BRIEFS

argued that high community status carries with it a certain responsibility that has been breached, making the offences more rather than less serious. By contrast, a social security beneficiary is unlikely to be able to call character witnesses well known and respected in legal or business circles. Should a person be penalised because poverty and other social disadvantage make them less likely to be involved in and recognised for community activities? Should a person be able to gain advantage from a so-called 'social standing' which is often based mainly on wealth or at least made possible by it, particularly when the conviction is for accumulating some of that wealth in a criminal, fraudulent manner?

The effect on the defendant's employment is also mentioned as a mitigating factor in the tax fraud cases. Certainly the estate agents suffered, as they were disqualified from acting as estate agents. Both barristers, however, were barred from practising for only a few months and then they presumably returned to their practices. Their employment is unlikely to be significantly affected, precisely because tax fraud is seen by many as a legitimate practice and the defendants as unlucky to be caught. The effect on the employment prospects of an unemployed recipient of social security benefits is likely to be significant. A criminal record will hinder them in obtaining employment, and would probably have a much greater impact on their future careers than a criminal record would for someone who is employed and established in their field.

Social security fraud needs to be treated more rationally and fairly, and a comparison with taxation fraud points out a reasonable perspective on the crime. Unfortunately the issue is predominantly one of attitude, and attitudes are often slow to change.

Merrin Mason works for the Law and Government Group in the Parliamentary Research Service, Canberra.

Refer nces

1. McClements, Jill, 'Criminalisation of the Poor', (1990) 15(1) *Legal Service Bulletin*, p.22.

TENANTS

A landmark decision

ROBERT MOWBRAY reports on a recent NSW Supreme Court decision which accords public housing tenants natural justice where termination notices are issued.

Much heralded reforms to residential tenancies legislation in New South Wales in 1989 did not guarantee a right to shelter. A recent Supreme Court decision is, however, a small step along the way.

The Department of Housing in New South Wales used to issue termination notices as a way of ensuring that tenants became starkly aware of problems about the tenancy: rent arrears, nuisance or damage, for example. There was always then a period of negotiation and compromise, and eviction rarely ensued if efforts were made to remedy any difficulties.

Section 58 of the *Residential Tenancies Act* 1987 (NSW) allows an owner to give 60 days notice of termination of a tenancy, without cause. The Department, whose leases are covered by the Act, has taken to using this provision to evict public housing tenants.

They issued such a notice, stating no reasons for eviction, to a Mr Nicholson. The matter went to a single judge of the NSW Supreme Court in December 1991, by way of stated case from the Residential Tenancies Tribunal.

In a landmark decision, the court declared that the decision of the Department to issue a termination notice pursuant to s.58 was invalidated by the Department's failure to accord to the tenant procedural fairness. The court ordered that the Department's decision to issue a termination notice be quashed, and added that if the Department should decide to issue a fresh termination notice then it must 'heed what has been said in this judgment'.

Mr Nicholson had not challenged the Department's right to issue a termination notice; he argued that the *decision to exercise this right* was subject to an obligation to accord procedural fairness. The court agreed. It found that the decision of the Department to exercise its contractual right to give a termination notice under s.58 of the *Residential Tenancies Act* was a decision to which the rules of natural justice apply, requiring procedural fairness.

In summary, the court decided that before a public housing tenant can be evicted, the Department must accord that tenant natural justice by making available any adverse material in its possession which it proposes to take into account when coming to a decision about eviction. It then must give the tenant an opportunity of dealing with that material. If the tenant has been refused access to adverse material, and denied an opportunity of responding to it, then the court will quash the termination notice.

The tenant 'was entitled to entertain a legitimate expectation of security of tenure, and was therefore entitled to procedural fairness in respect to a decision to deprive him of it'. Putting it another way, the court held that if a tenant 'in fact enjoyed the benefit of tenancy' she or he has a legitimate expectation of procedural fairness in respect of any decision which would adversely affect the benefit of tenancy.

The decision of the NSW Supreme Court has clear implications. The Department of Housing has two options. It must issue a termination notice alleging breach of the agreement or, prior to serving a termination notice without relying on a breach, it must establish and implement clear procedures which give the tenant access to any adverse material in its possession which it proposes to take into account when coming to a decision about eviction and, further, it must give the tenant an opportunity to be heard fairly and to refute that material.

The Department has since appealed to the Full Court of the Supreme Court.

Robert Mowbray is a Sydney Lawyer