THIRTY-EIGHTH PARLIAMENT

REPORT 65

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

RESIDENTIAL TENANCIES AMENDMENT BILL 2011

Presented by Hon Adele Farina MLC (Chairman)

November 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

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Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

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REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

RESIDENTIAL TENANCIES AMENDMENT BILL 2011

EXECUTIVE SUMMARY

1 Part 4 of the Residential Tenancies Amendment Bill 2011 (**Bill**) which inserts a proposed Part VIA into the *Residential Tenancies Act 1987* is the main uniform part of the Bill. The rest of the Bill is a result of a seven year statutory review of the *Residential Tenancies Act 1987*.

2 Part 4 implements and is consistent with Model Provisions approved by the Ministerial Council on Consumer Affairs aimed at ensuring nationally consistent regulation of personal information of tenants and prospective tenants provided by real estate agents to residential database operators. Listings on residential tenancy databases have been linked to homelessness.

3 The Bill enables tenants and prospective tenants to readily check information listed about them in databases and seek corrections of personal information. Currently, tenants in Western Australia cannot seek recourse if a listing is false, malicious, out of date or inaccurate. This is an important development and welcome reform to the private rental market.

RECOMMENDATIONS

4 The Committee made four narrative form and four statutory form recommendations. The recommendations are grouped as they appear in the text at the page number indicated.

Page 7

Finding 1: The Committee finds that the requirement in proposed subsection 27C(4) for a lessor to conduct an inspection of the residential premises; prepare a final report describing the condition of the premises; and provide a copy of the report to the tenant '*as soon as practicable*' is vague. The phrase "*as soon as practicable*" places an unreasonable burden on tenants (such as resulting in a delay in the return of the security bond to the tenant), their advisers and Magistrates when a tenant applies for an Order that the lessor comply with proposed subsection 27C(4).

Page 8

Recommendation 1: The Committee recommends that clause 22 of the Residential Tenancies Amendment Bill 2011 be amended in the following manner:

Page 17, line 26 - To delete "as soon as practicable" and insert -

within 7 days

Page 11

Recommendation 2: The Committee recommends that the Minister:

(1) explain why the Department has not turned its mind to the quantum of the option amount;

(2) explain what assessment the Executive has undertaken with respect to the option amount;

(3) explain what parameters the Executive will set to guide the quantum of the option amount;

(4) advise what amount the Minister anticipates the Executive will approve; and

(5) explain why the Legislative Council should adopt the proposed provision in the absence of evidence in support of the provision and evidence on the impact of such a provision on lower socio-economic prospective tenants.

Page 14

Finding 2: The Committee finds that proposed section 59A lacks express safeguards for minors entering into residential tenancy agreements.

Page 15

Recommendation 3: The Committee recommends that clause 56 of the Residential Tenancies Amendment Bill 2011 be amended in the following manner:

Page 44, after line 18 - To insert -

(3) A minor must seek advice from a prescribed tenancy network provider before entering into a residential tenancy agreement about their responsibilities and obligations under the agreement.

Page 18

Recommendation 4: The Committee recommends that the Minister explain the rationale for the 30 days notice period to vacate in clause 79 and whether consideration has been given to this being unreasonable in a tight rental market.

Page 20

Recommendation 5: The Committee recommends that the Minister with respect to clause 83, clarify:

(1) whether an infringement notice can only be issued during the term of a tenancy and whether it would give rise to a listing on a residential tenancy database; and

(2) the nature of the independent processes.

Page 23

Recommendation 6: The Committee recommends that in light of the views of the Commissioner for Equal Opportunity, the Minister advise the Legislative Council:

(1) of any inconsistency between clause 95 of the Bill and section 36(2) of the *Equal Opportunity Act 1984;* and

(2) of any section 109, *Commonwealth Constitution* inconsistency between clause 95 of the Bill and the *Racial Discrimination Act 1975 (Cth)*, the *Disability Discrimination Act 1992(Cth)* and the *Age Discrimination Act 2004 (Cth).*

Page 26

Recommendation 7: The Committee recommends that the Bill be amended in the following manner:

Page 115, after line 22 -- To insert -

(3) The personal information may indicate the circumstances of the breach.

Page 28

Finding 3: The Committee finds that in relation to residential tenancy databases, neither the Bill nor the Model Provisions distinguish between minor and adult tenants. A three year listing on a database has the potential to contribute to or exacerbate homelessness for vulnerable minors.

Page 29

Recommendation 8: The Committee recommends that the Bill be amended in the following manner:

Page 120, line 10 -- To delete "principles." and insert -

principles; or

(c) if that person is a minor as described in section 59A -- the period ending on the day when that person attains the age of 18 years.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

RESIDENTIAL TENANCIES AMENDMENT BILL 2011

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1 REFERRAL

1.1 On 7 September 2011, Hon Simon O'Brien MLC, Minister for Commerce, introduced the Residential Tenancies Amendment Bill 2011 (**Bill**) into the Legislative Council. Following the Second Reading Speech, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A. Under Temporary Standing Orders of the Legislative Council, the Committee must report to the Legislative Council within 45 days of referral of a bill.

2 INQUIRY PROCEDURE

2.1 The Inquiry was advertised in *The West Australian* on 17 September 2011 with details published on the Committee's webpage. The Committee wrote to stakeholders inviting submissions. The list of stakeholders is at **Appendix 1**. The Committee extends it appreciation to those who made submissions.

2.2 A hearing was held on 28 September 2011 with three officers from the Department of Commerce (**Department**). Answers to questions taken on notice at the hearing were provided on 7 October 2011.

3 UNIFORM LEGISLATION

3.1 The uniform part of the Bill is in Part 4 which deals with residential tenancy databases. The structure used is *Model Legislation.* This structure enables the making of legislation that can be drafted with a view to a high degree of uniformity when implemented and where the relevant Ministerial Council has indicated that a high degree of uniformity is desired. This structure (and other types of uniform structures) is described in **Appendix 2**.

3.2 When scrutinising uniform legislation, the Committee considers various 'fundamental legislative scrutiny principles' as a convenient scrutiny framework. These principles are set out in **Appendix 3**.

4 SUPPORTING DOCUMENTS FOR THE LEGISLATIVE PROPOSAL

4.1 On 9 June 2011, well before the Bill was referred, the Committee received a letter from the Minister for Commerce, Hon Simon O'Brien MLC (**Minister**), containing background information as well as attaching various documents supporting the legislative proposal. One of these is the *Residential Databases - Model Provisions* (**Model Provisions**).

4.2 The Minister confirmed there is no written intergovernmental agreement on residential tenancy databases. An 'out of session' *Agreement D10/0004M* made on 5 November 2010 was referred to in the Second Reading Speech, evidencing the approval by the Ministerial Council on Consumer Affairs (**MCCA**) of the Model Provisions. The Minister stated that *Agreement D10/0004M* was referring to the MCCA decision to endorse the Model Provisions.

4.3 The Committee extends its appreciation to the Minster for the early provision of the supporting documents.

5 BACKGROUND TO THE BILL

5.1 The Bill contains 108 clauses in five Parts. Part 4 deals with residential tenancy databases and implements the Model Provisions whilst other clauses in the Bill result from a statutory review of the *Residential Tenancies Act 1987* (**Act**) pursuant to subsection 90(1). The Committee was advised the review of the Act commenced in 2001 and concluded in 2008.[1]

6 OVERVIEW OF THE BILL IN RELATION TO UNIFORM RESIDENTIAL TENANCY DATABASES

6.1 The Explanatory Memorandum (**EM**) states.

> *The Bill implements a nationally consistent approach to the regulation of residential tenancy databases developed by the Ministerial Council on Consumer Affairs for implementation in the legislation of each jurisdiction. Tenancy databases are a legitimate tool for minimising risk in the rental property market.*
>
> *The Bill will improve the quality of information on tenancy databases and establish regulatory requirements so tenants are not unfairly excluded from the private rental market.*[2]

---

1 Answer to Question on Notice by Ms Anne Driscoll, Acting Director General, department of Commerce, 7 October 2011, p3.

2 Government of Western Australia, Department of Commerce, *Explanatory Memorandum, Residential Tenancies Amendment Bill 2011*, p1.

