the activity around 'bad behaviour' has primarily concerned public tenants, although the legal controls through tenancy law have until recently been more broadly focused. There is now increasing evidence of the private sector being the tenure of need for households unable to access the declining stocks of public

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<sup>82</sup> (1997) 30 HLR 875.

housing,<sup>83</sup> and it is clear that some vulnerable households are now ‘churning’ through the private rental market, seemingly caught in a cycle of housing/eviction/homelessness/emergency housing/private rental/eviction and so on.

Contributing to this could be the impact of more stringent attitudes to anti-social behaviour in public rental. If a tenant is evicted from public housing because of ‘behaviour’ in South Australia, for example, they are not eligible for public housing for a period of 12 months. However, they may still be eligible for assistance to pay a bond to secure private rental accommodation, thus moving the problem from one sector to the other. No strategic policy response has yet been fully developed in respect of evicted anti-social tenants, despite the clear evidence of eviction as a ‘trigger’ for homelessness.<sup>84</sup> However, there is as yet no significant discussion of measures intended to apply specifically to private renters or indeed to owner occupiers. While private landlords have recognised a change in the profile of their tenants,<sup>85</sup> co-operative moves between public and private agencies to address this have tended to develop early intervention preventive strategies to promote successful tenancies, rather than facilitate evictions.<sup>86</sup>

In England, the concern expressed by various governments during the mid-1990s focused almost exclusively on the problems of the anti-social behaviour in and around social housing. However, more recently the concern has widened to embrace the private sector. One study<sup>87</sup> suggests that problems of neighbour disputes are more prevalent amongst owner-occupiers than tenants (the study does not, however, seek to define what is meant by neighbour disputes.)

The Social Exclusion Unit Policy Action Team (PAT) 7 report<sup>88</sup> identified a cycle of decline that can encompass areas of private sector housing. In such areas demand falls, leaving properties impossible to sell to owner-occupiers. Landlords purchase the properties for very low prices. Such landlords are unconcerned about the behaviour of their tenants and ‘just one anti-social tenant can clear a street, and so the spiral of decline accelerates, as the owner-occupiers and good landlords are forced out’.<sup>89</sup> The problem was also highlighted in a government green paper in 2000 which refers to ‘an unholy alliance between bad landlords and bad tenants

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<sup>83</sup> M Slatter and A Beer, *Housing Evictions in South Australia* (2003); M Slatter and M Crearie, ‘Setting Them Up To Fail?’ (paper presented at the *National Housing Conference*, Adelaide, 2003).

<sup>84</sup> C Chamberlain and G Johnson, *Early Intervention: a Research Paper* (paper prepared for the Victorian Homelessness Strategy, Department of Human Services, Melbourne, 2000).

<sup>85</sup> Department of Human Services (National Key Centre for Research and Teaching in Social Applications of GIS), South Australia, *Drivers of Contemporary and Future Housing Demand in Adelaide and Outer Adelaide* (2000) 6.6.

<sup>86</sup> M Slatter and M Crearie, ‘Sustainable Tenancies: From Public to Private?’ (2003) 7 *Flinders Journal of Law Reform* 15. The work of Private Tenancy Liaison Officers in South Australia and their equivalents elsewhere is the result of this approach.

<sup>87</sup> H Genn, *Paths to Justice* (1999).

<sup>88</sup> Social Exclusion Unit, *Report of Policy Action Team 7: Unpopular Housing* (1999).

<sup>89</sup> *Ibid* para 1.26.

which creates a complex and intractable set of problems requiring a multi-agency approach'.<sup>90</sup>

The PAT 8 report in 2000<sup>91</sup> noted that practitioners on the ground have concerns that 'victims living next to perpetrators in private rented or owner-occupier accommodation are less protected from anti-social behaviour than social tenants'.<sup>92</sup> Our own research<sup>93</sup> indicates a problem of displacement of social tenants evicted for anti-social behaviour into the private sector. The new concern emerging therefore is how to control anti-social behaviour perpetrated by people living in private sector housing. This in turn requires an examination of the legal mechanisms by which such control can be exercised and also asks questions of the way the roles of different tenures are constructed.

