

27th September 2011

The Secretary
Standing Committee on Uniform Legislation and Statutes Review
Parliament House
Perth 6000 WA

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Dear Sir

Inquiry into Residential Tenancies Amendment Bill 2011

REIWA appreciates the opportunity to provide a written submission on matters of interpretation of the Bill as drafted.

REIWA is an apolitical professional association of real estate practitioners in Western Australia, representing some 1500 principals and 5000 employees. REIWA represents an important element of the broader property sector which makes a significant contribution to Western Australia's social and economic development. REIWA also serves as an advocacy group for consumers engaging in real estate transactions in the State, speaking on their behalf on a range of issues impacting on property.

REIWA has liaised with the Department of Commerce during the review of this Act which has extended over a decade and is pleased to see the review nearing completion.

For your information I have attached a summary of issues that REIWA raised with the Minister's staff immediately prior to the Bill being debated by the Legislative Council.

Overall, REIWA does not have many concerns with the interpretation of the Bill.

The major point debated in the Legislative Council was in reference to the new provisions for tenants of social housing especially s75A "Termination of social housing tenancy agreements due to objectionable behaviour".

REIWA strongly disagrees that this provision should apply only to tenants in a social housing tenancy agreement. Mr M. McGowan on 6th September 2011 requested an explanation as to why there is a different rule for public housing tenants compared to private housing tenants and why there is a stronger provision for public housing landlords as opposed to private landlords. The explanation from Mr T.R. Buswell was that it is more difficult for the Dept of Housing to progress an eviction than for a private landlord. REIWA is not aware of any evidence to support the comment.

REIWA is also concerned with the interpretation of this section by Magistrates who are asked to make decisions. Can it be interpreted that a magistrate cannot terminate a private housing tenancy where there is an alleged breach through an illegal use of the premise or other objectionable behaviour?

The proposed s75A is the only section that expressly deals with objectionable behaviour. Will the courts interpret this to mean that it cannot apply the same sanctions for objectionable behaviour to private housing tenancies?

If magistrates can terminate private housing tenancies through an interpretation of the existing s62 for objectionable behaviour then there is no reason why it should not be an express provision of the Act in the same way that it is proposed to have an express provision for social housing tenants.

The social housing groups have submitted that it unfair that one group of people (social housing tenants) are treated differently from another group (private housing tenants). I believe the term "discrimination" has been used.

REIWA agrees that there is no justification for treating the two groups differently and that the same express conditions in the Act should apply to both groups. It should not be left to the magistrates to make an unnecessary interpretation of the provisions of the Act, especially when each magistrate has the ability to interpret the Act in his/her own way. The interpretation should be clear so that there is consistency of decision-making.

If the express conditions apply to both groups then it ultimately rests with the magistrates to determine if a given set of circumstances justify a termination. The proposed provisions for social housing certainly set out what issues the magistrate should consider. There is little justification for not including the same issues that a magistrate should consider for private housing tenancies.

No justification has been given as to why the proposed express provisions of s75A should not be set out for private housing tenants. It appears that from the statements from Mr Buswell on 6th September 2011 that the only reason is that the express conditions make it clear to magistrates that they have the power to terminate a tenancy when it is justified. If this is the case, then the express provisions should also be set out for private tenancies.

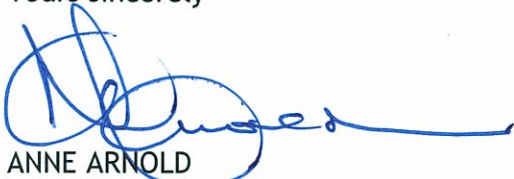
The other issue addressed in the attached paper relates to the service of notices. REIWA is of the view that as the Act applies to some 26 per cent of the population and many of those people would be considered to be young members of society it appears reasonable to REIWA that notices are able to be served electronically.

Another important issue relates to the interpretation of proposed s82K. It is REIWA's view that the words in s82K "other personal information" be defined because the term "personal information" is so broadly defined that there cannot possibly be any "other personal information".

Also in s82K, it proposes the length of time that records of defaulting tenants can be kept on tenancy database will be three years. REIWA submits that the time should be five years. A five year period would match periods in other Australian states.

REIWA would be pleased to discuss these issues with you if required.

