POST IMPLEMENTATION REVIEW

REPORT ON THE IMPACT OF RESIDENTIAL TENANCY ACT

November 2000

1. Contents

2. *Executive Summary*

Respondents have made detailed contributions to the review which have been enormously useful in addressing the terms of reference. Generally, the Act is working well and will require minimal amendments to deal with a range of technical issues. Most respondents are supportive of the general framework of the Act and believe that it represents a vast improvement on previous tenancy law in Tasmania.

Some of the issues raised by respondents were outside of the scope of this review. For example, the regulation of boarding and rooming houses, retirement homes, and caravan parks are subject to separate reviews and will be resolved apart from this process. Similarly, privacy issues associated with the use by real estate agents of credit reporting and other information services for assessing the suitability of prospective tenants, are sufficiently complex to warrant an investigation with separate terms of reference. Nevertheless, these issues are of sufficient concern to warrant further attention.

The issue which has attracted greatest concern among respondents has been the charging by real estate agents of up front fees to tenants. While section 17 of the Act was intended to prohibit such fees, the drafting of this section has been insufficiently clear to achieve this objective, and the real estate industry has demonstrated a blatant disregard for the Act's policy objective. This review proposes that these type of up front charges should be prohibited and that the drafting of the Act be strengthened to bring the provisions in line with all other Australian jurisdictions. It is anticipated that industry will oppose such amendments.

Lease break fees have also arisen as a major issue during this review. However, the problem is not so much a conflict between tenants and owners as for the need to create clearer and more transparent rules for the calculation of such fees. Therefore, the review proposes that an appropriate formula be included in the Act.

Most of the issues raised during this review have been those relating to term of reference 1. Term of reference 2 sought information as to the impact of the Act on the residential tenancy market in Tasmania. Generally, there is no evidence that the Act has adversely impacted on the market by increasing costs or by increasing rents. The impact has been

positive to the extent that it has simplified the relevant law and created simpler processes.

Term of reference 3, which focuses on areas for administrative improvement has identified scope for improvement, primarily around the provision of accurate information to appropriate groups. In relation to court processes, some statutory revision is proposed in this review to ensure that orders for vacant possession are valid and to provide some discretion to the courts in determining these orders.

The review has highlighted a need for more public education and for ongoing information to be provided to tenants and owners. Additional information and training also needs to be provided for public sector groups such as staff within Housing Services, the courts and the Police.

Ultimately, good communication and a clear understanding of appropriate rights and obligations are the most important factors in establishing positive tenancy relationships.

2.1 Recommendations

1. *That the Act be amended to entitle a mortgagee who exercised rights of foreclosure under a mortgage to give a tenant notice to vacate after 28 days.*

2. *That any conflict between the Residential Tenancy Act and the* Land Titles Act 1980, *relating to the rights of mortgagees be resolved.*

3. *That the Act be amended to allow an owner to give 14 days notice to vacate so that it takes effect on the day of expiry of a fixed term agreement.*

4. *That section 57 be amended to give the court a discretion to order work to be performed if it is of a view that security is inadequate.*

5. *That where an owner requires entry for the reasons detailed in section 56(3), the parties should negotiate a mutually agreeable time. Where a mutually acceptable time cannot be agreed, the owner should advise the tenant of the intended time of entry.*

6. *That section 56 (5) be repealed.*

7. *That the Act be amended to provide for entry by an owner within one month of commencement of the tenancy to inspect the premises and every 3 months thereafter.*

8. *That the Office await the outcome of the current interdepartmental review of boarding and rooming houses and conduct a separate examination of caravans parks.*

9. *That section 6 of the Act be amended to allow for the non-application of a part of the Act to prescribed premises or premises of a prescribed class.*

10. *That the current exemption regulation for retirement villages be revised once the detail of retirement villages legislation is known.*

11. *That section 17 of the Act be amended to make it illegal for any fees to be charged to any person for making an application to rent premises or for viewing a residential premises.*

12. *That the Act be amended to provide that penalty clauses in residential tenancy agreements are void.*

13. *That the Act be amended to allow a payment period to run from a fixed date in one month to a fixed date in another month by allowing a payment period of up to 31 days.*

14. *That the Act require an owner to mitigate any loss which arises from an action of a tenant.*

15. *That a definition of 'early termination' be included in the Act to mean:*

(a) the termination of a fixed term agreement prior to the expiry date by:

- *vacant possession being delivered to the owner by the tenant, following a notice to vacate, as a result of a failure of the tenant to comply with a condition of the agreement; or*
- *vacant possession being delivered to the owner by the tenant without a notice of termination being lawfully given to the owner or a notice to vacate being given to the tenant.*

(b) termination of any agreement prior to the date upon which lawful notice by either the owner or the tenant takes effect.

16. That the Act be amended to provide that the maximum amount of loss that may be charged to the tenant for 'early termination' of a fixed term agreement be limited to:

- *advertising;*
- *rent; and*
- *the pro-rata costs paid to agents of the owner for establishing an agreement with a new tenant.*

17. That the maximum charges to be charged for 'early termination' be prescribed by regulation.

18. That the provisions relating to abandonment be revised to make it clear that abandonment can occur without the need for an order from the court.

19. That the Act be amended to give the Commissioner a discretion to refuse to consider applications if not lodged within 30 days after the end of the tenancy.

20. *That sections 17 and 25 of the Act be amended to allow a pet bond (except for dogs required to assist the vision or hearing impaired) to a value equivalent to 2 weeks rent for the premises.*

21. *Amend the Act to prohibit the keeping of pets on residential premises without the permission of the owner.*

22. *Amend the Act to make it clear that the court can order the performance of 'urgent' and 'emergency' maintenance as well as 'general' maintenance.*

23. *That clause 39 (2) be amended to prevent its application (notice becomes void) where notice of termination is given for the non-performance of maintenance.*

24. *That the Act be amended to require that where arrangements are made by an owner to arrange for emergency and urgent repair, that the repairs be carried out as soon as practicable.*

25. *That section 24 of the Act be amended to extend the prohibition on distress for rent to distress for any reason.*

26. *That the Act be amended to make it clear that goods distrained must be returned at no charge to the lawful owner.*

27. *That the application of section 41 [order of termination] to co-tenants be clarified and the Act amended accordingly.*

28. *That the application of section 41 be extended to allow for the termination of a tenancy where injury has occurred or is likely to occur to a neighbouring occupant or damage has or is likely to occur to a neighbouring property.*

29. *That the Act be amended to remove doubt that the Small Claims Court can hear and determine any matter under sections 41 and 45 of the Residential Tenancy Act [vacant possession and termination] and make any orders specified in those sections.*

30 *That the Commissioner have a discretion to refund fees where it is clear that an application by a tenant or the actions of an owner in relation to a dispute about security deposits are vexatious.*

31. *That the Act be amended (in consultation with the courts) to more clearly define 'service' for the purposes of serving notices under the Act.*

32. *That the requirement that applications for orders be served on the tenant on the same day that they are made should be replaced with a requirement that they be served 'within 24 hours'.*

33. *That the Office conduct a public awareness campaign following the enactment of amendments to the Act and provide training for key groups within the market and within government.*

34. *That the Office examine the collection and use of information by property managers and owners, to determine whether the provisions of the* Privacy Act 1988 *adequately meet the needs of the Tasmanian market and whether further protections or restrictions are required.*

35 *That the Act be amended to allow a magistrate to delay hearing an application for an order for vacant possession until the correct time for expiration of a notice to vacate has elapsed.*

3. Background

The *Residential Tenancy Act 1997* and the *Residential Tenancy Regulations 1997* came into effect on 1 July 1998 replacing the former *Landlord and Tenant Act 1935*.[1] Development of the new Act took place over a number of years and involved extensive consultation with property owners, managers, tenants and tenant organisations.

It was considered appropriate to review the effectiveness of the Act after it's first year of operation, to examine the impact of the new legislation and to determine whether any improvements should be made. Consequently, the Attorney-General the Hon. Peter Patmore, approved terms of reference for a Post Implementation Review of the Residential Tenancy Act.

3.1 Terms of Reference

Terms of reference for the review were to determine:

- whether the Act is achieving its objectives;
- its impact on the residential tenancy market; and
- areas for administrative improvement arising from the above.

3.2 The Review Process

An *Issues Paper* based on the terms of reference was prepared by the Office of Consumer Affairs and Fair Trading and circulated to stake holders in August 1999. Twenty eight submissions were received in response. The content of these submissions along with an analysis of their proposals is summarised in this report. This discussion is followed, where appropriate, by specific recommendations. A list of respondents is provided at appendix 1.

[1] The *Landlord and Tenancy Act 1935* is still in force but no longer applies to residential tenancies.

4. Term of Reference 1

Whether the Act is achieving its objectives

4.2 Objective 1

To establish a fair and equitable framework for all parties where a right of occupancy is granted for private residential tenancy purposes

Issue One: Does the act adequately define a tenant's right to occupancy ?

Submissions

Cooling off periods and subletting

One respondent proposed that a 'cooling off' period should be provided after a tenancy agreement has been signed. It was also suggested that owners should be able to prohibit tenants from subletting without having to provide reasons. Section 49 of the Act currently provides that a tenant may not sublet without the owner's permission but states that permission cannot be unreasonably withheld.

Continuity of agreement after sale and rights of mortgagees

Further issues arose during the course of the review relating to the rights of tenants following the sale of a property and following foreclosure by a mortgagee.[2] Where a property is sold with a pre-existing tenancy agreement, there appeared to be some doubt as to the impact of that sale on the agreement. In some circumstances new owners have given immediate notice to tenants. Similarly, where mortgagees have foreclosed on mortgages, some mortgagees have given either very short or little notice to tenants. It was presumed by the mortgagee that any existing agreements were terminated.

[2] This information was provided through complaints by tenants to the Office.

Notice to vacate prior to expiry of fixed term agreements

A number of respondents raised issues relating to giving notice after a fixed term agreement has expired. As currently drafted, the Act provides that notice cannot be given until after a fixed term agreement has expired and this notice is effective 14 days after service of the notice. This means that any 12 month agreement is effectively 12 months and 14 days in duration. A specific problem arises for the Tasmanian University Union Housing Scheme which generally gives notice to all of their tenants at the end of the academic year. Some tenants renew agreements while others leave on the day upon which notice takes effect. Where tenants do not leave, action must be taken in a court to obtain vacant possession, this action cannot commence until at least 14 days after the expiry of the agreement. This presents some difficulty in the management of these tenancies. It is proposed that it would be helpful and logical that notice is able to be given a sufficient number of days before expiry of a fixed term agreement, so that it takes effect on the day of expiry.