### B *Private Rented Sector*

English government policy the past 20 years towards the private rented sector is overwhelmingly one of deregulation. Thus since 1988 private sector landlords have been able to use assured shorthold tenancies, which give a minimum 6 month security of tenure for tenants, after which the tenant can be evicted simply by giving notice and applying to the court. When first introduced landlords had to make a positive choice to use such tenancies and serve relevant notices on their tenants. If they failed to do so the tenants would have fuller security of tenure. Since the Housing Act 1996 assured shortholds have become the default tenancy.

PAT 8<sup>94</sup> suggested that there are legal anomalies in that private tenants are less likely to be subject to specific anti-social behaviour clauses in their tenancy agreement and there can be no power of arrest applied to any breach of their tenancy agreement. Given the lack of rights that private tenants have, it might be thought that this would not make a great deal of difference to their position. The PAT 8 report goes on to suggest a much more important difference at para 4.31: 'it appears that private landlords are much less prepared to take action'. This is not surprising, given the evidence above of differential use by social landlords of the remedies available.

The SEU report very tentatively sets out some options to deal with the problem. These include empowering local authorities to take action against private tenants through injunctions and evictions and charging the private landlord for the costs incurred. At this stage it is not clear at all how such an option would work. Would the landlord and tenant have to be forewarned of the process, to give them a chance to remedy the behaviour? Would the local authority step into the shoes of the

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<sup>90</sup> Department of Environment, Transport, and the Regions, *Quality and Choice: a Decent Home for All: the Housing Green Paper* (2000) 49.

<sup>91</sup> Social Exclusion Unit, *Report of Policy Action Team 8: Anti-social Behaviour* (2000) 95.

<sup>92</sup> Ibid.

<sup>93</sup> Hunter et al, above n 6.

<sup>94</sup> Above n 92.

landlord, if so would it only be for these purposes? Would the local authority have to serve the requisite notices under the *Housing Act 1988*? It would certainly present a novel form of action that the claimant in a case for possession of land does not themselves have any interest in the land, but is acting as an agent for an unwilling party.

The suggestion here seems to be that action must be taken against perpetrators to terminate their property rights. Since the one person with the power to do this is unwilling to take such action the local authority should be authorised to do so.

In fact the British government has taken a slightly different route, enacting in the *Housing Act 2004* a scheme for selective licensing of landlords where areas either of low demand or those 'experiencing a significant and persistent problem caused by anti-social behaviour' where 'some or all of the private sector landlords who have let premises in the area are failing to take action to combat the problem that it would be appropriate for them to take'.<sup>95</sup> Landlords will be controlled by imposing conditions as part of their licensing 'requiring the taking of reasonable and practicable steps to prevent or reduce anti-social behaviour by persons occupying or visiting the house'.<sup>96</sup> Landlords who fail to comply with such conditions will be liable to have their licence withdrawn and also face criminal proceedings.

### C *Owner-occupiers*

Owner-occupation is the majority tenure in both England and Australia and yet legislators have not been concerned with legal steps specifically designed to deal with anti-social behaviour caused by or to owner-occupiers.

Owner-occupiers generally have no landlord they can look to seek to protect them if they are victims of anti-social behaviour. On the other hand, if they are perpetrators, the victim cannot look to a landlord to take action to stem the behaviour through eviction or injunction. The range of legal options is more limited. The position was considered in England by PAT 8 of the Social Exclusion Unit. For owner-occupiers, two were canvassed by PAT 8. These are first that local authorities include covenants in the freehold conveyances or leases of properties they sell and enforce them. This is a much more limited option than that in earlier drafts of the report which suggested requiring all property sellers to include covenants prohibiting anti-social behaviour on the sale of a freehold or leasehold property. This was probably a well-advised change, as an understanding of the law of covenants shows. Leasehold covenants are effectively the same as a tenancy term, and do not create particularly difficult legal problems. The freeholder (landlord) can enforce the term through injunction or forfeiture, although it has to be said that many local

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<sup>95</sup> *Housing Act 2004* (UK) s 80(6). The provisions came fully into force in May 2005: *Housing Act 2004 (Commencement No. 3) (England) Order 2005*.