Yours sincerely



ANNE ARNOLD
CHIEF EXECUTIVE

*Residential Tenancies Amendment
Bill 2011 (Bill No. 199 — 1 Pt. 2-4)*

REIWA ISSUES

Termination of tenancy agreement due to objectionable behaviour

The Government is proposing in the amending Bill to introduce a procedure whereby a magistrate has the power to terminate a social housing tenant if that tenant has continually breached the lease through objectionable behaviour.

REIWA's view is that the magistrates' power should apply to all tenants including those in the private system and not just a social housing tenant.

Recommendation

That the proposed amendment s75A should apply to all residential tenancy agreements.

S75A of the Bill should be amended by deleting the words "social housing" and inserting the words "residential".

Background

Currently the owner of public/social or private housing for a tenancy of a fixed term can apply to a magistrate under s62 seeking a termination of the lease on the grounds that the tenant has not remedied a breach through causing a social nuisance or conducting illegal acts on the premises under section 62.

Dealing with objectionable behaviour under a periodic lease (no agreed termination date) is less of an issue as the owner can serve a 60 day termination notice upon the tenant.

The proposed addition of s75A is that an owner of social housing can apply to a magistrate seeking a termination order if 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"

Discussion

S62 states that "*A lessor may give notice of termination of a residential tenancy agreement to the tenant upon the ground that the tenant has breached a term of the agreement and the breach has not been remedied.*"

The short coming with this s62 is that termination is only possible if the breach has not been remedied.

However, with some types of illegal conduct termination is not possible; e.g. if a person has established a drug laboratory on the premises and the police remove the operation then the tenant has nothing to remedy and therefore the tenancy cannot be terminated.

Similarly, a tenant who constantly causes a nuisance that affects the quiet enjoyment of other residents can be breached but avoid termination by not causing a nuisance for a

short period of time and then reoffending. In these scenarios, a magistrate would not have the power to grant a termination application from an owner.

REIWA agrees with the proposed introduction of s75A as it provides clarity to tenants that that there are limits to continued objectionable behaviour and illegal conduct.

Further s75A is a positive step forward to provide an opportunity (that currently does not exist) to a group of affected residents through the property owner to deal with continued objectionable behaviour.

The tenant's right of occupation is protected because the magistrate, when asked to consider an application for termination must be "satisfied that the behaviour justifies the terminating the agreement".

s75A(3) clearly sets out the issues that the magistrate must take into consideration when making a decision. - whether the behaviour was recurrent and, if it was recurrent, the frequency of the recurrences; and the seriousness of the behaviour.

However; the proposed s75A only refers to social housing tenants rather than all tenants.

Tenants in private housing are equally likely to exhibit objectionable behaviour and therefore private property owners should have the same rights as the owner's of social housing.

REIWA does not see how the proposed section can be misused as it sets out the clear grounds upon which an application can be made and it will be the magistrate's decision as to the whether the circumstances warrant a termination i.e. it is certainly not an automatic termination.

Part VIA – Residential tenancy databases

The Government proposes to introduce provisions into the Residential Tenancies Act that will provide for the operation of tenancy databases.

It is proposed that after three years a person's personal information be removed from a database.

The provisions are confusing because they state that "other personal information" does not have to be removed after three years.

The term "personal information" is so broadly defined that there cannot possibly be any "other personal information".

Recommendation

That in s82K "other personal information" be defined.

Background

S82 is a newly proposed section that addresses the use of tenancy databases.

S82A defines "personal information" as "*information (including an individual's name) or an opinion, whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*".

S82K uses the term "other personal information".

Discussion

The definition of “personal information” is so broad that it covers everything and therefore there cannot be any other information.

REIWA can only assume that the “other personal information” refers to personal information that has been lodged with a database operator about another tenancy.

To prevent any misunderstanding the term “other personal information” should be defined.

S85 Service**Service of Notices and Documents to an Agreed Electronic Address**

The Act should also have provision for the service of notices and documents electronically.

Background

Currently the Act only provides for the service of notices by post or by personal delivery.

Discussion

In an age where a significant percentage of people communicate electronically it would be efficient, where the parties to the lease consented to that method, if copies of notices and other documents could be served by transmitting an electronic copy of the notice, addressed to the person at the person’s nominated electronic address.

The time at which a notice or document is taken to have been served would be at the end of the first day following the day on which the copy is transmitted.