Key features of Part 4 - the uniform scheme part of the Bill

6.2 Part 4 of the Bill proposes to insert Part VIA into the Act. Part 4:

- provides for the formal regulation of residential tenancy databases which are operated by private companies on which information about tenants is stored and widely used by landlords and property managers to screen prospective tenants; and
- implements Model Provisions approved by the MCCA in *Agreement D10/0004M,* ensuring nationally consistent regulation of database operators. The Parliament of Western Australia is free to amend these provisions at any time and is not bound to mirror any amendments made by any other jurisdiction.

6.3 The Model Provisions require each jurisdiction to insert a consequence for the contravention of the provisions. The penalties in the Bill have been benchmarked against the penalties to apply in the remainder of the Bill.[3]

7 OVERVIEW OF THE BILL ARISING FROM THE STATUTORY REVIEW OF THE ACT

Key features

- All residential tenancy agreements will be in a prescribed form, making them simpler to understand for both lessors and tenants.
- Contracting out of the provisions of the Act will be prohibited.
- Mandatory property condition reports at the beginning and end of each residential tenancy.
- Compulsory depositing of all tenants' bonds with the Bond Administrator (to be established at the Department of Commerce to manage the lodgement and disposal of all residential tenancy bonds), leading to greater transparency for tenants in the handling of bond money.
- Greater periods of notice for a tenant of a property the subject of a mortgagee repossession (minimum of 30 days notice to be provided to a tenant before a property can be repossessed).
- Amendments to address anti-social behaviour in social housing, such as enabling the Department of Housing to apply to the Magistrates Court if a

[3] Answer to Question on Notice by Ms Anne Driscoll, Acting Director General, Department of Commerce, 7 October 2011, p5.

tenant has engaged in serious or sustained disruptive behaviour without first having to issue the tenant with a notice of a breach of the tenancy agreement.

- Amendments providing for criteria when assessing tenants in social housing.
- The introduction of an infringement notice system in relation to prescribed offences against the Act.
- Amendments to enable minors (defined as a person who has reached 16 but not attained 18 years of age) to enter into residential tenancy agreements.

8 SELECTED CLAUSES

Clause 2(b) - Commencement

8.1 Clause 2(b) provides for the substantive provisions of the Bill to come into operation on a day fixed by proclamation. The Committee was told that the anticipated time frame for the introduction of the substantive provisions is 2012 and "*most likely the latter part of 2012*."[4] This is because the Bill requires a significant number of amendments to be made to the *Residential Tenancies Regulations 1989*.

Clause 5 - amending the definitions of tenant and owner

8.2 Clause 5 proposes to amend section 3 of the Act to:

- expand the definition of 'tenant' to include prospective and former tenants; and
- delete the term 'owner' and substitute 'lessor' as well as expanding its definition to include former and prospective lessors.

8.3 The Committee noted that the term 'lessor' is a feature of the Model Provisions based on definitions used in Queensland where the Model Provisions were drafted.[5]

Clause 22 - inserting a proposed subsection 27C(4) into the Act

8.4 Proposed section 27C titled "*Property condition report at start and end of tenancy*" states in subsection (4) that:

> *A lessor must, as soon as practicable after the termination of a tenancy —*

4 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p2.

5 Letter from the Minister, Hon Simon O'Brien MLC, 9 August 2011, Attachment "I".

(a) conduct an inspection of the residential premises; and

(b) prepare a final report describing the condition of the premises; and

(c) provide a copy of the report to the tenant.

Penalty: a fine of $5 000.

8.5 The Committee noted that proposed subsection 27C(4) does not prescribe a time frame within which the property condition report must be given to the tenant at the end of the tenancy. The proposed subsection merely states that this must be done "*as soon as practicable*".

8.6 The Committee queried the ambiguity of the phrase "*as soon as practicable*" in proposed subsection 27C(4) and the absence of an express time frame within which a lessor must meet the obligations being imposed, especially given the quantum of the penalty.

8.7 The Committee noted that proposed subsection 27C(1) regarding the start of a tenancy prescribes a seven day time frame during which the lessor must prepare a property condition report and give two copies of it to the tenant once the tenant is in occupation. The Tenants Advice Service Inc said the time limit for providing the report at the start of the tenancy "*should be consistent with the time for providing the report at the termination of the tenancy*."[6] The Tenants Advice Service Inc said they receive telephone calls from tenants indicating that many weeks have passed since they vacated the premises but the lessor has yet to conduct the final inspection. Often it is the case that the condition of the property has altered: dust and dirt build up, gardens deteriorate and leaves accumulate.

8.8 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, said the requirement to have a property condition report at the end of a residential tenancy agreement is not a current feature of the Act but the Review recommended its inclusion. Ms Blake said:

> *There would be circumstances in which it may be difficult, given we have such a large state, for a landlord to attend within a short period of time to do a final inspection report. You might have people who are living in the metropolitan area who have investment properties in country or rural or regional Western Australia or, likewise, you might have people in regional and remote areas who have investment properties in the city.*

6 Submission No 3 from the Tenants Advice Service Inc, 27 September 2011, p6.

> *It is easier to have a property condition report at the beginning of a tenancy because it would be a version of either the property condition report that was at the conclusion of the previous tenancy or, if it is a new property completely, there is a reasonable expectation you would have that available at the time when you are putting it on the market for rent.*
>
> *However, at the end, we thought that there were some variables that could not be accommodated in a seven-day time frame, such as travel. We have legislated it to be "as soon as practicable". If the tenant believes that the landlord is not dealing with it as soon as practicable, they have the opportunity to apply to the court under section 15 and seek an order that the landlord attend to the property condition report by a certain date because the court can make those types of orders. At the time the review report found that it was not appropriate.*
>
> *The review report suggested that we prescribe different time frames for different parts of the state but in drafting we felt that that would just add too much complexity to the legislation.*[7]

8.9 The Committee is not persuaded by the Department's argument and is of the view that the variables described above regarding the lessor are surmountable. Not prescribing a time frame places an unreasonable burden on the tenant to seek a court order compelling the lessor to provide the property condition report by a certain date.

8.10 The Committee was advised that if the property condition report is not prepared and given to the tenant, the tenant can apply to the court at a cost of $26 plus time off work to attend court and obtain the report.[8] Alternatively, the tenant can lodge an application online with the Magistrates Court or physically lodge at their local courthouse. Once an Order is made, the tenant has to serve it on the lessor.[9] The Committee is of the view that these processes are onerous, not only on the tenant, but a waste of judicial time in the Magistrates Court assessing what constitutes "*as soon as practicable*" in all the circumstances.

8.11 The Department argued that the phrase "*as soon as practicable*" is "*not unusual and is very common in legislation. Sometimes, time frames are mandated: 21 days, seven working days. Sometimes terms like 'as soon as practicable' are used. It is not an*

[7] Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, pp4-5.

[8] Ms Blake also stated that the Bill introduces an automatic entitlement for both a tenant and lessor to be represented in the Magistrates Court, rather than representation being left to the Magistrate's discretion.