<sup>96</sup> *Housing Act 2004* (UK), s 90(1)(b). Breach of a condition will be a criminal offence: *Housing Act 2004* (UK) s 95(2)(b).

authorities who have sold properties under the right to buy on long leaseholds fail to exercise these powers.<sup>97</sup>

Freehold covenants are, however, legally far more problematic. A freehold covenant is essentially a promise made by an owner of land to a third party. Generally they have arisen in relation to the sale of part of an estate, where (for example) the purchaser of the part promises not to use the land except for a private residence, so as to protect the value of the land being retained by the vendor. As it forms a contract between the land owner and the third party, it can be enforced between those two parties. Problems arise where either of the parties sell their interest. At common law the benefit of a covenant can pass on the sale of land, although the covenant must touch and concern the land – that is, it must be of importance to successive owners and enhance the value of the land. A covenant not to be a nuisance to the covenantee would seem to fall within this definition.

The general rule at common law is, however, that the burden of a covenant does not run with the land. This rule is ameliorated in equity in relation to restrictive (negative) covenants. The covenant must also have been taken out to preserve the value of other land owned by the covenantee in the neighbourhood and that land must be retained by the covenantee. There are two notable exceptions to this. First, where there is a 'scheme of development' where the 'covenants given on the sale of each plot are enforceable by the owner for the time being of any plot on the estate'.<sup>98</sup> Second: the *Housing Act* 1985, s 609 permits a local housing authority which enters into a covenant on the disposal of land held by it for housing purposes to enforce the covenant against the covenantor and his successors in title even though it was not taken for the benefit of land owned by the authority.

Yet, even with these exceptions, there is no evidence of covenants being used to control anti-social behaviour. At the moment, for any other situation, the covenant does not provide a workable solution. The whole notion of the freehold covenant would have to be rewritten in order for them to provide protection to most owner-occupiers. If they did become generally applicable between neighbouring properties, their effect would only be limited in that it would only be the owner of the land that would have the right to take action, the benefit does not pass to tenants or other occupiers of the land. Furthermore: the covenant would presumably be for the benefit only of neighbouring (ie adjoining) land. This would not begin to deal with the problems of criminal or anti-social behaviour carried out in a general neighbourhood.

The second option from PAT 8 is to encourage local authorities and community groups to support individuals to take out injunctions against perpetrators. The option does not set out the basis for any such injunctions but we assume that they would primarily be based on nuisance. While nuisance is the primary remedy in English law to balance the rights of neighbouring landowners, its inherent

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<sup>97</sup> Nixon et al, above n 6.

<sup>98</sup> R Megarry and H Wade, *The Law of Real Property* (6<sup>th</sup> ed 2000) 1034.

limitations make it inadequate as a mechanism for the control of anti-social behaviour, which is ill-defined but clearly encompasses activity beyond that of unreasonable land use by landowners or tenants.

#### X THE ROLE OF DIFFERENT TENURES

The problems of translating action to the private sector provide a very interesting illustration of two different but interrelated issues. First is the notion that anti-social behaviour is a problem, which is essentially a 'housing' issue. A property rights approach has severe limitations. Property rights are not intended to control the broader sort of behaviour which seems to be at the forefront of government concerns. They can regulate the relations between landlords and tenants and between some neighbours. Extending the law in this way gives rise to innumerable technical difficulties, as the limits of property law are exposed.

The second related issue which emerges from the consideration of broadening powers to deal with anti-social behaviour is that it has proved much easier to control the behaviour of occupiers in the social housing sector than those in the private sector. Property rights have been adjusted, and social landlords (some with greater enthusiasm and success than others) have used the extra powers they have been given. Trying to broaden such an approach to other tenures reveals the different ideological understandings we have of these tenures.