Comments

Cooling Off Periods

No persuasive reasons were advanced for the proposed cooling off period. Further, no problems or complaints have been raised with the Office which might support such a proposal. Generally, an agreement is not valid until there has been an amount paid (consideration) so it is possible for contracts to be avoided prior to the payment of any money. However, once an agreement is signed, the owner usually advises other prospective tenants and in the event of cancellation the owner would need to re-advertise the property. Therefore, cancellation would result in costs to the owner which would include a loss of rent. As a result, it would be inappropriate to implement such a measure without more compelling argument.

Subletting

Subletting is a common practice where premises are shared between a number of people. For some groups such as students, an initial tenant is responsible to the owner for the obligations under the agreement but sublets part of the premises to other tenants to share the rental costs. While an owner may reasonably refuse to allow the property to be sublet to a person who is unsuitable, no compelling argument has been

advanced for allowing an owner to reject subletting without reason. The specific provisions ensure that the tenancy is not transferred to a sub-lettee but that the original tenant remains responsible. Were an owner to refuse permission, there is no penalty and only a court could determine whether an owner's refusal was unreasonable. In practice, this provision does not appear to create any problems and is not onerous for property owners.

Continuity of agreement after sale

There may need to be greater clarity about the rights of tenants following the sale of property. Where tenants enter into an agreement with an owner for a fixed period of time, this agreement should not be subverted by the sale of a property. It is not uncommon for rental properties to be sold 'with tenants' and indeed this may be an attractive proposition for a prospective purchaser. The rights of tenants should be made clearer in this regard. However, in the absence of a statutory problem, this needs to be addressed by providing information through public awareness.

Rights of mortgagees

With respect to the rights of mortgagees, the Office sought advice from the Solicitor General. The Office was advised that as currently drafted, the Residential Tenancy Act does not provide authority for a mortgagee to give notice to a tenant. The rights conferred by a residential tenancy agreement for giving notice are provided exclusively to the 'owner' who as the person holding title, is the mortgagor. This creates a potentially absurd outcome where, for example, the mortgagor rents the premises under a long term agreement at less than market rent.

The rights of a mortgagee to sell a property should not be restricted by the unilateral action of a mortgagor, particularly where this has potential to impact on the value of a mortgage. Many mortgages are provided over a principal place of a mortgagor's residence and mortgages often prohibit rental to a third party without the mortgagee's permission. Creating delays in the sale of a property or imposing other restrictions in usage, following foreclosure, may unreasonably effect the reasonable rights of the mortgagee and the value of a mortgage. Therefore, the mortgagee should have a reasonable choice as to whether a property is to be sold with or without tenants. Nevertheless, tenants are often innocent parties

who may in good faith have entered into a medium term tenancy with an expectation of security of tenure for this period.

Some rights are provided to mortgagees by the *Lands Titles Act 1980*[3] but there appears to a conflict between the provisions of this Act and the Residential Tenancy Act.

The Office has discussed this issue with a number of solicitors and credit providers and has examined legislation in other jurisdictions. Other states and territories allow the mortgagee to obtain vacant possession following between 30 to 60 days notice. This approach protects the property rights of the mortgagee while giving a tenant reasonable notice. While this notice will shorten the term of a fixed term agreement it does provide a reasonable solution which balances the legitimate needs of both parties. Solicitors and credit providers have indicated that this would be an acceptable solution. It is proposed that 28 days notice be given in these circumstances as this time period is consistent with notice periods currently contained in both the Land Titles Act and the Residential Tenancy Act.

Notice to vacate prior to expiry of fixed term agreements

There would appear to be some logic in allowing a property owner to give notice so that the agreement ceases on the nominated date of expiry. In many circumstances, owners and tenants will agree to extend or renew an agreement for a further period, commencing on the day after the day of expiry. However, there will be circumstances where the owner chooses to terminate the agreement at the end of the fixed term.

At present, the tenant can leave (without any notice) on the day of expiry. However, an owner is able to give notice only after the expiry of the

---

[3] Leases which exceeds three years are registrable under section 64 of the Land Titles Act. Section 146 requires an application to the Supreme Court for vacant possession where this is not delivered on expiry of the agreement, or following a failure to meet financial obligations. While nearly all leases registered under the Land Titles Act are retail tenancy leases the Act also applies to residential tenancy leases. There is thus inconsistency between the provisions of the Land Titles Act and the Residential Tenancy Act.

agreement. Allowing a notice to vacate to take effect on the day of expiry would appear to be a logical refinement.

Allowing the owner to give notice also provides a reminder to the tenant that the fixed term period is due to expire along with their continuing right of occupancy. This will inform the tenant that a decision needs to be made to either find alternate premises or negotiate a renewal or extension.

Recommendations for change

1. That the Act be amended to entitle a mortgagee who exercised rights of foreclosure under a mortgage to give a tenant notice to vacate after 28 days.

2. That any conflict between the Residential Tenancy Act and the *Land Titles Act 1980,* relating to the rights of mortgagees be resolved.

3. That the Act be amended to allow an owner to give 14 days notice to vacate so that it takes effect on the day of expiry of a fixed term agreement.

Issue Two: Does the Act strike a reasonable balance between the property owner's interest in managing the property and a tenant's right to privacy and security?

Submissions

Security of premises and owner's rights of access

Submissions focused on two issues. One was the degree of security to which tenants should be entitled. The other concerned what rights of access should be given to owners and trades people. It was argued that tenants should have sufficient security to allow them to obtain home and contents insurance and that deadlocks and window locks should be supplied in all properties.

There was considerable discussion as to the appropriate circumstances for owner entry. On the one hand, it was proposed owners should be able

to inspect premises within the first month of a tenancy, as any problems will usually surface within that time. It was also proposed that the time of any visit by the owner should occur, where possible, at a time which was agreeable and convenient to the tenant. It was also proposed that clause 56(5) be repealed as it serves no practical purpose.

Concern was also expressed about trades people entering at inappropriate times. It was further suggested that owners are not qualified to assess whether a tenant is sick or injured and that entry for this reason should be removed from section 56.

Comments

Security of premises

The Act regulates a variety of properties ranging from rural huts to family homes and expensive inner city apartments. Therefore, it is difficult to determine what constitutes appropriate security for a given premises. While it appears to be appropriate that tenants are able to obtain contents insurance, linking legislative standards to insurance industry standards presents considerable difficulty, particularly where industry standards change over time. Further, in many instances compliance with an industry standard will not ensure adequate security. The Act currently requires an owner to fit any locks or security devices which are necessary to secure the premises and in some cases it might be argued that this would require more than window locks and deadlocks. Generally, security is dependent upon location, the nature of the property and the specific characteristics of tenants and their possessions.

The Act currently provides that the owner is responsible for the maintenance of existing security systems and prevents either party from making a unilateral installation, or changes to locks or security devices during the tenancy. However, there is no penalty for not providing adequate security and in the absence of appropriate measures, the court has no power to order that adequate security be provided.

There is presently considerable scope for negotiation between owners and tenants about security and there is nothing that prevents a tenant from adding to existing security, as long as keys, opening devices or security access is provided to the other party. Nevertheless, at $50 for a set of 4

window locks, the cost to the owner of providing these locks is not prohibitive. Deadlocks are more costly at about $55 each but would be an appropriate capital improvement to most premises.

It would be difficult and probably unhelpful to attempt a more precise definition of 'adequate security' in the Act as this depends upon a range of issues. It is appropriate that this issue is left to the courts to determine in the context of the facts relating to each circumstance. This approach is consistent with that of other jurisdictions where 'adequate security' is similarly defined and ultimately determined by the courts. However, the court's role would be usefully strengthened by allowing it to order additional work, where it considers that security is not adequate.

Owner's rights of access

While entry for the purpose of inspections should not occur so as to interfere with the reasonable privacy of the tenant it is often the case that tenants who abuse properties will do so shortly after obtaining occupancy. It is reasonable therefore to allow an inspection early in the tenancy followed by three monthly visits.

It is generally accepted that owners have a legitimate right of entry for the purposes of inspections, repair, and to show the property to future prospective tenants or purchasers. However, tenants often wish to be present for reasons of security or to discuss issues with the owner.

Since work and other commitments will restrict the times that a tenant is able to be present, it is not possible to legislate a set of times that will satisfy all parties. Where entry is required for the reasons detailed in section 56(3), it would be reasonable that a mutually convenient time should be agreed to allow the tenant to be present.

The tenant should not be able to refuse entry but there should be an attempt for both parties to agree to a mutually convenient time. Where a mutually convenient time is not possible, the owner should advise the tenant of the time that entry will occur. As trades people act as agents of the owner they are bound by the same provisions regarding access as the owner.

Section 56(5) was included as a fail safe when drafting the Act as it was not felt that all contingencies were covered. It now appears that this provision is not needed, as there are no legitimate reasons for entry other than those otherwise detailed in section 56. For this reason section 56(5) should be repealed.

While injury or sickness may best be assessed by a health professional there is no reason why anybody might not make an emergency assessment and either render assistance or seek help. Many owners may have first aid experience or indeed hold relevant certification. Removal of a right in the Act to use this experience to render assistance would amount to a specific prohibition on providing assistance, where appropriate, and would seem to be an undesirable and unnecessary restriction.

Recommendations for change

4. That section 57 be amended to give the court a discretion to order work to be performed if it is of a view that security is inadequate.

5. That where an owner requires entry for the reasons detailed in section 56(3), the parties should negotiate a mutually agreeable time. Where a mutually acceptable time cannot be agreed, the owner should advise the tenant of the intended time of entry.

6. That section 56 (5) be repealed.

7. That the Act be amended to provide for entry by an owner within one month of commencement of the tenancy to inspect the premises and every 3 months thereafter.

Issue Three: Is the Act sufficiently clear about what agreements it does and does not regulate? Are there any agreements which the Act should regulate which it does not at present?

Submissions

Sub-standard accommodation

A number of submissions expressed concern about unhealthy and substandard accommodation currently let in the private rental market. It is was also suggested that specific provision be inserted in the Residential Tenancy Act to void a residential tenancy agreement where a premises became uninhabitable according to the *Public Health Act 1997*.

Boarding houses and caravans

Other submissions raised concerns about the rights of tenants of boarding and rooming houses and others suggested a need for greater protection of long term lessees of caravan sites.