[9] It can be served personally as the tenant will know the lessor's address but can also be posted.

unusual concept."[10] The phrase is "*is not an open-ended invitation to take as long as they like. Given the circumstances, it is what is reasonable*."[11] However, by not prescribing a timeframe, there will be a plethora of views amongst tenants, Magistrates, lessors and community legal centres advising tenants, as to what constitutes "*as soon as practicable*". Certainty is preferred - it is fairer on all parties if an express timeframe is prescribed in the Bill for when the property condition report must be given to the tenant as this may affect the release of the bond money pursuant to clause 8(1) of Schedule 1 of the Act.[12] The Department said:

> *The giving of a property condition report at the end of a tenancy should not delay the release of the bond. It is current industry practice for a property condition report to be completed at the conclusion of a tenancy agreement prior to the disposal of the security bond.*
>
> *A tenant ... may, at any time after the conclusion of the tenancy agreement, make an application to the Court for the disposal of the security bond (clause 8(1) of Schedule 1).*[13]

8.12 Despite this evidence, sections 96(1)(a) and 96(3)(a) of the Act require both parties to sign an approved form for the release of the security bond. Release of the security bond may be delayed if an owner is unwilling to sign the approved form until a termination condition report has been completed.

8.13 The Committee makes the following finding and recommendation.

Finding 1: The Committee finds that the requirement in proposed subsection 27C(4) for a lessor to conduct an inspection of the residential premises; prepare a final report describing the condition of the premises; and provide a copy of the report to the tenant '*as soon as practicable*' is vague. The phrase "*as soon as practicable*" places an unreasonable burden on tenants (such as resulting in a delay in the return of the security bond to the tenant), their advisers and Magistrates when a tenant applies for an Order that the lessor comply with proposed subsection 27C(4).

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[10] Mr Andrew Lee, Acting Manager, Legislation and Policy, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p8.

[11] Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p5.

[12] It states: "*Referee may determine disposal of bond. (1) Subject to this clause, a competent court may, upon application by an owner or a tenant, order that the amount of any security bond be paid to the tenant in full, or, where the court is satisfied that the tenant is liable to pay an amount to the owner by reason of a breach of a term of a residential tenancy agreement or for fumigation of the premises as mentioned in section 29(1)(b)(ii), that the amount of the security bond be applied in payment of, or towards, that amount and the balance, if any, be paid to the tenant.*"

[13] Further Answers to Questions on Notice provided by Ms Patricia Blake, Senior Policy Officer, Department of Commerce, 20 October 2011, p2.

Recommendation 1: The Committee recommends that clause 22 of the Residential Tenancies Amendment Bill 2011 be amended in the following manner:

Page 17, line 26 - To delete "as soon as practicable" and insert -

within 7 days

Penalties

8.14 Clause 22 of the Bill also raises issues around the quantum of the penalties in both proposed subsection 27C(4) (when a lessor must after the termination of a tenancy give a tenant a property condition report) and other parts of the Bill, often five fold increases. In proposed subsection 27C(4) for example, the proposed penalty is $5,000. The increases appear to reflect the fact they were outdated in terms of severity, given the timing of when the original Act came into force, as well as an intent to treat breaches of the Act more seriously.

8.15 Property owners criticised the Bill for:

- favouring tenants over owners by diminishing owners' rights;
- empowering 'bad' tenants; and
- increasing fines for owners.[14]

8.16 Of this latter point, Ms Patricia Blake, Senior Policy Officer, Department of Commerce, said:

> *There are only 22 new penalties. There may appear to be more but in the drafting of the bill, sometimes Parliamentary Counsel had to strike out a whole existing clause and redraft it so it would appear to be new when, in fact, it is not. Of the new penalties, 10 of these are related to the tenancy database provisions. Because that is a completely new regulatory framework, it is appropriate that there are new provisions attached to those.*

---

[14] See, for example, 'Things you can do about the review of the Residential Tenancy Act 1987', Adam Bettison, President, Property Owners Association of WA' and 'Fines under the Residential Tenancies Amendment Bill 2011'. Also Submission No 1 from Property Owners Association of WA Inc, 23 September 2011, p1. Also Submission No 5 from Mr Peter Bolden, September 2011, p6. Also Submission No 7 from RW Bradley, 3 October 2011, p6. Also Submission No 17 from Mr Laurie Maiolio, 10 October 2011, p2. Also Submission No 18 from Ms Debra Darch, 10 October 2011, p2.

> *The remaining 12 provisions come out of the review report and recommendations arising out of that. Because we are now going to mandate a prescribed lease agreement, failure to use the prescribed lease agreement has a fine attached to it and failure to provide property condition reports have fines attached to it. It is things of that nature. They are recommendations that came out of that review.*
>
> *The last time the penalties were increased was in 1995. From 1987, when that act came in, to 1995, so eight years, they were increased two and a half-fold. This time around it is 16 years and they are being increased five-fold, so it is proportionate to that. The penalties were benchmarked against the Residential Parks (Long-stay Tenants) Act (2006). That is newer legislation. The penalties in that legislation were advised by parliamentary counsel at the time that the bill was being drafted. It was considered a reasonable benchmark because you have tenants and you have landlords in the same jurisdiction. It is appropriate that if they are undertaking a like offence or a breach of the Act, they would get a like penalty.* [15]

8.17 The Committee noted that the proposed penalties are the maximum possible penalties under section 9 of the *Sentencing Act 1995*.

Clause 23(2) - prescribing an amount as consideration for an option

8.18 This clause proposes to delete subsection 27(2)(a) of the Act and insert a new provision that prescribes in regulations an amount as consideration for an option to enter into a residential tenancy agreement. The Department was unable to indicate the amount as consultation with stakeholder groups has not yet been undertaken, except that the amount would be cost recovered.[16]

8.19 The Committee is concerned at the Department's lack of preparation with respect to the amount, given that it may be linked to rent and the impact of this on lower socio-economic prospective tenants.

8.20 Given that the Bill introduces Model Provisions about residential tenancies databases, arguably, using such a tool means the prescribed amount for the effort involved could be minimal. The Department said:

> *Ultimately, we give advice to the Minister about what we would recommend the prescribed maximum would be, and we would note*

15 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p3 refers to Flag "B" of a Handout tabled at the Hearing on 28 September 2011.

16 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p14.

> *that the tenants' group said that it should be $X and the landlords' group said that it should be $Y, and that in other states with similar arrangements it is level Z. We would give advice about what we think is a reasonable level in light of the overall purpose of the bill—the act—to protect the rights of tenants, protect the reasonable rights of landlords, and have a fair regulatory environment. We would certainly need, in our advice, to give a justification for how reasonable costs were assessed in underpinning whatever prescribed amount is recommended.*[17]

8.21 The Department provided additional advice that:

- neither the ACT nor the Northern Territory permit option amounts in their equivalent legislation; and
- Victoria, Tasmania, South Australia, Queensland and NSW in authorising either option or (equivalent) holding amounts have not, to date prescribed an amount.[18]

8.22 The Committee is not persuaded by the Department's argument that an option amount is necessary and expresses concern that the Department has not yet turned its mind to the quantum. The Committee is of the view that based on the evidence, the requirement for an option amount will have an impact on lower socio-economic prospective tenants and is unsupported. Given that the Minister is asking the Parliament to approve a provision in a Bill that is undetermined, the Committee makes the following recommendation.

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17 Mr Andrew Lee, Acting Manager, Legislation and Policy, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p14.

18 Answer to Question on Notice by Ms Anne Driscoll, Acting Director General, Department of Commerce, 7 October 2011, unnumbered page.

Recommendation 2: The Committee recommends that the Minister:

(1) explain why the Department has not turned its mind to the quantum of the option amount;

(2) explain what assessment the Executive has undertaken with respect to the option amount;

(3) explain what parameters the Executive will set to guide the quantum of the option amount;

(4) advise what amount the Minister anticipates the Executive will approve; and

(5) explain why the Legislative Council should adopt the proposed provision in the absence of evidence in support of the provision and evidence on the impact of such a provision on lower socio-economic prospective tenants.