Burney<sup>99</sup> identifies two approaches to housing management in England which emerged at the end of the Victorian era, when the state first became involved in the provision of public housing. These were 'control of access, and control of tenants' conduct'. Both, she concludes, have 'been practised widely by council landlords for the greater part of their existence'.<sup>100</sup> Hayward identifies a broadly parallel theme in the history of Australian public housing. He points to the 'variety of clauses in tenancy agreements requiring tenants to commit themselves to good behaviour' and the 'variety of tactics [used] to monitor tenant activities' as aspects of the paternalistic ways in which tenants' 'moral fibre' was monitored, with a view to improvement.<sup>101</sup> It is this control of tenants' conduct which seems to have become a dominant concern of the last twenty years. As Clapham<sup>102</sup> has suggested, an emphasis on surveillance of tenants has become an accepted part of housing management work. Haworth and Manzi also identify that this 'social control' approach has emerged more forcefully in recent years, and is strongly influenced by the specific policy discourse of 'residualisation', 'social exclusion' and 'underclass' theories'.<sup>103</sup>

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<sup>99</sup> E Burney, *Crime and Banishment: Nuisance and Exclusion in Social Housing* (1999).

<sup>100</sup> Ibid.

<sup>101</sup> D Hayward, 'The Reluctant Landlords: a History of Public Housing in Australia' (1996) 14 *Urban Policy and Research* 27.

<sup>102</sup> D Clapham, 'The Social Construction of Housing Management' (1997) 34 *Urban Studies* 761.

<sup>103</sup> A Haworth and T Manzi, 'Managing the "Underclass": Interpreting the Moral Discourse of Housing Management' (1999) 36 *Urban Studies* 153.

Haworth and Manzi go on to examine how this discourse has come to dominate in English housing management:

A dominant deontological theme permeates the practice of housing management, underpinned by strong moralistic perspectives, reinforcing a disjuncture with the discourse of empowerment. Resource constraints and the stigma attached to public rented housing are inexorably connected to the kind of restrictive housing policies operating in contemporary housing management.

Jacobs and Arthurson comment that, although increasingly visible, the 'underclass' discourse has not yet come to dominate Australian housing policy in quite the same way. Nevertheless, they point to increasing evidence of policy settings that reflect its influence.<sup>104</sup>

What then are the discourses of other housing tenures, which we argue will make it very difficult for policy makers to frame policies and laws to effectively control behaviour? For the private rented sector, the policy since the first Thatcher government has been one of deregulation. This culminated in the *Housing Act 1988*, which swept away security of tenure and rent control for new tenants. The current government has not shown any great interest in re-imposing control on the sector.<sup>105</sup>

In Australia there has been no evidence yet of any desire to introduce regulation into the private rental market. Indeed, the current enthusiasm for developing new 'affordable housing options', including low-cost rental, with private funds is a strong contra-indicator to regulation. Although such initiatives aim to encourage institutional investment rather than the traditional Australian individual property investor, there is nothing to suggest that any landlord or prospective landlord would encourage increased government interference with the industry. As in England, there is very little enthusiasm for interfering with the property rights of landlords to let their properties on terms as they see fit, nor to limit their right to enter into the market at all.

Turning to owner-occupation, home ownership is the most popular choice of housing in both countries, with recent surveys showing that for up to 90% of the population home ownership is the preferred tenure. It is also the tenure encouraged by both governments. The government approach to owner-occupation is one of support for it as the tenure of 'choice'. What is it that makes home ownership the tenure of choice?

Much of the debate of the popularity of home ownership has focussed on the 'ontological security' derived from ownership. Saunders<sup>106</sup> for example has argued

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<sup>104</sup> Jacobs and Arthurson, above n 5, 12.

<sup>105</sup> The Green Paper, *Quality and Choice – a Decent Home For All* (2000) para 5.2. Although there has been some back-tracking from this in the proposals for licensing contained in the *Housing Act 2004* (UK). See discussion above.