Educational institutions and crisis accommodation

Some respondents proposed that educational institutions should not be exempt[4] while others noted that the existing exemption for providers of crisis accommodation should be reviewed.

Use of premises

A further submission argued that the Act should prohibit prostitution from rented premises.

Comments

Sub-standard accommodation

The Residential Tenancy Act was not intended to regulate the physical state of premises as this function is already performed under the *Public Health Act 1997*. The primary purpose of the Residential Tenancy Act is to regulate the formation and performance of contracts within the

[4] Section 6(2)(d) currently exempts educational institutions, hospitals and nursing homes from the application of the Act.

residential rental market. From this perspective, it regulates obligations for maintenance (which is implicitly a part of the contractual bargain) but not the initial state of a premises as they exist at the time of entering the contractual bargain.

The *Public Health Act 1997* empowers building surveyors and environmental health officers, authorised by Local Government to inspect buildings and issue notices under the Act. Where premises are a threat to public health an officer may issue notices requiring rectification of a specific problem. Similarly, a building surveyor may issue a notice requiring remedial work where a building has some structural defect and in extreme cases may order demolition. On occasion a closure order will be issued making it an offence to remain in occupancy or to let the property.

While clearly circumstances might arise where a premises becomes uninhabitable there would not appear to be a need to make specific provision for termination of a residential tenancy agreement. Where a closure order that is issued or rectification work is too extensive to allow a tenant quiet enjoyment of the property, the residential tenancy agreement would be 'frustrated' and the owner would be unable to fulfil their part of the contract by continuing to provide accommodation. As this situation is adequately governed by the common law, a specific provision in the Act is not needed.

Boarding houses and caravans

The Residential Tenancy Act does not currently cover boarding houses or caravan sites. As the issues relating in particular to boarding houses are complex (comprising issues relating to income support, ancillary support services and standards of accommodation), an intra-Departmental Working Party has recently been established to explore a number of the relevant issues. The Office will participate in this process which will determine whether amendments to the Residential Tenancy Act, separate legislation or other measures are required. This process should be completed by the end of 2000.

Generally, caravans are occupied for holiday purposes. While in other jurisdictions, the price of mortgages and rents make caravans an

attractive option, this does not occur to the same extent in Tasmania. Indeed, local government usually discourage long term occupancy of caravan sites. The problems in Tasmania do not appear sufficient to regulate this type of accommodation. Nevertheless, the Office will collect statistics on the location and occupancy of caravans.

Educational institutions

Accommodation provided by educational institutions is exempt from the Act as it is substantially different from mainstream residential tenancies. Generally, such accommodation is provided only to students of the institution and payment usually includes food, lesson tuition and staff support. Most other jurisdictions exempt these facilities from their residential tenancy legislation and there has been no persuasive argument presented which would warrant inclusion within the Tasmanian Residential Tenancy Act.

Crisis accommodation

The regulations currently exempt crisis accommodation from the application of the Residential Tenancy Act. The regulations similarly exempt retirement villages. Prior to the commencement of the Act, lengthy discussions were held with the Supported Accommodation Assistance Program (SAAP) to consider issues relating to the provision of crisis accommodation.

The discussions raised a variety of views from within the SAAP service. On the one hand, some people argued that the Residential Tenancy Act should not apply as it presented a range of compliance problems, particularly in relation to vacant possession. On the other hand some people argued that it should apply, at least in part, to strengthen rights for residents of crisis accommodation. As a result, there was general agreement that the provisions of the Act relating to vacant possession should not apply. However, the Act makes provision for the non-application of the entire Act to a prescribed premises or premises of a prescribed class.[5] The Act does not allow the non-application of a part of the Act. Therefore, the Act needs to be amended to allow for the non-

[5] Section 6 of the Residential Tenancy Act.

application of a part of the Act. Further discussions will need to take place between SAAP and the Office to determine an appropriate revision of the existing exemption regulation.

Retirement villages are also exempted from the Act. Government is currently developing specific retirement villages legislation. Once the detail of this legislation is known, the existing exemption regulation should be revised to ensure appropriate intermeshing between those provisions and the Residential Tenancy Act.

Use of premises

With respect to the proposal that prostitution be prohibited from residential premises, this issue would already appear to be covered adequately by the Act. The Act currently provides that premises are not to be used for unlawful purposes and that the premises are to be used for residential purposes. These prohibitions would appear to be adequate.[6]

Recommendations for change

8. That the Office await the outcome of the current interdepartmental review of boarding and rooming houses and conduct a separate examination of caravans parks.

9. That section 6 of the Act be amended to allow for the non-application of a part of the Act to prescribed premises or premises of a prescribed class.

10. That the current exemption regulation for retirement villages be revised once the detail of retirement villages legislation is known.

[6] Section 52 of the Residential Tenancy Act.

4.2 Objective 2

To establish a legislative scheme which clearly details the minimum obligations for tenants and property owners under residential tenancy arrangements, particularly in relation to security deposits, changes in rent, and maintenance of residential premises

Issue Four: What basis is there for regulating fees and how should fees be regulated?

Submissions

Up-front fees and charges

The current practice of charging of a range of fees by real estate agents was a central issue raised by a number of respondents to this review. Most respondents opposed the charging of application fees in any form, although naturally industry argued for their retention.

Industry argued that up-front fees were based on the provision of a genuine service to tenants which included searching for properties on their behalf. One submission from a real estate agent, opposed the charging of these fees and alleged that the practice of charging 'service fees' is a breach of various provisions of the *Auctioneers and Estate Agents Act 1991*. A number of social arguments were advanced for the abolition of fees. Agencies involved in the provision of housing related services to people on low incomes noted that fees caused hardship for a significant number of their clients.

Comments

Up-front fees and charges

Section 17 of the Residential Tenancy Act currently prohibits an owner from receiving from a tenant or prospective tenant, any money (or other consideration) other than rent in advance, a security deposit or a holding fee. However, fees are currently charged by most agents to prospective tenants who inquire about residential rental property. An up-front fee is often charged as a registration fee for a person wishing to be considered

as a tenant for a rental property. Fees vary from $25 to $100 dollars and are usually not refundable.

The policy intent of section 17 was clearly to restrict the imposition of up-front fees other than rent in advance, a security deposit or a holding fee. The purpose of this restriction was to limit the costs of entry into the residential tenancy market, in particular for low income earners. Where the rental for a 2 bedroom flat is $120 a week, an owner may require 2 weeks rent in advance ($220) and a security deposit of $440. This already represents a total up-front cost of $660. In addition, many tenants will have removal and other associated costs. Funding is provided by both State and Federal Government programs to assist tenants, who meet program criteria, to meet these costs.

The current industry practice arises from an interpretation of section 17 which is that registration or search fees are payment for a discrete service of finding a premises for a tenant and not for '...entering into, renewing, extending or continuing a residential tenancy agreement'.[7] This discrete service consists of processing an application to determine a tenant's suitability, and showing one or a number of properties to the prospective tenant. Therefore, the service provided by an agent is to assist the tenant to find suitable rental accommodation. Industry regard the fee as reasonable compensation for the time and expense incurred by the agent, although while arguing for the retention of fees, industry have supported the imposition of a cap on such fees at $25.

Legal advice obtained by the Office from the Office of the Solicitor-General suggests that the wording of section 17 is such that fees currently charged by industry are not caught by the Act. The general problem relates to whether a person paying a registration fee is or is not a 'prospective tenant' for the purposes of this section. As there is some doubt about the application of this section, no prosecutions have been made at this time.

[7] This is the specific wording of section 17.

In offering properties for rental, a real estate agent always acts as an agent for an owner of residential tenancy property. Rather than an owner advertising and selecting their own tenants, the owner agrees and pays an agent to advertise and make an appropriate selection. Typically, an owner will pay an agent for the costs of advertising and for the costs of entering into an agreement with a tenant. The costs to the owner for having an agent sign an agreement ranges from between $150 and $300. These costs are additional to charges of between 8% and 10% of rental for the costs of other services to the owner.

Despite the claim by industry that up-front fees are charged for a discrete service, many tenants are not taken to a range of properties but are simply given keys. Similarly, paying a fee does not guarantee that a property will be obtained and a fee may be charged where an agreement does not eventuate.

A significant difference appears to exist in relation to the selling of real estate and the provision of real estate for rental. Agents spend considerable amounts (on behalf of vendors) advertising properties for sale and often conduct 'open homes' where prospective purchasers are welcome to view a range of properties without charge. Nevertheless, prospective tenants may be unable to view a range of properties unless they first pay a fee to an agent. This practice potentially restricts tenant access to the residential tenancy market and establishes real estate agents as gatekeepers to this market.

While it is reasonable that agents let properties to those persons who are suitable for a specific property and have a good rental record, the practice of restricting access to tenants in the current manner, may create distortions in the market, as well as creating unnecessary barriers to market entry. Further, the costs associated with searching for and choosing appropriate tenants should rest with the owner, rather than the tenant. Where an actual cost arises, this charge should be borne by the owner. These costs may legitimately be passed onto the tenant in the weekly rental.

The practice of charging application fees makes it more difficult for persons on low incomes to enter the private rental market and obtain

accommodation. One of the respondents to the review, Colony 47 Inc, provides financial assistance to a number of people principally in the form of paying security deposits direct to property owners on behalf of tenants. They have dealt with 7,200 tenants since the Act came into effect. Research conducted by Colony indicates that 70% of their clients have been forced to seek emergency financial and food relief because of the additional cost burden imposed by fees. Other welfare agencies have noted that fees are causing hardship to many of their clients. It is also argued that some people remain homeless because of the high up front costs imposed by fees.

Approaches to this issue differ between jurisdictions. Fees are illegal in New South Wales, South Australia and the Australian Capital Territory. The charging of fees is an imprisonable offence in Queensland and the Northern Territory. Fees are charged in Victoria but must be refunded if an agreement is entered into. In Western Australia agents can charge prospective tenants a letting fee for considering their application. The Ministry of Fair Trading in Western Australia has recommended that these fees be abolished.

The policy intent of section 17 was clearly to prohibit the charging of these types of fees. Their continued existence represents an intent by the industry to ignore the spirit of these provisions and to comply with the precise wording rather than the intent of the law. Up-front fees clearly impose a burden on many tenants, represent a cost for market access and are a restriction on tenant access to the market. Taking all of these matters into account, section 17 of the Act should be strengthened and rewritten to ensure that these types of charges are prohibited. Where costs are incurred, these can be passed on to the tenant through higher weekly rental charges, rather than up-front costs.