Clause 41 - amending the frequency of the lessor's right to enter and inspect

8.23 Clause 41 proposes to delete sections 42 to 46 of the Act. It then proposes to insert subsection 46(3) which reduces a lessor's right to enter and inspect premises from the current frequency of not more than once every four weeks to not more than four times a year. This amendment arose from the review of the Act which found that the current frequency was, compared with other jurisdictions, "*overkill*".[19] Proposed subsection 46(3) reflects what occurs in NSW.

8.24 The Department said the 'not more than four times in any 12 month period' approach was a compromise between all the interest groups. The tenant network was satisfied that it was not too frequent while providing lessors with flexibility to adapt the timing to suit the nature of the tenancy.[20]

8.25 Ms Debra Darch, private citizen, said more inspections need to be carried out "*in the first four weeks of a tenancy and then every two to three months depending on how the initial inspection went.*" [21] Ms Darch argued that "*landlords should be given the*

19 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p16.

20 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p17.

21 Submission No 18 from Ms Debra Darch, 10 October, p2.

opportunity to keep an eye on their investments, just like the share market or any other investment opportunity."[22]

8.26 The Committee noted that four times in a year means a lessor could, for example, inspect premises every couple of weeks in the first two months but then be unable to inspect it again that year. This could be problematic for a lessor if circumstances of the tenancy change because additional inspections cannot be written into the tenancy agreement.

8.27 The Committee acknowledges that inspections conducted not more than four times in any 12 month period is suitable for a 'normal' tenancy. However, for those who have had a previous negative record but whose situation has now improved, it is unlikely a lessor will afford these prospective tenants a second chance at demonstrating responsible tenanting behaviour by renting to them without the option of more frequent inspections. The Bill does not assist these persons whose only alternative recourse is to the public housing waiting list.

8.28 The Committee acknowledges that inspections not more than four times in any 12 month period is a policy decision of the Executive.

Clause 56 - Minors

8.29 This clause proposes to insert section 59A which gives capacity for a person who has reached 16 but not yet 18 years of age to enter into a residential tenancy agreement as a tenant.[23] Ordinarily, minors cannot enter into contracts on the legal presumption that they are not mature enough to know what they involve. They are considered to lack the skills and independence necessary to have legal capacity.

8.30 The Committee, in appreciating that many minors need their own tenancy for a variety of reasons, is concerned whether at the point of entering into the agreement, their rights are safeguarded. Minors are a vulnerable group, many of whom lack understanding of what entering into a residential tenancy agreement involves. Fundamentally, any minor signing a residential tenancy agreement is taking on significant legal obligations.

8.31 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, advised of the following protections in the Bill in the event a minor encounters trouble with their tenancy:

- the Magistrates Court (Minor Cases Procedure) Rules 2005 allow a minor to have a litigation guardian present with them in any court proceedings; and

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22 Submission No 18 from Ms Debra Darch, 10 October 2011, p2.

23 Queensland is the only other jurisdiction with a similar provision relating to minors. See section 19 of the *Residential Tenancies Act 1994 (Qld).*

- proposed subsection 22(2) entitles a minor to be represented in court.[24] Under it, a minor will have an automatic right to representation by a tenant advocate, such as the Youth Legal Service.

8.32 The Committee is more concerned at the absence of protections in the Bill at the point a minor enters into a residential tenancy agreement, than when a problem arises after becoming a tenant. Ms Blake said part protection will be provided by the (yet to be prescribed) lease agreement:

> *By having a prescribed lease agreement, it is going to be considerably simplified from the tomes that are currently used to lease premises and properties. The feedback that we have got, particularly from the courts, is that even landlords and property managers do not understand the quite legalistic documents that are currently flooding the market place. So, the prescribed lease agreement will be very plain-English, straightforward documents, and our education strategies will be greatly assisted by that, because we will be able to say to people, "Look clearly at these parts of the document, these are the parts that you need to pay attention to." So, the front page will have the details about how much the rent is and how often it has to be paid.*
>
> *The core terms of the agreement are straight from the act, so it is that part that says "This is a term of every residential tenancy agreement." And then there will be a section that will say, "Additional clauses", and it will clearly say that these are not compulsory, but once you sign them they do become binding on you. They will be set out quite separately in the agreement, not as is currently the case, where they are intermingled in between all the other clauses. So, that will be a lot easier and again, the department will undertake a lot of education, not just when the bill comes into play, but constantly. And youth is one of our target audiences, so now that this group comes under the Act, we will put considerable resources into making sure that there are publications available and other resources available—that they get advice all the way through the process from beginning to end.*

8.33 The Committee is of the view that a plain English lease agreement is just as binding on a minor as a legalistic document. The binding nature of a contract such as the prescribed lease agreement is just as difficult for a minor to understand. A minor may

[24] Ms Blake said at page 22 of her *Transcript of Evidence,* 28 September 2011: "*The current position is that any representation in court is at the discretion of the magistrate, and it is actually very rare for magistrates to allow any party to be represented.*"

not be aware of their rights and obligations and need to be made aware of them before signing the lease agreement.

8.34 The Committee was advised that the (then) Department of Community Development did not provide a submission to the statutory review of the Act on the issue of minors entering into residential tenancy agreements.[25] The Commissioner for Children and Young People advised that she has no record of being contacted by the Department for her views on clause 56.[26] The Committee is of the view that this is a significant omission given that the Commissioner has published guidelines to assist government agencies assessing draft legislation from the perspective of children and young people's wellbeing, with the intent of producing laws that better meet their needs and interests.[27] Under the guidelines agencies are to:

- identify the impact on children and young people;
- assess if the proposal is in the best interests of children and young people; and
- further analyse and assess the significance of the impacts.

8.35 The Committee noted that no other Australian jurisdiction except Queensland provides for minors to be tenants and similar to the Bill, Queensland does not provide any safeguards for minors.[28]

8.36 The Committee finds that minors will be assuming significant legal obligations at the time they enter into a residential tenancy agreement but the Bill fails to provide express safeguards, such as a requirement they seek advice from a tenancy network provider about their responsibilities and obligations under the Act. In rural and remote regions, this could be undertaken by telephone. Therefore, the Committee makes the following finding and recommendation.

Finding 2: The Committee finds that proposed section 59A lacks express safeguards for minors entering into residential tenancy agreements.

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25 Answer to Question on Notice by Ms Anne Driscoll, Acting Director General, Department of Commerce, 7 October 2011, covering page.

26 Telephone call from the Office of the Commissioner for Children and Young People, 20 October 2011.

27 *http://www.ccyp.wa.gov.au/content.aspx?cId=259* viewed on 19 October 2011.

28 Section 28 of the *Residential Tenancies and Rooming Accommodation Act 2008* (*Qld*) states "*(1) A minor has the capacity to enter into a residential tenancy agreement or rooming accommodation agreement. (2) An agreement entered into by a minor is enforceable in the same way as if the agreement had been entered into by an adult.*"

Recommendation 3: The Committee recommends that clause 56 of the Residential Tenancies Amendment Bill 2011 be amended in the following manner:

Page 44, after line 18 - To insert -

(3) A minor must seek advice from a prescribed tenancy network provider before entering into a residential tenancy agreement about their responsibilities and obligations under the agreement.