<sup>106</sup> P Saunders, *A Nation of Home Owners* (1990).

that home ownership is the tenure of choice because it fulfils households need for emotional expression, autonomy and control. Critics of this view on the other hand, have suggested that the concept of ontological security is 'a fantasy of the academic'<sup>107</sup> and that 'sightings are rare'.<sup>108</sup> A more recent study exploring three aspects of home; as a haven, a site of autonomy and a source of social status, concluded that in general most people derived a range of psycho-social benefits from the home with little differentiation found between owners and renters. However, when only taking into account socio-demographic variables rather than including broader housing and neighbourhood factors, owners were found to be more likely to gain a sense of status and feel in control of their home as compared to renters.<sup>109</sup> Australian policy settings have heavily favoured home ownership since the Second World War and the aspiration is now almost universal, irrespective of the realities.<sup>110</sup>

Despite cycles of negative equity and the impact of volatile housing markets leading to increased financial insecurity, general attitudes to home ownership remain positive with feelings of independence, security, investment and social status strongly associated with ownership.<sup>111</sup> The evidence strongly suggests that the popularity of home ownership is closely associated with a greater sense of status and control that ownership confers. Any attempts to increase control over homeowners through the introduction of measures to regulate behaviour may jeopardised these perceived benefits. If the rights of an owner-occupier can be limited in the same way as a tenant, what are the benefits to home ownership, and will they not be undermined?

## XI CONCLUSION

In this paper we have sought to examine how adjustments in property rights have been introduced to try to deal with problems of neighbour nuisance and anti-social behaviour. As responses have moved further from orthodox tenancy concerns to the behaviour of non-tenants and to activities beyond the rented premises, the extensions of tenancy law have become increasingly unpredictable in their use.

In terms of the social rented sector there has been a significant increase in the use of legal powers in England and considerable pressure for such an increase is now emerging in Australia. Where narratives of public housing as a 'privilege' have been introduced, confiscation of tenure is portrayed as an appropriate and proportionate response to 'bad behaviour' even if this results in homelessness. Indeed, strategic policy responses to the anticipated homelessness resulting from

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<sup>107</sup> B Franklin (1996) as cited in A Kearns et al, 'Beyond Four Walls. The Psycho-Social Benefits of Home: Evidence from West Scotland' (2000) 15 *Housing Studies* 386.

<sup>108</sup> Ibid (per Gurney C).

<sup>109</sup> Ibid.

<sup>110</sup> Badcock and Beer, above n 28, ch 3; Commonwealth, Productivity Commission, *First Home Ownership Inquiry Report No 28* (2003) xix, 1.

<sup>111</sup> R Forrest, P Kennett and P Leather, *Attitudes to Home Ownership in the 1990s* (1998).

'behaviour' evictions are everywhere conspicuous by their absence. This is both curious and ironic, a peculiar contradiction given the priority attached by English and Australian governments to reducing homelessness and fostering social inclusion. Security of tenure and the operation of subsidised rents in public housing have been used to justify an exclusive focus on public tenants, encouraged by media reports portraying State/council tenants as the 'tenants from hell'. However, in many cases local authorities have been taking action not simply in their capacity as landlords but also in terms of their wider role as strategic housing bodies responsible for community safety issues. This confusion of roles raises important questions as to the likely success of extending the use of a property rights model to control nuisance behaviour occurring in the private housing sectors.

An assessment of the likely success of applying a property rights approach to deal with anti-social behaviour must be informed by an analysis of the construction of the problem which differs according to housing tenure. The development of effective interventions requires a greater understanding of the dynamic nature of the problem. Anti-social behaviour can take many forms. Some incidents are relatively minor, others very serious causing extreme distress to many people. The underlying causes are frequently complex and behaviours can change over time, thus simple solutions are rarely sufficient.

In the private housing sectors analysis of the legal mechanisms by which control could be exercised reveals that the construction of anti-social behaviour as a predominantly housing issue will give rise to innumerable difficulties as the limits of property law are exposed. Even if the technical difficulties could be overcome it is unlikely that changes in existing private sector property rights would receive wide spread support. Indeed, it is clear that the current approach to both the private rented sector and owner occupation is to maintain the status quo rather than embark on a programme of greater regulation and restriction of choice. In this context we conclude that any attempts to introduce the same controls on private tenants and owner-occupiers, which have been imposed relatively easily on tenants of social landlords, seem unlikely to be as successful because of the different constructions of these tenures in the ideological approaches to them by successive governments.