Recommendations for change

11. That section 17 of the Act be amended to make it illegal for any fees to be charged to any person for making an application to rent premises or for viewing a residential premises.

Issue Five: Are there any problems with the way rent is paid under the Act?

Submissions

Rent free settling in period
Receipts for rent
Restriction on amount of security deposit
Penalties for late payment; and
Restriction on payment period

Respondents raised a number of issues in relation to this particular issue, including a proposal for a rent free settling in period for all tenants. One respondent said that there should be penalties for owners who fail to provide receipts and others raised the issue of late payment fees for tenants who didn't pay the rent on time. Of particular concern to industry is the current restriction on payment periods of four weeks. Some owners wish to be able to charge rent monthly or divide the year in to 12 equal parts for payment purposes. As currently drafted, such an arrangement would contravene section 17 and possibly section 19.

Comments

Rent free settling in period

The notion of a rent free settling in period may well assist in reducing up-front costs but would substantially alter the general scheme of the Act. A rent free period, is a period of no income for the owner and ultimately such a cost would be reflected as an increase in rent. No rationale was provided for the suggestion by the respondent, beyond it being a good idea. However, nothing in the Act prevents an owner from choosing to adopt this approach voluntarily, for a specific period after commencement of a new tenancy.

Receipts for rent

The Office has received some complaints about receipts not being provided. Generally, tenants should not give money to owners unless the owner provides a receipt and tenants should ask an owner to write something on a piece of paper, if no formal receipt book is available.

However, payment of rent in cash is becoming less common and many owners make arrangements for bank deposits. Banks provide, at minimal

cost, numbered receipt books to allow tracking of tenant deposits. Some tenants also arrange for payroll, credit union, bank or other automatic electronic deductions. While it is possible to prescribe a penalty for not giving a receipt, it would be extremely difficult to prove, although an owner might be challenged to provide a carbon copy from a receipt book. The problem of evidence rests more with the tenant being able to prove that money was paid, when an owner maintains that money was not paid. Ultimately, the problem might best be solved by public awareness and an increasing reliance on electronic transfers where receipts are generated and payments are traceable within those systems.

Restriction on amount of security deposit

Owners have always argued against any restrictions on the amount of security deposit which might be obtained. However, the restriction in the Act was directed towards preventing unreasonable costs of entry and creating barriers for low income earners. As owners are able to charge 2 weeks rent in advance as well as the equivalent of 4 weeks rent for a security deposit, there is substantial security on commencement of a tenancy. Further, building insurance provides some cover for damage and owners may obtain specific insurance against losses arising from agreements.

Penalties for late payment

The issue of penalties is problematic and needs more explicit reference in the Act. Generally, there is a view that the common law does not allow for the recovery of costs which exceed actual costs. For example, a tenant is liable to an owner for a loss which arises from the non-performance of an agreement. This means that an owner may recover the costs of damage or unpaid rent but not a penalty for non-occurrence of an event.

Nevertheless, the Office is aware that some private property owners and real estate firms have included penalty provisions in contracts. From this perspective, it would be useful to specifically prohibit these types of penalties and to give a clear signal that they are not appropriate. The prohibition should make void any charge which is a penalty rather than cost recovery.

Restriction on payment period

There is no reason why owners and tenants should not be able to arrange for rent to be paid by calender month as opposed to a fixed rental periods. The existing provisions were constructed for simplicity and payment periods are generally of the same length. At present, there is no reason why a written agreement cannot specify at the outset that the payment period varies throughout the year to accommodate the varying length of calender months. However, the Act restricts the length of a payment period to 4 weeks. This restriction was imposed, again to reduce the total up-front costs, should an owner decide to charge, for example, 8 weeks rent in advance. It is reasonable that the Act is amended to allow a payment period to be of up to 31 days duration, both to retain the original principle to restrict up-front payments and to accommodate the proposal for payment of rent by calender month.

Recommendations for change

12. That the Act be amended to provide that penalty clauses in residential tenancy agreements are void.

13. That the Act be amended to allow a payment period to run from a fixed date in one month to a fixed date in another month by allowing a payment period of up to 31 days.

Issue six: Are there any problems with the rent increase provisions ?

Submissions

Respondents did not advance any compelling reason for change to existing provisions. One submission suggested that thirty days was adequate notice for increase in rent. Another said that there should be a time limit after which tenants may not seek an order against an unreasonable rent increase. Another respondent proposed that the right to increase rents should not be restricted to non-written agreements. The respondent argued that all agreements should allow for rent to be increased, except where an agreement specifically prohibited an increase. It was argued that an owner might be caught if they forgot to include a provision for an increase.

Comments

There have been no reports of specific problems arising from the current provisions. In the event of a dispute, the Act provides that a court may determine what constitutes a reasonable increase. However, the Office is not aware that any person has yet made an application under this section.

Where agreements are in writing, whether the agreement is prepared by a solicitor or otherwise, a provision to increase the rent at some time in the future would seem to be a basic provision. While it is conceivable that an owner might forget to include such a provision, it is not the role of government or of this statute to organise such issues on the owners behalf. There would be equal justification to include a number of other property management functions. Further, in reality, few agreements exceed 12 months and the detriment of not allowing for an increase in rent during this period would be minimal.

Given recent levels of inflation and the extent to which reasonable increases might occur, six months initially and 60 days subsequently seem to be adequate notice periods and there would seem to be little argument for amendment.

Issue seven: Should the owner be liable for all the costs associated with preparing agreements?

Submissions and comment

Respondents did not raise any concerns or questions in relation to this issue. The bearing of up-front costs is linked to the earlier issue about up-front fees. The existing provisions of section 60 make the owner liable for cost of preparing agreements. This provision was included in the Act to ensure that lease preparation fees could not be charged. This provision was included as a miscellaneous adjunct to section 17. In light of the recommendation to prohibit the charging of any up-front fees to tenants, section 60 should remain unaltered.

Issues eight and nine

Does the Act need to be more explicit with respect to penalty clauses?

Does the Act need to make explicit reference to the principle of mitigation of loss?

Submissions

Lease break costs

These two issues have been considered together as they substantially overlap. A specific recommendation was made [recommendation 12] to make penalty provisions void.

A number of respondents agreed that where a tenant leaves a property before the expiration of their agreement, they should pay the owner for any loss that arises from that early departure. However, there was also argument that any charges to the tenant should not exceed the actual loss incurred and that penalties should not be permitted. Much discussion centred around how best to give legislative effect to these ideas.

Another respondent raised an additional but related issue by suggesting that a residential tenancy agreement cannot be lawfully terminated where an owner obtains an abandonment order.

Comments

Lease break costs

The issue of what constitutes an appropriate charge for 'lease-breaking' has been of considerable importance to the Residential Tenancy Commissioner as a large number of disputes have related to the appropriateness of 'lease breaking' costs charged by owners.

There is some case law which establishes a general obligation for an owner to mitigate any loss which might arise from the actions of a tenant. Therefore, if a tenant breaks a lease, the owner has an obligation to advertise as soon as reasonably practical. If the owner waits 2 or 3 weeks

before taking action, some of the costs arise because of the owners delayed response, not the tenants leaving the premises.

The type of loss or costs which the owner will incur as a result of lease breaking will include: advertising; lost rent; and a proportion of the costs of renewing agreements, where these costs are incurred to a third party. At present many of the disputes which arise relate to arguments about the quantum of these costs.

There is substantial debate as to what should reasonably be included as a cost arising from early termination. Some owners have claimed the cost of their own time while others have claimed advertising costs. Some agents have claimed the time spent in showing new tenants (despite the fact that the tenants were also charged for being shown!) and some agents have billed the owner, the prospective tenant and the departing tenant.

As there is clearly considerable potential for debate about what should or should not be included as a legitimate 'lease break cost', prescribing a formula is an attractive option. Indeed, many contracts have prescribed a formula for this reason. The only problem with a formula, is that some people are charged the maximum amount when they do not actually incur a cost. In many circumstances, tenant's arrange suitable tenants to move in on the same day as they move out, resulting in little or no loss to the owner.

Enforcing a formula in these circumstances is clearly not reasonable. Indeed it should be borne in mind that tenants may wish to terminate a tenancy early for legitimate reasons such as moving to another state for employment. Nevertheless, in New South Wales, for example, real estate agents can impose lease break fees as long as these are advertised clearly at the premises.[8]

[8] The New South Wales law provides that the fee is divided by the proportion of the tenancy period remaining. Where less than 25% of the agreement has expired, 100% of the fee is payable. Where 10% is left to run, 10% of the fee is payable.

At present, the Residential Tenancy Commissioner is applying consistent rules to these matters. However, only a small number of the disputes which arise in the community ever reach the Residential Tenancy Commissioner. Therefore, it would be useful and appropriate that clearer rules are contained in the Act and disseminated more broadly to the community.

Despite the simplicity of the New South Wales approach, the Office does not support the notion of a fixed formula. The Office believes that the Act should in the first instance render void any formula which is not related to cost and is therefore a penalty. Secondly, the Act should state an explicit obligation to mitigate any loss that arises from an action of the tenant. Thirdly, in the event of an early termination of a lease (through lease break or because of a breach of the agreement leading to vacant possession), the Act should specify the nature of the costs that are to be charged to the tenant. It is proposed that these should be restricted to: lost rent, advertising, and a proportion of the costs of renewing agreements paid to third parties.

Clause 47 of the Act already provides that a tenant who abandons property is liable to the owner for any loss caused by the abandonment but the section imposes no obligation to mitigate any loss.

There appears to have been considerable confusion about the abandonment provisions and their precise meaning. For example, the definition of abandonment is not conditional upon an order being provided. The definition is a criteria for a magistrate for making an order and also provides a definition for general use within the Act. However, its placement under the heading 'order for abandonment' in the text of the Act has increased this confusion. In the context of the review there would appear to be merit in revising the abandonment provisions to make these provisions clearer.

Recommendations for change

14. That the Act require an owner to mitigate any loss with arises from an action of a tenant.

15. That a definition of 'early termination' be included in the Act to mean:

    (a) the termination of a fixed term agreement prior to the expiry date by:

    - vacant possession being delivered to the owner by the tenant, following a notice to vacate, as a result of a failure of the tenant to comply with a condition of the agreement; or
    - vacant possession being delivered to the owner by the tenant without a notice of termination being lawfully given to the owner or a notice to vacate being given to the tenant.