Clause 79 - proposed subsections 81A(8) and (9)

8.37 Clause 79 generally proposes to replace section 81 of the Act[29] and insert sections 81A, 81B and 81. Proposed section 81A is titled: *Mortgagee repossessions of rented properties.* 81B is titled *Notice of proposed recovery of premises by person with superior title* and 81 is titled *Order for tenancy against person with superior title*. Proposed subsections 81A(8) and (9) state:

> *(8) This section extends to a tenant who is, immediately before the commencement of this section, holding over after termination of the residential tenancy agreement.*
>
> *(9) This section has effect despite the terms of any court order made before the commencement of this section or any contract or other agreement.*

8.38 The Committee noted that these proposed subsections have retrospective effect. This raises that fundamental legislative principle the Committee routinely considers: *Does the Bill adversely affect rights and liberties or impose obligations retrospectively*? The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.[30] Ms Blake said:

> *They do operate retrospectively in two ways. One is that just prior to when these provisions become law, if a tenant has been issued with a notice by the mortgagee that the premises are to be repossessed and they are to move out and they are still in those premises at the time this becomes law, they will have access to these new provisions. That*

[29] Titled: *Protection of tenants in relation to persons having superior title.*

[30] *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ.

is time-limiting in itself because a mortgagee does not allow a tenant to stay for lengthy periods of time. They want properties vacant so they can sell quickly. Yes, it is retrospective, but it is time-limiting because of industry practice in itself. The reason that it is operating retrospectively is because losing your home—what happens currently when a property is repossessed is that often the first time that a tenant knows that a property is to be repossessed is when the sheriff comes around to serve them with a notice to move out, and often they have to move out that day, or at most they have two days notice if they are lucky. They are not given a lengthy period of time.

What the provision in the bill requires is a mandated 30 days notice—the tenant has to have a minimum. So, even if the Supreme Court says that the bank has possession of the premises as of today, they cannot require the tenant to move out now for 30 days, whereas current practice is that they will get their court order, the sheriff will go to the premises and the tenants have got to pack up ... everything and get out that day. So, it is a significant burden on the tenant. That is why the provisions are operating retrospectively in terms of tenants that are affected immediately before the law comes into being.[31]

8.39 The Committee is of the view that the retrospective operation of proposed subsections 81A(8) and (9) has been justified.

Clause 79 - the notice period to vacate when a mortgagee is in possession of premises

8.40 The 30 day notice period in proposed subsection 81B(2)(b) is consistent with both the practice in New South Wales and the review of the Act. Ms Blake advised that "*the banks can take over the tenancy, so the tenant can apply to have the tenancy vested in the bank if there are special circumstances, —so, if it is too tight and they want to raise that argument with the court.*"[32] However, the Committee is of the view that the 30 days notice period is too short, especially in a tight rental market as currently exists. The tenant is placed in a difficult position, especially if they do not have a support network.

8.41 The Committee was advised that an advantage for a tenant is that under section 62 of the Act, the tenancy agreement ceases if a person with superior title takes possession and this is consistent with all jurisdictions. Ms Blake said:

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31 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p24.

32 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p25.

What happens at the moment ... is that as soon as the mortgagee commences proceedings, their solicitors, because of their requirement to notify anyone who is in possession of the premises that proceedings are underway, will write to the tenant and tell the tenant that the tenant has to vacate. We are telling tenants and Tenants Advice Service is telling tenants that if they vacate at that point in time, they are in fact in breach of their tenancy agreement. They cannot stop paying rent, because nothing has been decided. But that is industry practice and for many tenants when they get a letter from a solicitor telling them they have to vacate, they do not wait. Like you say, if they know it is hard to get another property, they will just start moving and grab the first property that they can get.

What this bill will do is make it quite clear to industry that they cannot require anyone to vacate until the possession has been awarded to the mortgagee and 30 days notice has been given. It will be whatever length of time the superior court requires for its action plus 30 days.

[Thus] *the tenant does not have to pay rent for those 30 days at all; they do not pay to the previous owner and they do not pay to the bank. So, they have the benefit of 30 days free accommodation essentially too.*

The reason they are getting free rent is essentially just the operation of the law. The previous owner is no longer the owner because the bank has regained possession. There is no tenancy agreement between the bank and the tenant, so there is no-one to pay rent to. Quite often, historically, if tenants were staying on, they were still paying rent to the previous owner, who was then not on-paying their money to the bank, which just exacerbated the mortgage default.[33]

Our advice to tenants will be, "You do not have to move out and you stay put until you are given the 30 days notice." We will be doing extensive work to make sure that people in that situation are very much aware of their right to stay in the property and not vacate until that 30 days notice has expired.[34]

[33] Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p25.

[34] Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p26.

8.42 The Committee queried whether the proposed 30 day notice period to vacate commences when the mortgagee obtains a court order for possession or when the when the mortgagee applies to obtain this order from a court. The Department said:

> *Under section 81A(2)... the mortgagee, after becoming entitled to take possession through an order of the Supreme Court ... must give the tenant a notice to vacate the premises. Therefore, the notice to vacate can only be given to the tenant once the mortgagee has obtained a court order for possession.*[35]

8.43 The Committee makes the following recommendation.

Recommendation 4: The Committee recommends that the Minister explain the rationale for the 30 days notice period to vacate in clause 79 and whether consideration has been given to this being unreasonable in a tight rental market.

Clause 83 - proposed infringement notice system

8.44 An infringement notice system is proposed by the Bill whereby an authorized person may give an infringement notice to a person whom they have reason to believe has committed an offence under the Act. The Committee noted the following issues that arise in connection with infringement notice systems.

- A risk of the system being driven by fiscal rather than correctional objectives.
- It not always being successful in stopping undesirable behavior - the payment of the fine may be regarded as the cost of doing business.
- The possibility of poorly justified proceedings being initiated by way of an infringement notice when the case is weak.
- The risk that innocent parties will nevertheless settle allegations by paying up because of the pressure of convenience, discounted penalties, threat of costs and the limited availability of legal aid for defended summary matters.
- The undesirability of enforcement authorities imposing penalties without independent scrutiny of the facts by a court.[36]

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35 Further Answers to Questions on Notice provided by Ms Patricia Blake, Senior Policy Officer, Department of Commerce, 20 October 2011, p1.

36 See Professor Richard Fox, 'Infringement Notices: Time for Reform?' *Australian Institute of Criminology*, November 1995, Issue No. 50, p4.

- The fact that the courts cannot handle large numbers of offenders does not exempt policy makers from their obligation to judge the appropriateness of the elements of each particular prohibition and the aptness of the particular legal procedures selected for its enforcement.[37]

- If there is undue delay between the alleged commission of an offence and the issue of an infringement notice, the alleged offender may not recall the circumstances giving rise to the alleged offence.[38]

8.45 The Committee noted that regulation 20 of the *Residential Tenancies Regulations 1989* currently allows for infringement notices to be issued under Part 2 of the *Criminal Procedure Act 2004*. The Bill appears to propose establishing the Act's own internal infringement notice system for other offences such as failing to use a prescribed lease and failing to provide a property condition report with the modified penalty of up to 20 per cent remaining consistent with the *Criminal Procedure Act 2004*. However, the Department stated the modified penalty may be less than 20 per cent.[39]

8.46 The Committee was advised that payment of a modified penalty is not an admission of guilt for the purposes of any proceedings under proposed subsection 88A(11). It does not result in a tenant having a negative listing on a residential tenancy database.[40] The Department said proposed section 82E provides that a person can only be named on a residential tenancy database if:

- the person was named on a tenancy agreement [82E(1)(a)];

- the tenancy agreement has ended [82E(1)(a)];

- the person has breached the tenancy agreement [82E(1)(b)]; and

- the person owes the lessor an amount that is more than the security bond [82E(1)(c)(i)]; or

- a court has made an order terminating the residential tenancy agreement [82E(1)(c)(ii)].

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37 See Professor Richard Fox, 'Infringement Notices: Time for Reform?' *Australian Institute of Criminology*, November 1995, Issue No. 50, p5.

38 Department of Planning and Infrastructure, Government of Western Australia, 'Implementation of the Planning and Development Act 2005, Discussion Paper: Planning Infringement Notice Regulations, December 2006, at p16.

39 Answer to Question on Notice by Ms Anne Driscoll, Acting Director General, Department of Commerce, 7 October 2011, p2.

40 Answer to Question on Notice by Ms Anne Driscoll, Acting Director General, Department of Commerce, 7 October 2011, p3.

8.47 The Department said an infringement notice would therefore not give rise to a listing on a residential tenancy database because:

- an infringement notice can be issued during a tenancy, for example, if a tenant changes the locks without the lessor's consent and without reasonable excuse. In this case, the requirement of 82E(1)(a) that the agreement be ended is not met; and
- an infringement notice is not a court order, thus not meeting the requirement of 82E(1)(c)(ii).

8.48 The Department said it should be noted that the circumstances giving rise to an infringement notice, for example, a failure to pay rent with the expectation that it be paid from the bond, may also give rise to a listing on a database, but these would be independent processes.[41]

8.49 The Committee is unclear, based on the evidence received, that an infringement notice can only be issued during the term of a tenancy.

8.50 At paragraph 8.46 the advice of the Department appears to be that the issuing of an infringement notice will not give rise to a negative listing in the database. However, at paragraph 8.47 the Department provides an example in which an infringement notice would give rise to a negative listing in the database. This requires further clarification from the Minister. In addition, clarification is needed as to the independent processes referred to in paragraph 8.48.

8.51 The Committee makes the following recommendation.

Recommendation 5: The Committee recommends that the Minister with respect to clause 83, clarify:

(1) whether an infringement notice can only be issued during the term of a tenancy and whether it would give rise to a listing on a residential tenancy database; and

(2) the nature of the independent processes.

Clause 95 - Social housing

8.52 Clause 95 proposes to insert section 75A titled: "*Termination of social housing tenancy agreement due to objectionable behaviour*". The proposed section prescribes

41 Further Answers to Questions on Notice provided by Ms Patricia Blake, Senior Policy Officer, Department of Commerce, 20 October 2011, p1.

a procedure by which a competent court may, upon application by a lessor, terminate the agreement, without notice of a breach, if the court is satisfied that the tenant has:

> *(a) used the social housing premises, or caused or permitted the social housing premises to be used, for an illegal purpose; or*
>
> *(b) caused or permitted a nuisance by the use of the social housing premises; or*
>
> *(c) interfered, or caused or permitted any interference, with the reasonable peace, comfort or privacy of any person who resides in the immediate vicinity of the premises,*
>
> *and that the behaviour justifies terminating the agreement.*

8.53 The genesis for clause 95, which polarised stakeholder submissions to this Inquiry, was explained by the Department of Housing:

> *Under the existing legislative framework, we are constrained from effectively terminating public housing tenancies that engage in serious and persistent disruptive behaviour by virtue of the operation of section 62(3) of the Act. The restriction occurs because although the tenant is in breach of the Act and/or their tenancy agreement and the tenant is issued with a Breach Notice, if the tenant rectifies their conduct for the term of the Breach Notice (14 day period), there can be no further action taken to terminate the agreement.*
>
> *The literal and common judicial interpretation of section 62 essentially allows tenants to avoid further legal action by refraining from disruptive behaviour for 14 days, while allowing the behaviour to continue unabated after this period.*[42]

8.54 The Tenants Advice Service Inc said termination without notice of a breach is a "*denial of natural justice to the tenant*."[43] This may be contrasted with the procedure in the Department of Housing's 2009 Disruptive Behaviour Management Strategy. In the Strategy, a strike is issued but if three strikes are issued within 12 months, legal action will commence[44] for the termination of a tenancy where there has been ongoing and/or serious disruptive behaviour.[45]

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42 Submission No 12 from the Department of Housing, 5 October 2011, p2.

43 Submission No 3 from the Tenants Advice Service Inc, 27 September 2011, p3.

44 Submission No 3 from the Tenants Advice Service Inc, 27 September 2011, p21.

45 Submission No 12 from the Department of Housing, 5 October 2011, p1.

8.55 The proposed procedure is not available to private lessors, a source of discontent for the Real Estate Institute of Western Australia who argue that as it is the only section expressly dealing with objectionable behaviour, it should be expanded to cover all tenants.[46] Currently, only section 62 of the Act covers termination for private lessors on grounds of an unrectified breach of a term of the agreement but proposed section 64 usefully provides for a notice of termination without specifying any ground for the notice.

8.56 The Department of Housing advised that as at 30 June 2011 there were:

- 36,539 rental properties tenanted by individuals and families on low to moderate incomes; and

- 23,411 listings on the rental waiting list.[47]

8.57 The Commissioner for Equal Opportunity (**Commissioner)** said of these statistics, "*nearly 22% of Department of Housing properties are occupied by Aboriginal tenants and their families*".[48]

8.58 The Commissioner raised the issue of indirect discrimination by the Department of Housing against Aboriginal tenants in clause 95 of the Bill. The Commissioner stated that clause 95 and the Disruptive Behaviour Management Strategy are arguably inconsistent with the *Equal Opportunity Act 1984*. That is, the combination of the two indirectly discriminate against (particularly) elderly Aboriginal grandmothers and great-grandmothers on the grounds of race, impairment and age. The Commissioner said indirect discrimination is defined in section 36(2) of the *Equal Opportunity Act 1984* in the following way:

> *A person … discriminates against another person … on the ground of race if the discriminator requires the aggrieved person to comply with a requirement or condition —*
>
> > *(a) with which a substantially higher proportion of persons not of the same race as the aggrieved person comply or are able to comply; and*
> >
> > *(b) which is not reasonable having regard to the circumstances of the case; and*
> >
> > *(c) with which the aggrieved person does not or is not able to comply.*

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46 Submission No 4 from REIWA, 27 September 2011, p4.

47 Submission No 12 from the Department of Housing, 5 October 2011, p1.

48 Submission No 19 from the Commissioner for Equal Opportunity, 10 October 2011, p6.

8.59 The Commissioner said the definition is intended to capture systemic discrimination that is caused by the application of a seemingly neutral practice or procedure to a particular cohort, made up of individuals who, due to the attributes they possess, have varying degree to comply.[49] Elderly Aboriginal women have three strikes recorded against them when they are not themselves responsible for the disruptive behaviour but who are "*unable due to age, disability and a sense of obligation to do much about it*".[50] The Commissioner further said:

> *Paradoxically, it is the capability and resolve of older Aboriginal women in managing their tenancies in the face of considerable hardship that leads them to being placed in the situation where they are most at risk of their tenancies being terminated.*[51]

8.60 The Commissioner commented that if the Bill is passed, it will prevail over the *Equal Opportunity Act 1984* to the extent of any inconsistency but any inconsistency between the Bill and Commonwealth discrimination laws,[52] which contain similar indirect discrimination provisions, raises section 109 of the *Commonwealth Constitution.* A claim of discrimination could be lodged by an aggrieved social housing tenant with the Australian Human Rights Commission or the Federal Court.

8.61 Due to time constraints the Committee was unable to investigate in detail the Commissioner's concerns and in light of this the Committee makes the following recommendation.

Recommendation 6: The Committee recommends that in light of the views of the Commissioner for Equal Opportunity, the Minister advise the Legislative Council:

(1) of any inconsistency between clause 95 of the Bill and section 36(2) of the *Equal Opportunity Act 1984;* and

(2) of any section 109, *Commonwealth Constitution* inconsistency between clause 95 of the Bill and the *Racial Discrimination Act 1975 (Cth)*, the *Disability Discrimination Act 1992(Cth)* and the *Age Discrimination Act 2004 (Cth).*

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49 Submission No 19 from the Commissioner for Equal Opportunity, 10 October 2011, p7.