    (b) termination of any agreement prior to the date upon which lawful notice by either the owner or the tenant takes effect.

16. That the Act be amended to provide that the maximum amount of loss that may be charged to the tenant for 'early termination' of a fixed term agreement be limited to:

    - advertising;
    - rent; and
    - the pro-rata costs paid to agents of the owner for establishing an agreement with a new tenant.

17. That the maximum charges to be charged for 'early termination' be prescribed by regulation.

18. That the provisions relating to abandonment be revised to make it clear that abandonment can occur without the need for an order from the court.

Issue 10: Does the Act adequately regulate the management of security deposits?

Submissions

Requirement for return of security deposits to tenant

This issue attracted a great deal of attention in submissions and a variety of suggestions were made. The basic concern of most submissions was how to ensure the prompt return of security deposits. Several respondents argued that the Act should prescribe a minimum period for the return of the security deposit. Suggested times varied from 24 hours to 21 days.

Payment of interest on security deposits

It was also suggested that interest should be paid on security deposits and that the Act should more clearly define what costs can be claimed against the deposit. It was further proposed that tenants should have access to any final inspection report.

Pet bonds

It was argued that the parties should be allowed to negotiate a pet bond, where applicable, in addition to a general security deposit.

Bond board

Submissions argued that there should be a government controlled repository for all security deposits as there are in other States. One welfare agency argued against the creation of a 'bond board' and in favour of the present system.

Level of security deposit

Some respondents argued that the amount of money that can be required as a security deposit should be greater than four weeks rent. One submission suggested giving tenants a risk rating which determined their security deposit.

Comments

Requirement for return of security deposits to tenant

The proposal to create a statutory period for the return of security deposits poses a number of difficulties. Firstly, if a statutory time is included, many owners may wait until this period has elapsed before

returning the security deposit. Secondly, procedural fairness would dictate that a tenant could not lodge a dispute with the Commissioner until after the statutory period for the return of security deposits had elapsed. This would lengthen the whole process of determining a security deposit dispute. Presently if a tenant feels aggrieved by the non-return of a security deposit they may lodge the matter as a dispute before the Commissioner as soon as they choose. However, anecdotal evidence would indicate two problems. Firstly, some tenants fail to contact or discuss the security deposit with owners, simply presuming that a dispute exists. On a few occasions when the Commissioner has contacted an owner, it has been revealed that there is no dispute and that the owner is happy to repay the money. On the other hand, a number of owners and agents are taking a considerable amount of time before repaying the deposit.

The Act currently requires that the security deposit is to be returned on termination of the tenancy agreement which in effect imposes an obligation for immediate return. Adding for example, the words, 'as soon as practicable' adds a reason for not returning the deposit immediately. Therefore, it is difficult to envisage any addition which will improve the rate of return. It would seem that the best approach would be to advise owners, through public awareness, of the need for prompt return and to advise tenants that they can make an immediate application to the Commissioner, where the deposit is not returned.

Limitation on application to time for the Residential Tenancy Commissioner

Presently, a tenant may lodge a claim with the Commissioner long after the end of the tenancy. This may pose evidentiary problems and be unfair to the owner. Other statutes specify various time limitations which may be appropriate. A limitation of 30 days would be consistent with the scheme of the Act while allowing the tenant adequate time to locate to a new tenancy, prepare a case and lodge a claim.

Interest on security deposits

The amount of the security deposit for most tenancies does not generate enough interest to justify prescribing a rate of interest to be returned to tenants. Many account keeping fees exceed interest on average size

deposits. If interest rates rise to the level that owners are receiving a significant financial return from tenant's security deposits, provision exists in the Act to prescribe a rate by executive action.

Pet bonds

Owners have a legitimate concern about potential damage and wear caused to properties by pets. One way to address this issue is through the charging of 'pet bonds'. Presently such charges are prohibited by section 17 and owners can either prohibit pets in their tenancy agreements or charge a higher rent to tenants with pets at start of the tenancy.

When the Act was first developed the Office resisted arguments to provide for pet bonds. It was argued that if pet bonds were permitted, there were similar arguments to allow bonds for other matters such as white goods and furniture. Also, there was concern about increasing up-front costs. Nevertheless, it appears that the inability of owners to charge pet bonds means that tenants who have pets are having difficulty in obtaining suitable accommodation. From this perspective it seems that a pet bond is an appropriate measure. The amendment should provide that dogs required to assist the vision or hearing impaired are exempted from this provision.

While a pet should be permitted, the amount of money should be restricted to limit up front costs. It is proposed that the maximum amount be 2 weeks rent. As there is currently some confusion about the status of pets, it is appropriate that the Act be amended to make it clear that pets are not allowed without the permission of the owner.

Bond board

The basic rational for a bond board is to create a third and neutral party to hold the security deposit in behalf of the owner and the tenant. In other jurisdictions these funds generate considerable income which is able to fund dispute resolution and provide funds for other purposes. The size of the funds in some jurisdictions is substantial and capital has built up over some years. In Queensland, for example, the fund exceeds $50M and money assists the purchase of public housing for disadvantaged groups.

Bond boards were established in other jurisdictions prior to the National Competition Policy Agreement. In Tasmania, the legislation and proposals for a bond board were scrutinised according to national competition policy principles. While a pool of $8 to $9M could be collected in Tasmania (less administrative costs) it was difficult to argue such a level of market intervention when the level of disputes is less than 10% of the market. As a result of these difficulties alternate means of resolving disputes were explored and this analysis ultimately led to the development of the Residential Tenancy Commissioner.

While a bond board would provide more funds, the role of Residential Tenancy Commissioner is quite adequate as a mechanism for resolving disputes. Therefore, establishing a bond board would not add to this process.

The only reason for establishing a bond board would be to provide a source of funds to allow Government to perform various functions associated with the Act. Costs are an issue with respect to the administration of the Act and presently the application fee covers only a small proportion of the costs of providing the services of the Commissioner. Further, additional costs are incurred by the Office of Consumer Affairs and Fair trading in providing information, answering inquiries and in enforcing the Act.

At present, costs for the administration of the Act which include the costs associated with the functions of Magistrates Court (Small Claims Division) and the Residential Tenancy Commissioner are funded from the Auctioneers and Real Estate Agents' Guarantee Fund. While the funds obtained from this source need to be monitored,[9] they are adequate for the functions which need to be performed.

[9] In 1999, the funds drawn from the Guarantee Fund exceeded revenues and earnings on investment. This situation should be addressed by increasing revenues during 2000 but needs to be monitored to ensure that the Guarantee Funds earning capacity is not jeopardised.

Recommendations for change

19. That the Act be amended to give the Commissioner a discretion to refuse to consider applications if not lodged within 30 days after the end of the tenancy.

20. That sections 17 and 25 of the Act be amended to allow a pet bond (except for dogs required to assist the vision or hearing impaired) to a value equivalent to 2 weeks rent for the premises.

21. Amend the Act to prohibit the keeping of pets on residential premises without the permission of the owner.

Issue 11: Are there any problems with the provisions relating to repair?

Submissions

The role of the Commissioner

Repairs by unqualified persons

Invalidation of notice to terminate for non-performance of maintenance

This issue attracted a good deal of attention in submissions. It was proposed in various ways to extend the role of the Commissioner to deal with repairs. There was some concern that repairers nominated by the owner should be qualified and some issues around tightening definitions. Of particular concern were the provisions of sections 32(3), 37(1)(c) and 39 which state, in effect, that once a tenant has notified an owner of the need for general repair the owner has 28 days in which to carry out repairs. If the owner fails to carry out the repairs the tenant may serve a notice to terminate the agreement. However, if the owner carries out the repairs within 14 days of service of the notice it is of no effect. Tenants who serve a notice of termination and enter into an agreement to rent another property may find themselves bound by two agreements if the owner of the first property carries out repairs before the notice of termination takes effect. This creates an unreasonable outcome.

Comment

The role of the Commissioner

The role of the Commissioner is limited solely to providing a means for resolving disputes about the dispersal of the security deposit following the termination of a tenancy. If the Commissioner's role were expanded it would duplicate the current jurisdiction and function of the courts, which would be difficult to justify and difficult to fund.

The courts appear to be adequately fulfilling their respective functions and there is little valid argument for a modification of the existing scheme.

Repairs by unqualified persons

In many circumstances, it is quite reasonable that owners perform repairs on their own property. Other legislation restricts some activities such as plumbing, wiring and building and there appears to be no need to duplicate these provisions here. However, where tenants employ people (suitable repairer) to perform work, it is appropriate that this work is of adequate quality. Ultimately, the owner has a right to determine the standard of repairs to their property. For this reason the work must be performed by a person who ordinarily performs those repairs in the course of a business or as an employee. In the event that a suitable repairer is engaged at the tenant's cost, the owner is liable to reimburse that cost and the current provisions ensure that a tenant engages an appropriate person.

Where work performed by an owner is not of a suitable standard, the question arises as to whether the repairs have been satisfactorily performed or indeed performed at all. In this sence the issue of quality and the issue of performance can and should be dealt with by a court under the provisions of section 32(4).

Power of court to order performance of 'urgent' or 'emergency' repairs

Although not raised in submissions, an issue arises as to whether the application referred to in section 32(4) allows a court to make an order with respect to 'urgent' or 'emergency' repairs. As the Act distinguishes

between 'general', 'urgent' and 'emergency' repairs, it would appropriate to clarify this issue by suitably amending the Act to make this clear.

Invalidation of notice to terminate for non-performance of maintenance

Where maintenance is not performed within 28 days, the Act provides that a tenant may give notice to terminate or apply to a court for an order that reasonable repairs be performed. If the tenant chooses to give notice, the tenant would reasonably need to begin making alternate arrangements at this point, which might include entering into another lease. In these circumstances, it is unreasonable that the notice to terminate is voided because the owner performs the maintenance during the 14 day period following the delivery of the notice. The Act should clearly be amended to provide that performance of maintenance after the delivery of a notice to terminate does not invalidate the notice.

Recommendations for change

22. Amend the Act to make it clear that the court can order the performance of 'urgent' and 'emergency' maintenance as well as 'general' maintenance.

23. That clause 39 (2) be amended to prevent its application (notice becomes void) where notice of termination is given for the non-performance of maintenance.

Issue 12: Are the notice periods for repair appropriate? Are there any problems with the process of obtaining repair?

Submissions

Timeframe for urgent repairs

One respondent noted that it may take more than 24 hours to repair some services, such as an off peak heater. It was also suggested that while the Act requires that an owner make arrangements for the carrying out of repairs within 24 hours, it imposed no obligations on the completion of those repairs.

Comment

Timeframe for urgent repairs

The Act imposes an obligation on an owner to 'arrange for the carrying out of any urgent repair…within 24 hours after being notified,' not the completion or performance of the repair. It would clearly not be reasonable in the many circumstances for repairs to be effected within 24 hours, particularly where parts needed to be obtained or a time booked with an appropriate repairer. The present provisions in the Act appear adequate.

Nevertheless, it may be useful to add a provision which states that the owner both arrange for carrying out of repair and that they occur within a reasonable period. Adding the words as soon as practicable would be a useful inclusion in the Act.

Recommendations for change

24. That the Act be amended to require that where arrangements are made by an owner to arrange for emergency and urgent repair, that the repairs be carried out as soon as practicable.

4.4 Objective 3

To ensure that disputes are resolved within the shortest possible time and at minimum cost to either party.

Issue 13: Are the provisions relating to security deposits and record of rent adequate?

Submissions

Most of the issues raised in submissions have been raised and addressed under Issue 10. Several respondents suggested penalties for failing to provide receipts or condition reports. One suggested that an owner should be able to charge a months rental as security deposit.

Comment

These issues have already been discussed elsewhere. Any owner who fails to provide a condition report will be disadvantaged in any dispute with

the tenant as the Act provides that a condition report is evidence of the state of repair. In the absence of evidence of this type, the owner would have difficulty arguing the extent of damage.

Issue 14: Should the Act include some form of remedy for the prompt return of tenant's goods where an owner has levied distress?

Submissions

A number of submissions argued that the Act should include a remedy for the prompt return of tenant's goods where distress has been levied. Others argued that there should be a penalty for distress levied against a tenant's goods, compensation and payment of costs.

Comment

Section 24 prohibits distress for rent. However, the prohibition does not extend to distress levied for any other loss or debt. The purpose of prohibiting distress was to remove an explicit permission for levying distress which existed under the *Landlord and Tenant Act 1935* and to ensure that the recovery of debt took place through appropriate court process. Therefore, there is an argument that distress in any form should be prohibited. Where goods are seized in lieu of debt, the act constitutes an offence under the Act. Therefore, it would not appear to be possible for the person levying that distress to continue to retain the goods or indeed to charge the tenant for committing an offence. However, imposing an explicit provision to this effect may be of educative value.

Recommendations for change

245 That section 24 of the Act be amended to extend the prohibition on distress for rent to distress for any reason.

26. That the Act be amended to make it clear that goods distrained must be returned at no charge to the lawful owner.

Issue 15: ***Does the process of obtaining vacant possession strike a reasonable balance between the need of property owners to protect their investment and the rights of a tenant to receive reasonable notice, and to have opportunity to dispute whether or not they are entitled to stay?***

Submissions

Respondents raised a variety of matters in response to this issue as follows.

Unfit or damaged property

It was proposed that an agreement should be terminated where the premises become unfit or damaged, through fire or similar cause, other than through an act of a tenant. It was argued that the tenant should not be required to pay rent where the premises are unusable.

Co-tenants

It was proposed that there should be a provision in section 37 to allow an agreement to terminate where a tenant dies or a co-tenant dies or leaves.

Definition of renovation

It was suggested that the term 'renovation' in section 42(1)(c) be more clearly defined to better protect tenants who have agreements of no-fixed term.

Time to remedy breach and non-payment of rent

It was argued that tenants should have 28 days to remedy any breach. It was also proposed that an owner should be able to evict for non-payment of rent if in arrears more than twice in a six month period.

Costs for owners and tenants in rural areas

It was argued that the costs to owners of providing notices and appearing in court can be very high. These costs should be recoverable from the tenant or where appropriate tenants should be able to claim their costs from the owner.

Frequent breaches or nuisance
Owners should be able to terminate an agreement for frequent breaches or nuisance.

Comments

Unfit or damaged property
If continued occupancy of a premises becomes impossible and neither party is responsible, the contract is 'frustrated' and neither party can enforce the agreement. Where a tenant chooses to remain in a damaged property the normal rent is still required in the absence of any contrary agreement with the owner.

Co-tenants
Where a single tenant dies, the agreement ceases and the Act need not make this explicit. Where a co-tenant dies or leaves the premises, the rights of the remaining tenant are dependent to a large part on the terms of the residential tenancy agreement. It is possible for example under the Act to make the liabilities of tenancy 'joint and several' so that the obligations of the remaining party becomes that of the remaining tenant. In relation to Public Housing, one of the issues is whether the premises represent an appropriate usage. For example, a three bedroom house might be appropriate for a couple but not for a single person following the death or departure of the spouse. These issues should be dealt with in the residential tenancy agreement.

Definition of renovation
The problem of application is not to better define renovation but the extent of renovation which would make occupancy inappropriate. The term could be defined as 'sufficient to make continued occupancy impossible'. However, the point at which it becomes 'impossible' is a subjective decision. As properties and their uses vary, stating that renovations effecting a proportion of a property would also be difficult as it would depend upon what portion and what services were effected.

Section 45(3) provides that a magistrate may order that vacant possession be delivered only if (b) the reasons for serving the notice were genuine or just. This would appear to allow a magistrate to make a judgement as to whether renovations were real or fictitious and whether to grant or not to

grant vacant possession. A tenant should not vacate if they believe the reasons are fictitious and should argue their case in court.

Time to remedy breach and non-payment of rent

It would be unreasonable for tenants to have 28 days to repay rent in arrears or to remedy damage which has been caused by their action. The existing provisions already provide 14 days notice in the event of a breach and allow for that notice to become void where the breach is remedied. If the breach is not remedied, it would take a further period of time to obtain an order of vacant possession. This approach would add considerably to the risk of owning and letting residential accommodation and may ultimately result in higher rental costs or shortages in some areas of the market.

Costs for owners and tenants in rural areas

While the issue is appreciated, this is a matter which relates to court processes in general and not specifically to this Act. Further, either party can make an application for costs in a civil action and this action should be adopted where appropriate.

Frequent breaches or nuisance

This issue has been problematic since the Act was first drafted. While a notice may be provided in the event of a failure to comply with a condition of the agreement, the notice is void if the condition is complied with before the notice takes effect. There is some argument that frequent (noisy) parties (apart from a disturbance of the peace) may result in a failure to comply with a condition of the agreement, only so long as the party lasts. While these sorts of issues were considered at length during the drafting of the Act, there is no simple means of resolution.

It is possible to resolve a number of these issues by prudent drafting of an agreement. For example, a condition of an agreement might be that the tenant shall hold no parties during the term of the agreement. Subsequently, having one party is a failure to comply with a condition of the agreement and this fact cannot be rectified for however long parties are not held in the future. However, it is possible to conceive of provisions in agreements where the prohibitions could be quite absurd or at the very least trivial. One might for example, include a requirement

that the garbage is put in the proper place each Friday. Would not putting out the garbage on one occasion constitute a failure to comply with the agreement?

The provisions of section 45(2)(b) enable a magistrate to consider the genuiness or justness of an application for vacant possession. This provision provides a fail safe in the event of a vexatious application by an owner. However, it also means that there is some latitude and discretion for the magistrate and the owner as to the precise reason for the application. While the magistrate is obliged to be satisfied that the notice was properly given, the definition of properly given does not included the reasons for giving the notice. Section 45(3)(b) subsequently allows the magistrate to determine whether the reasons are genuine or just.

In relation to the causing of nuisance, section 52 (b) provides that it is an offence to cause or permit a nuisance. As section 10(3) provides that the provisions of the Act form part of the agreement, a failure to comply with section 52(b) would be an appropriate cause for giving notice to vacate. The difficulty in this case would be whether a nuisance would have been caused unless a prosecution was also made under this section.

Council by-laws also relate to matters of nuisance and in more extreme instances restraining orders can be sought and/or the police can become involved.

Issue 16: Are there any problems with the emergency termination provisions?

Submissions

One respondent questioned whether a joint tenant has the right to apply for an emergency termination. They also suggested that an owner should have the right to apply for an order of termination where a tenant has caused or is likely to cause damage or injury to a neighbouring occupier or premises.

Comments

Section 41 provides that a party to a residential tenancy agreement may apply for an order of termination where '...the other party has caused

physical injury, or is likely to cause physical injury, to that person or any other person occupying the premises.' Even where there are joint tenants, the reference to the other party would appear to relate to either the owner or the tenant, not a co-tenant. The Office will seek legal advice as to whether some modification or clarification is required to section 41 to ensure that it applies to co-tenants.

Where an occupant has or is likely to cause injury to a neighbouring occupier or cause damage to a neighbouring premises, the rights of termination provided by section 41 do not appear to apply. Where tenants live in close proximity to other tenants, it would seem that an extension of the existing provision to cover impacts on neighbouring occupiers and premises, would be appropriate.

Recommendations for change

27. That the application of section 41 [order of termination] to co-tenants be clarified and the Act amended accordingly.

28. That the application of section 41 be extended to allow for the termination of a tenancy where injury has occurred or is likely to occur to a neighbouring occupant or damage has or is likely to occur to a neighbouring property.

4.5 Objective 4

To ensure that agreements continue on the basis of the conditions of the agreement, and that property owners are unable to subvert the agreements simply by raising rental.

Issue 17: Can the process of obtaining vacant possession be improved?

Submissions

Respondents raised a variety of matters in relation to this issue.

Legitimacy of property sale
It was argued that if a property is to be sold for the purposes of section 42(1)(c) there should be offer and acceptance not merely an offer for sale.

Orders from Justice of the Peace and notice periods
One respondent suggested that all orders under the Act should be available from a Justice of the Peace instead of a Magistrate and argued that the 14 day notice periods in the Act should be reduced to seven. It was argued that tenants should have to give 14 days notice if they plan to leave a property at the end of their lease.

Enforcement of orders
Concerns were raised about the ability of magistrates to enforce compliance with orders under the *Magistrates Court (Small Claims Division) Act 1989*. It was suggested that that Act needs to be amended to allow the same enforcement powers as exist under the *Magistrates Court (Civil Division) Act 1992*.

Comments
If a tenant does not believe that an offer for sale of a property is genuine the tenant may refuse to leave and contest the matter in court if the owner applies for an order of vacant possession. The owner would then have to satisfy the court that the offer was genuine under the provisions of section 45(3)(b).

If both offer and acceptance were required and a tenant refused to leave the sale might be frustrated due to the time required for the lawful eviction. This would unfairly penalise the property owner. Generally, owners who were genuinely intending to sell would advertise and/or engage a real estate agent. If a real estate agent is engaged, the owner will enter into a contract which obliges them to sell at or below a price specified in that contract. Further, costs may be incurred whether the property is sold or not. Therefore, it is difficult for a sale to be fictitious unless an owner attempts to sell a property themselves. In this case, the court will determine whether the attempt was bona fide.

Orders from Justice of the Peace and notice periods
Applying for and obtaining orders is a judicial and not simply an administrative process. The courts have been given authority to provide

appropriate orders under the Act because they are equipped to make other appropriate judgements relating to evidence, equity and relevant precedent. While the Act seeks to create speedy resolution of orders for vacant possession, the courts (in particular the Small Claims Court) is an appropriate jurisdiction for most residential tenancy matters. For these reasons it would inappropriate for orders to be available from Justices of the Peace.

There is no reason for requiring tenants to serve notice of their intentions before the end of a fixed term agreement. The agreement is for a period of fixed duration and as detailed in section 11, an agreement expires on the date specified in the agreement. Informing tenants that their agreement is soon to expire is a property management rather than a legal or statutory function.

Recommendation 3, under issue 1 has already proposed that the Act be amended to allow an owner to give notice 14 days before the date on which a fixed term agreement expires. This will assist in a number of property management functions. However, the owner should have contacted the tenant well before the expiry of an agreement and should have determined whether or not the agreement is to be renewed, extended or terminated. In the absence of such an agreement, the Act is designed to prevent the situation of periodic tenancies and the implicit lack of security which arises from these arrangements. Therefore, the Act creates appropriate security of tenure, without unreasonably restricting the property management options available to owners.

Enforcement of orders

Doubt has been expressed as to whether orders for vacant possession and termination made in the Small Claims Court are enforceable.

A small claim is defined in the *Magistrates (Small Claims Division) Act 1989*, as an application for 'an order or determination under that [Residential Tenancy Act] Act'. Further, the Magistrates (Small Claims Division) Act provides that a magistrate may make 'any other order the magistrate considers appropriate'. However, section 3 of that Act appears to limit the type of orders to those involving sums of money, the performance of work, or the replacement of work. Subsequently, there is

some doubt as to the validity of orders for vacant possession or termination.

It would seem appropriate to remove any doubt by making it clear that the Small Claims Court can hear and determine any matter under section 41 and 45 of the Residential Tenancy Act which deals with vacant possession and termination.

Recommendations for change

29. That the Act be amended to remove doubt that the Small Claims Court can hear and determine any matter under sections 41 and 45 of the Residential Tenancy Act [vacant possession and termination] and make any orders specified in those sections.

4.6 Objective 5

To provide a mechanism for the speedy resolution of disputes relating to security deposits

Issue 18: Does the process of obtaining arbitration of a security deposit strike an appropriate balance between fairness and efficiency? Are there any ways in which this might be improved?

Submissions

Respondents proposed the following:

Relief agency

Tenants should have the right to apply to the Commissioner even if the security deposit is paid by a relief agency.

Vexatious claims to Commissioner

The Commissioner should have discretion to refund application fees where claims are frivolous or unreasonable or the tenant is under financial strain or has a concession card. Owners should have their fee refunded if their application is successful and should be allowed to view

the tenant's claim. Conversely the tenant should have their application fee refunded if their claim is successful. All applications should be in the form of a statutory declaration.

Third party witnesses
There should be a scheme for 3rd party witnesses to assess evidence provided to the Commissioner. There should also be face to face hearings before the Commissioner. The Commissioner should have the power to send parties to mediation.

Time limit on security deposit disputes
The whole process of arbitrating a security deposit dispute should occur within 21 days.

Owners should not have to deposit a security deposit with the Commissioner
Owners should not be required to deposit any amount of the security deposit until after a determination is made. An owner should only be required to lodge that part of the deposit which they have not spent.

The Commissioner should determine whether the termination is lawful
The Commissioner should be able to determine whether an agreement has been lawfully terminated where that is at issue in a security deposit dispute.

Comments

Relief agency
There would appear to be nothing in the Act which prevents a tenant from making an application, where the security deposit was paid for by a relief agency. The problem which is more frequently encountered is that a tenant is often unlikely to wish to make an application where the security deposit is not their money.

Often, a relief agency will make an application on behalf of a tenant in the tenant's name. This advantages the tenant should they wish to continue as a client of the relief agency. Alternatively the agency will make an application in their own name where the tenant is absent. In

this case the agency acts as an agent of the tenant. The agency will keep any money returned to them pursuant to their agreement with the tenant.

Vexatious claims to the Commissioner

There do not appear to have been many claims where the application is wholly vexatious. However, in this event it would seem a just outcome to allow the Commissioner to refund the application fee to the relevant party. The Act does not currently give the Commissioner discretion to refund fees and an amendment to the Act would be needed to achieve this purpose.

Nevertheless, most disputes result in an apportionment of the security deposit and there is not usually a 'winning side'. The right to refund should be restricted solely to circumstances where either the application by the tenant or the withholding of the security deposit are vexatious.

Third party witnesses

The proposal for 3rd party witnesses envisages complex court processes and more resources than are currently available to the Commissioner. The role of the Commissioner is to determine only security deposit disputes. Where a person is aggrieved there is a right of appeal to the Small Claims Court. To this point, the court has upheld the majority of decisions made by the Commissioner and there is little evidence to suggest that more resource intensive or indeed more rigorous processes need to be put in place.

Time limit on security deposit disputes

In most circumstances matters are resolved well within a 21 day period. Where delays occur, these arise because the Commissioner is waiting for information from the owner so as to verify claims or consider pertinent issues. It is unlikely that the process can be much improved and the timeframe for decisions is comparable and generally better than similar processes in other jurisdictions.

Commissioner

While owners will argue that they should keep the security deposit until after a dispute is determined, it should be recognised that Tasmania is one of the few jurisdictions where an owner has access to the deposit during a tenancy. In most jurisdictions security deposits must be lodged

with a central agency and is not made available to the owner until a claim has been successfully argued.

The requirement to lodge the security deposit with the Commissioner prior to the determination achieves a couple of objectives. Firstly, it ensures that the deposit is in neutral hands before a decision is made. Secondly, when a decision has been made, it means that the funds are dispersed as soon as possible. If the funds remained in the hands of the owner, a significant time may elapse before payment was made by an owner, particularly when the determination was not made in the owner's favour. The present system appears to be the fairest approach and appears to work well for most parties.

The Commissioner should determine whether termination is lawful

Where a question arises as to the lawfulness of termination, the question must clearly be resolved before a determination can be properly made. However, the resolution of this question is clearly beyond the jurisdiction of the Commissioner and may involve questions of law for which the role is not resourced. The most appropriate approach would be to hold the deposit on behalf of both parties, pending a resolution of the legal question in a court of appropriate jurisdiction.[10]

While the process will result in delays, the role of Commissioner was not established to replace the court or to consider legal questions. The role is clearly defined in the Act to determine a specific type of dispute. It does not adversely reflect on the role that some matters require further consideration in another forum and it is not appropriate that this role further supplant functions that are clearly appropriate for the courts.

[10] This is the approach suggested in the Commissioners Guidelines. The Guidelines are a detailed set of advice which was prepared by the University of Tasmania Law School to guide the Commissioner.

Recommendations for change

30 That the Commissioner have a discretion to refund fees where it is clear that an application by a tenant or the actions of an owner in relation to a dispute about security deposits are vexatious.

5. Term of Reference 2

5.1 The Impact of the Act on the residential tenancy market

Submissions did not address the impact of the Act on the operation of the market. No evidence has been provided which indicates changes to rental prices, property availability, or the ability of persons to enter the market as a result of the Act.

Inquiries and complaints to the Office continue to constitute about 15 % of all inquires and these generally relate to the performance of individual agreements, rather than the impact of the Act.

There appears to be a high level of public awareness of the new laws governing residential tenancy and a high level of cooperation among organisations involved with the issue. This has been achieved with a minimal amount of regulation. The new Act is shorter than comparable laws in other States and is arguably easier to understand. Most complaints about the new law are concerned with the prohibition on self help and issues around obtaining vacant possession. Many owners would like to lock tenants out of properties to obtain vacant possession without having to go through a court process. Many would also like to levy various forms of distress. There is always tension between the two objectives of fairness and efficiency in the process of obtaining vacant possession. However, the Office believes that efficiency can be improved, without compromising fairness, by altering the requirements for service of notices and orders.

6. Term of Reference 3

6.1 Areas for administrative improvement

Issue 19: Do the requirements for service of notices and orders strike a reasonable balance between fairness and efficiency?

Submissions

A number of submissions argued that posting documents by registered or certified mail should constitute 'service' for the purposes of the Act. There appears to be general dissatisfaction with the existing requirements for service of documents.

Comments

The issue of what constitutes adequate service is one which has caused a great deal of concern to property managers. The Act does not define 'service' but relies on the *Acts Interpretation Act 1931* sections 29AB and 31 which define service as including delivery by post to a person's residential or postal address. These provisions state that notice is served on the date that it would arrive at its' destination in the normal course of postage.

However, the court has interpreted these provisions by requiring that owners must either personally serve notices or, where this is not possible, sign an affidavit saying that the document has been left at the relevant address.

The requirement for personal service may risk an increase in the level of conflict between the parties. There would appear to be no reason as to why the normal post should not be a satisfactory manner in which to serve notice for the purposes of giving a notice to vacate under this Act. However, the normal post may not be sufficient to serve on a tenant a copy of an application for vacant possession, where matters (as is currently the case) are being listed in the same week or within days of the application.

Recommendations for change

31. That the Act be amended (in consultation with the courts) to more clearly define 'service' for the purposes of serving notices under the Act.

Issue 20: Is there a better alternative to the same day rule?

Submissions

A number of respondents indicated that they found it difficult to comply with the 'same day' rule. Longer times were suggested within which to complete service. It was noted that managers of rural properties had particular difficulty in driving to properties to serve notices and copies of applications for orders in person on the relevant day. It was suggested that the requirement that applications for orders be served on the tenant on the same day that they are made should be replaced with a requirement that they be served 'as soon as practicable'.

Comments

The requirement that copies of applications for orders should be served on tenants on the day that the application is made assumes that postal service is adequate. If 'service' is more clearly defined to include this property managers would have less difficulty complying. It is reasonable that there be no delay in informing a tenant about what are in effect proceedings against them. A slightly more flexible time frame might however be helpful.

Recommendations for change

32. That the requirement that applications for orders be served on the tenant on the same day that they are made should be replaced with a requirement that they be served 'within 24 hours'.

Issue 21: Is adequate information made available about the process of obtaining orders from the Court?

Submissions indicated that there is still a lack of understanding of the process and court pro forma's and processes appear not to be widely understood by property owners and industry. There is clearly scope for better communication and dissemination of information about the court processes and the Office will continue to encourage this process.

Issue 22: Do any problems arise from the process of determining disputes about security deposits?

Submissions

Few comments were made in submissions that were not already made in answer to issue 15. A number of suggestions were made with a view to strengthening the requirement to provide condition reports. There was also concern that the Office of the Commissioner be adequately resourced.

Comments

The purpose of providing condition reports is to maintain a record of the state of repair of the property, and a record of whether both parties agree with what is written in the condition report. Where this occurs it will assist in reducing the level of disputation about the state of the property once the tenancy ends.

The Act provides that a condition report given in the manner prescribed by the Act is evidence for the purposes of a later dispute and an owner who fails to provide a report is disadvantaged in any dispute by a lack of appropriate evidence.

In most circumstances the real estate industry provide adequate and comprehensive reports although many private property owners appear to misunderstand the need for condition reports.

While it would be easy enough to prescribe a penalty for the non provision of security deposits the problem would be better assisted by

community education about the purpose and the value of a report. Tenants should also be encouraged to make their own record of the state of the property, irrespective of whether or not the owner has provided an official report.

The Commissioner is adequately resourced to perform the role which is currently defined in the Act. There are no delays in the determination of disputes which arise from a lack of resources. Those delays which do occur, occur as a result of the time taken waiting for evidence or information to be provided by owners and this process would not be assisted by more resources.

Issue 23: Is the process of investigation and enforcement adequate?

Submissions

It was argued by some respondents that the Office had failed to enforce the Act and it was further suggested that there was a general lack of redress for tenants experiencing difficulties. It was further argued that government should have a more active role in enforcing the Act rather than leaving tenants to take the initiative. Another submission suggested that all final inspections be carried out by a government official.

Comments

The Office has investigated all of those matters which have been directed to it. Generally, the Office is only able to deal with specific complaints and the progress of complaints is dependent upon the evidence that is available and the likely success of a prosecution on any matter.

Most of the matters which have been referred to the Office relate to requests for advice or to provide information to assist a party make an appropriate judgement. However, many of the complaints referred to the Office have related to up-front fees. These have not been prosecuted because of ambiguity in the current drafting of section 17 of the Act, and because the policy was the subject of revision in the course of this review.

While prosecution is important in the event of a blatant breach of a provision of the Act, this is not the only means by which the Act is

enforced. Generally, the framework of the Act provides a set of rules which both parties can follow. Some of these rules provide for penalties if not complied with but many provide resource in a court and certainty in the event of a dispute. Having provided, in effect, a set of tools with which to ensure market fairness, it should not be necessary for government to intervene in the event of every dispute.

Either party to a tenancy agreement can request local government to provide a public health official or building surveyor to inspect a property where it is believed that the property is structurally unsound or a threat to public health. It would however be overly prescriptive to require such inspections at the end of every tenancy.

Issue 24 : Is the Office satisfactorily fulfilling it's role of providing information to the market?

Submissions

This issue attracted a lot of comment in submissions with a great variety of suggestions made as to how the Office can better inform tenants and owners of their rights and obligations. These ranged from adopting a multimedia strategy to talking to high schools. Several respondents wished booklets to be provided free of charge. Provision was urged for persons from non English speaking backgrounds and concerns were raised about the level of understanding of the new law within the police force.

Comment

The Office has an ongoing role in providing advice and education and monitoring the Act generally. Two booklets have been produced (one for owners and one for tenants) and have been highly successful. There may be value in supplying booklets through retail outlets.

Recommendations for change

33. That the Office conduct a public awareness campaign following the enactment of amendments to the Act and provide training for key groups within the market and within government.

7. Miscellaneous Issues

Use of information about tenants

Submissions have raised a number of concerns about the use, storage and transmission of personal information about tenants. The security, accuracy and commercial exchange of information about tenants are the principal concerns.

Comment

The *Privacy Act 1988* currently regulates some aspects of the collection, storage and distribution of information. However, this Act does not specifically regulate tenancy databases unless these contain credit reporting information.

Further despite a restriction on the use by real estate agents of credit reporting information, real estate agents are able to require that tenants obtain this information themselves and provide it with an application for tenancy.

The Office has spoken with the Federal Privacy Commissioner about this issue and has been advised that while the Commissioner does not support or condone this practice, the requirement does not contravene the Privacy Act. It is further alleged that the real estate industry has ready access to credit reporting data in contravention of the Privacy Act.

There are some businesses who operate national databases specifically for residential tenancies and some of these are quite responsive to privacy issues. Generally the Office understands the importance of information and sees that the appropriate use of data is an important tool for industry. However there remain concerns about some local practices.

The Privacy Act is currently under review and new provisions will commence shortly. The Office needs to examine these provisions in greater detail to determine whether they resolve all of the problems relating to the storage and distribution of information. It may be appropriate, in line with the approach adopted by other jurisdictions, to create specific and additional requirements for the local market.

Public Housing rentals

It has been proposed that tenants of Public Housing should receive the same notice for changes in their tenant contribution as do other tenants for changes in rent.

Comment

Public Housing tenants pay a rental which is set as the 'market rent' for each specific property. Where changes are made to this market rent, notice is given in accordance with the requirements of the Act. However, few tenants pay the full market rent as most receive a rental subsidy sufficient to ensure that their rent as a proportion of their income does not exceed between 20 to 25% of their income. Consequently, the amount of subsidy varies according to the income of the tenant and therefore, the proportion of the 'market rental' paid by the tenant also varies.

Where the income of the tenant varies, the obligations to pay a greater or lesser amount of rent varies immediately and no specific period of notice is required. As the actual 'market rent' is not varied this does not contravene the Act and these provisions are clearly spelt out in the agreement signed by all public housing tenants. The Crown Solicitor has provided advise on the construction of Housing Services contracts and there is no basis upon which to challenge the legality of the arrangement.

The purpose of the notice provisions in the Residential Tenancy Act is to guard against unreasonable increases in rent. As the policy of Housing Services is to base affordability on a fixed proportion of income,[11] it would be inappropriate to impose further notice restrictions on this arrangement.

[11] This is a national benchmark established under the Commonwealth State Housing Agreement.

Housing Services nominated repairers
One respondent advocated bringing disputes about the Housing Services maintenance charge within the jurisdiction of the Commissioner.

Comment

Housing Services have nominated repairers who are paid a standard rate for repair and maintenance work. Where the work required exceeds fair wear and tear the tenant will be charged for the damage. Tenants who believe that the charge is unfair can apply to their maintenance officer for the charge to be reviewed. The tenant may appeal this decision to a review committee. A tenant who still feels aggrieved may take the matter to the Small Claims Court. It would serve no purpose to add another layer of review to this process.

Financial hardship
It was suggested that a provision should be included in the Act whereby leases could be ended in the case of a tenant suffering financial hardship.

Comment

Although tenants enter into a contractual bargain to rent at a given rate, hardship may arise through unexpected events such as unemployment, illness or other unforseen circumstances.

As renting is a commercial arrangement hardship ultimately involves a difficulty in paying rent and any statutory relief would of necessity be directed towards either the forgiveness of a debt or a postponement of an obligation to make a payment. As any such measures would result in either a loss of income or a delay in the receipt of payment by an owner.

While the issue is clearly one of great importance to many tenants it is difficult to argue that property owners should bear a cost for making such a provision. Such a provision is more appropriately made by support agencies in the provision of cash or income support, rather than by mandating specific obligations for owners.

In part, the Act already makes some concession for hardship and provides that a tenant may be late in paying rent on two occasions in any 12 month period. This provision was added from the outset as an acknowledgment that the most conscientious tenant will experience unforseen problems at

some time. Where a particular property becomes too expensive to rent, a decision may ultimately need to be made to rent a property at a lower price. Hardship may arise where excessive lease break fees result in a significant cost and restrict the funds available for establishing a new tenancy. From this perspective, the clear rules proposed by the review for early termination may assist in reducing hardship under these circumstances.

Recommendations for Change

34. That the Office examine the collection and use of information by property managers and owners, to determine whether the provisions of the *Privacy Act 1988* adequately meets the needs of the Tasmanian market and whether further protections or restrictions are required.

Appendix 1 List of Respondents

- The Tenants Union of Tasmania
- Ian Stewart, Office of Residential Tenancy Commissioner
- Shae McCrystal, academic and tenant advocate, Faculty of Law, University of Tasmania
- J H Saward, private citizen
- Jane Broad, International Student Adviser, University of Tasmania
- Michael Dixon, former Recorder of Titles, Department of Primary Industries Water and Environment
- Mr Duncan Bowers, private citizen
- Linda Seaborn, private citizen
- DA & BA Hill, private property owners
- R Hopcroft, Office of the State Ombudsman
- Keith Viney, private property owner
- Shae McCrystal, Lynden Griggs and Ken Mackie, Faculty of Law, University of Tasmania
- Mrs M Cooke, tenant
- Meredith Zantuck, law student and property manager
- Neil Readett, lawyer, Clerk Walker & Stops
- Charmaine White, real estate agent
- Julian Joscelyne, Manager Policy and Planning, Housing Tasmania
- Real Estate Institute of Tasmania
- Bob Castles, private citizen
- G.R. & J.V. Bealey, Kelso Holiday Developments
- Bruce Beattie, President, Tasmanian Arboretum Inc
- Jonathan Jones, Manager, Tasmanian University Union

Appendix 1 List of Respondents

- Sally Bridge, District Registrar, Civil Division, Magistrates Court of Tasmania
- James Boyce, Anglicare Tasmania
- Peter D Tulloh, Co-chairperson, Ravenswood Walk Tall Association
- Pattie Chugg, Executive Officer, Shelter Tasmania Inc
- Sue Ham, Chief Executive Officer, Colony 47 Inc
- Adrian Hawkes, Manager, Derossco Pty Ltd

g:\e\restens\review\report.doc