50 Submission No 19 from the Commissioner for Equal Opportunity, 10 October 2011, p7.

51 Submission No 19 from the Commissioner for Equal Opportunity, 10 October 2011, p8.

52 In particular the *Racial Discrimination Act 1975(Cth),* the *Disability Discrimination Act 1992(Cth)* and the *Age Discrimination Act 2004(Cth).*

Structural Bias

8.62 Arguably, based on submissions received, proposed section 75A is structurally biased. Structural bias refers to the inherent discriminatory impact of laws, policies and practices on a particular group of people,[53] such as Aboriginal people (especially elderly Aboriginal women[54]) tenants with children and their children, people with an intellectual disability or mental illness[55] and domestic violence victims.[56] The social housing provisions and their application prescribe more grounds upon which to terminate an agreement than for non-social housing tenants.[57]

8.63 The Committee acknowledges that proposed section 75A reflects a policy position of the Executive.

Clause 96 - amendments relating to residential tenancy databases

8.64 This clause proposes to insert Part VIA into the Act and is titled "*Residential tenancy databases*". It reflects the Model Provisions. Proposed section 82A defines a "*residential tenancy database*" as a database containing personal information.

8.65 The Committee noted these databases will not be accessed by the Housing Authority because the legislation authorising the Housing Authority to lease premises limits the eligibility criteria to their income and not to the tenant's history.[58] The Committee noted that the Housing Authority is the statutory authority created by the *Housing Act 1980* and that the Department of Housing is the public interface of the Housing Authority.[59]

8.66 Residential tenancy databases are a relatively recent phenomenon: the first sizeable database was established in 1987. The databases generally include listings collected from across Australia and can be accessed nationally.[60] They emerged from the regulation of credit rating agencies and the resulting need for real estate agents to have

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53 A former Legislation Committee commented on structural racism in the Parental Support and Responsibility Bill, Western Australia, Legislative Council, Legislation Committee, Report 5, *Parental Support and Responsibility Bill,* November 2006, p22-23.

54 Submission No 19 from the Commissioner for Equal Opportunity, 10 October 2011, p7.

55 Submission No 13 from the WA Association for Mental Health, 6 October 2011, p1. Also Submission No 19 from the Equal Opportunity Commissioner, 10 October 2011, p2.

56 Submission No 3 from the Tenants Advice Service Inc, 27 September 2011, p22. Similar concern was also expressed in Submission No 10, by Ms Mary Clark, Principal Legal Officer, the Aboriginal Family Law Services, 3 October 201, p1.

57 See reference to a position paper received by Anglicare from the Tenants Advice Service quoted at Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard),* 30 August 2011, p56.

58 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p28.

59 Further Answers to Questions on Notice provided by Ms Patricia Blake, Senior Policy Officer, Department of Commerce, 20 October 2011, p2.

60 Victorian Law Reform Commission, *Residential Tenancy Databases*, Report, March 2006, p2.

their own specialised tenancy database when the industry lost the ability to access credit information. Such databases are operated by private companies. Information about tenants and their rental history is collected, stored and made available to real estate agents to search for listings of potential tenants as part of their responsibilities as property managers. Database listings are created on the basis of information provided by real estate agents to database operators. The purpose of such databases is to enable real estate agents to assess 'business risk' on behalf of the property owner.[61]

8.67 The Committee noted that the proposed amendments do not regulate internally held databases. For example, if a real estate agent's business is a franchise, each franchisee is a separate entity, each with its own database. However, "*if the head office collects data centrally and shares it with the other franchisees, then that will come under the operation of the Act and if that information is used for the purpose of assessing someone's rental application, then it comes under these provisions*."[62]

8.68 The Minister advised the Committee of research conducted by Mission Australia in 2002 for the Federal Government's *Supported Accommodation Assistance Program* which linked listings on residential tenancy databases and homelessness.[63] Currently, tenants in Western Australia cannot seek recourse if a listing is false, malicious, out of date or inaccurate.[64] The proposed provisions enable people to readily check information listed about them in databases and seek corrections for information that is wrong or outdated. This is an important development and welcome reform to the rental market[65] given the history of databases described below.

> *Traditionally the databases were created to collect negative data about tenants. Then they morphed into listings. There is such a variation of practice. Some real estate agents put every person that rents with them on a database but do not necessarily put any data next to them. Other real estate agents—and sometimes even the database companies now— every applicant, every inquiry is being listed on the database and they often do not have any data next to them. If a future property manager or property owner is looking at that and they see a name, they are left to determine whether it is a negative listing or a positive listing or just an administrative practice.*[66]

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61 Victorian Law Reform Commission, *Residential Tenancy Databases*, Report, March 2006, p2.

62 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p28.

63 Letter from the Minister, Hon Simon O'Brien MLC, 9 August 2011, p3.

64 Letter from the Minister, Hon Simon O'Brien MLC, 9 August 2011, p2.

65 Submission No 3 from the Tenants Advice Service Inc, 27 September 2011, 4.

66 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p29.

8.69 The Committee noted that only negative listings can be made and only after the termination of the tenancy agreement.[67] However, the *Regulation Impact Statement* of 28 March 2006 states that the MCCA/Standing Committee of Attorney-Generals Working Party on Residential Tenancy Databases recommended positive listings be permitted.[68] That *Regulation Impact Statement* lists three types of listings:

- negative (issues with previous tenancies);
- neutral (tenancy history information); and
- positive (such as 'recommended tenant').[69]

8.70 Proposed subsection 82E(2) states that the listing "*must indicate the nature of the breach*." According to the Department, this *would* require that a listing state for example, rent arrears or property damage and the person making the listing *could* add the surrounding circumstances of the listing, for example, that the tenant was temporarily unemployed, provided the information is accurate.[70]

8.71 The Committee finds that the regulation of residential databases is a step forward in reducing homelessness. However, the absence of an express provision to qualify a negative listing with information regarding the circumstances around which the negative listing is made, is a weakness of the database, especially as that information will be kept for three years.[71] For example, the tenant may have had a situational crisis such as illness or temporary unemployment and is in arrears as a consequence. For this reason, the Committee makes the following recommendation in order to provide context for the listing.

Recommendation 7: The Committee recommends that the Bill be amended in the following manner:

Page 115, after line 22 -- To insert -

(3) The personal information may indicate the circumstances of the breach.

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67 As per proposed new section 82E(1)(a).

68 Ministerial Council on Consumer Affairs/Standing Committee of Attorneys-General Working Party on Residential Tenancy Databases, pp31-32.

69 The *Regulation Impact Statement,* p31.

70 Email from Ms Patricia Blake, Senior Policy Officer, Department of Commerce, 10 October 2011.

71 Submission No 2 from Tenant Check, 27 September 2011, p1. Tenant Check suggested four years as this is the same period used by credit bureaux.

8.72 Similarly, the inability to list a positive comment "*denies recognition to those West Australians currently deemed to be Recommended Tenants*"[72] and is a weakness. However, the Committee acknowledges the Department's advice that "*if an agent wants to positively refer someone, they can write a reference for them.*"[73]

Residential tenancy databases and minors

8.73 At paragraphs 8.29 to 8.36, the Committee raised the issue of minor tenants and their obligations under the Bill. Further to that commentary, the Committee is concerned at the impact on minor tenants of a three year negative listing in a residential tenancy database.

8.74 Minors are already age disadvantaged in the private rental market and, because of their developmental life stage, it is unrealistic to expect them to have the same sense of responsibility towards their tenancy as adult tenants. The Bill fails to distinguish sufficiently between adult and minor tenants in the databases. The Model Provisions did not take minors into account when setting the level at three years.[74]

8.75 The Department stated that in reviewing the submissions made to the national consultation on the Model Provisions specifically advocating for a timeframe shorter than three years for a listing to remain on a database:

> *None referred to the impact of a three year listing on minors as the rationale for their position. All of these submissions were noting the significant impact of a negative listing generally on a tenant and that a person's circumstances can change significantly over a shorter period of time.*[75]

8.76 The Committee queried whether accommodation for minors is currently given priority on the Department of Housing lists. The Department said:

> *Under the current provisions of the Residential Tenancies Act 1987, the Housing Authority does not give priority on its waiting lists to persons under 18 years of age. However, DoH's Regional Managers have the discretionary power to consider the circumstances of those under 18, and to make necessary decisions; and DoH works with Non*

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72 Submission No 6 from Mr Matthew Strassberg, Senior Adviser External Relations, Veda, an information economy company, 30 September 2011, p1.

73 Ms Patricia Blake, Senior Policy Officer, Department of Commerce, *Transcript of Evidence,* 28 September 2011, p29.

74 In clause 1 of the Model Provisions, lessor is defined as meaning a "*person to whom the right to occupy residential premises under a residential tenancy agreement is given*" and if a jurisdiction includes provisions for minors such as Queensland and Western Australia, then they are caught by the definition.

75 Email from Ms Patricia Blake, Senior Policy Officer, Department of Commerce, 11 October 2011.

Government Organisations to deliver youth-specific accommodation/support programs.[76]

8.77 The Committee is of the view that a three year listing may contribute to or exacerbate homelessness amongst some minors. Developmentally, minors are undergoing significant remodelling in the area of the brain[77] responsible for a range of functions including coordinating behaviour, impulse control, decision-making, judgment, planning and other higher order cognitive functions.[78]

8.78 The Committee is of the view that, similar to a spent conviction system, any listing on a residential tenancy database should be expunged when a minor reaches 18 years of age. Therefore, the Committee makes the following finding and recommendation.

Finding 3: The Committee finds that in relation to residential tenancy databases, neither the Bill nor the Model Provisions distinguish between minor and adult tenants. A three year listing on a database has the potential to contribute to or exacerbate homelessness for vulnerable minors.

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76 Further Answers to Questions on Notice provided by Ms Patricia Blake, Senior Policy Officer, Department of Commerce, 20 October 2011, p2.

77 Australian Law Reform Commission Report 108, published on 12 August 2008, last modified on 1 September 2010 at Chapter 68 titled: 'Decision Making by and for Individuals Under the Age of 18' states: "*The frontal lobe of the brain is responsible for functions such as organising thoughts, setting priorities, planning and making judgments. Scientists have discovered that the frontal lobe undergoes significant change during adolescence, in which it produces a significant amount of 'grey matter' (the brain tissue responsible for thinking) and then undergoes a period in which it rapidly thins or 'prunes' the grey matter and develops 'white matter' (the brain tissue responsible for making the brain operate precisely and efficiently). The research suggests that the frontal lobe, and therefore an individual's decision-making capacity, has not reached full maturity until some time in a person's early twenties.*"

78 Australian Broadcasting Commission, *The Science Show,* Sarah-Jayne Blakemore, Research Fellow Institute of Cognitive Neuroscience, Department of Psychology, University College London, in an interview with Robin Williams, Presenter, 14 October 2006. Ms Blakemore said: "*I think you have to take into account when you're thinking about how to treat teenagers, both in terms of education and also legally, you have to take into account this new research showing that their brain is essentially a work in progress, it's still developing. Through no fault of their own it's genetically pre-programmed to continue developing well into the early 20s. It's been known and accepted for many years that hormones affect teenagers and cause all sorts of teenage behaviour, but now this research is showing it's not just hormones, it's also the brain that's changing during those years.*"

Recommendation 8: The Committee recommends that the Bill be amended in the following manner:

Page 120, line 10 -- To delete "principles." and insert -

principles; or

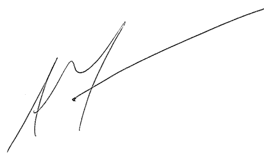
(c) if that person is a minor as described in section 59A -- the period ending on the day when that person attains the age of 18 years.

9 FURTHER AMENDMENTS TO THE BILL

9.1 The Department advised that no further amendments are proposed for the Bill.[79]

10 CONCLUSION

10.1 The Bill implements Model Provisions developed and endorsed by the Ministerial Council on Consumer Affairs.



Hon Adele Farina MLC
Chairman

1 November 2011

[79] Answer to Question on Notice by Ms Anne Driscoll, Acting Director General, Department of Commerce, 7 October 2011, p5.

APPENDIX 1

LIST OF STAKEHOLDERS

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Stakeholders
Mr Philip Nounnis, Managing Director, Tenancy Information Centre Australia
Mr Hylton Quail, President, The Law Society of WA
Mr Alan Bourke, President, Real Estate Institute of WA
Ms Amanda Lynch, Chief Executive Officer, Real Estate Institute of Australia
Mr John Perrett, Executive Officer, Tenants Advice Service
Ms Bronwyn Kitching, Executive Officer, Shelter WA
Mr Warren Rule, Owner, Landlords Advisory Service
Mr Mark White, Head of Department, National Tenancy Database
Ms Yvonne Henderson, Commissioner, Equal Opportunity Commission
Mr Adam Bettison, President, Property Owners Association of Western Australia
Mr Michael Fredericks, Chief Executive Officer, Console
Ms Penny Carr, Co-ordinator, National Association of Tenant Organisations
Ms Irina Cattalini, Chief Executive Officer, Western Australian Council of Social Service
Mr Mark Atkinson, President, Strata Titles Institute of Western Australia
Ms Emily Sim, National Operations Manager, Apmasphere
Ms Gai Williams, Managing Director, Trading Reference Australia Pty Ltd
Mr Andrew Muir, State Manager (WA), RP Data
Mr Vaughn Gill, Owner Operator, Tenant Check
Mr Grahame Searle, Director General, Department of Housing

Stakeholders
Mr Matt Walker, Chief Executive Officer, Geographe Bay Tourism Association
Mr Paulo Amaranti, Chief Executive Officer, Rottnest Island Authority
Mr Paul King, President, Tourism Council of Western Australia
Mr Geoff Dixon, Chairman, Tourism Australia

APPENDIX 2

IDENTIFIED STRUCTURES OF UNIFORM LEGISLATION

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The Committee has adapted the following five structures from the Protocol on *Drafting National Uniform Legislation* by the national Parliamentary Counsel's Committee, 2008 Third Edition. Further detail of these structures may be found at: http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf or in the Committee's sixty fourth report titled *Information Report on Uniform Scheme Structures* tabled in August 2011.

Structure 1 - Applied laws. Also know as template, cooperative and complementary legislation, here legislation is enacted in one jurisdiction and applied (as in force from time to time) by other participating jurisdictions as a law of those other jurisdictions.

Structure 2 - Model legislation. Also know as mirror legislation, this legislation is enacted in participating jurisdictions with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law. It is drafted in either non-jurisdictional specific terms, or as the law of a particular jurisdiction.

Structure 3 - Legislation of the States referring legislative power to the Commonwealth. Legislation can either confer general authority to legislate with respect to a general matter described in the referral legislation or confer specific authority to legislate in the terms set out in the referral legislation.

Structure 4 - Legislation of the States adopting a Commonwealth law. The *Commonwealth Constitution* at paragraph 51 (xxxvii) enables a State, as an alternative to referral, to "adopt" a Commonwealth law enacted in reliance on a referral by other States. A referral of power gives the Commonwealth greater flexibility to make future changes and to ensure that those changes commence at the same time in all jurisdictions.

Structure 5 - A combination of structures. Here some provisions of a legislative project may be dealt with by way of an applied law scheme and other provisions by way of national model scheme. Those jurisdictions that are currently prepared to use an applied law model to achieve future consistency by delegation of legislative changes to the Parliament of another jurisdiction (the template jurisdiction) may also be prepared to enact national model legislation and delegate legislative changes that are agreed by government nationally to the executive of their own jurisdiction, subject to a power of the local Parliament to disallow the changes in the same way as they may disallow subordinate legislation made by the executive.

APPENDIX 3

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

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FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament.