ANGLICARE
TASMANIA

Response to
Consumer Affairs and Fair Trading discussion paper
The Residential Tenancy Act 1997 and current issues in the residential tenancy market

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About Anglicare

Anglicare Tasmania is the largest community service organisation in Tasmania, with offices in Hobart, Glenorchy, Launceston, St Helens, Devonport and Burnie, and a range of outreach programs in rural areas. Anglicare's services include emergency relief and crisis services, accommodation support, employment services, mental health services, acquired injury, disability and aged care services and alcohol and other drug services. In addition, Anglicare's Social Action and Research Centre conducts research, policy and advocacy work with a focus on the needs and concerns of Tasmanians on low incomes.

The lack of appropriate, affordable housing for people on low incomes is a problem reported by Anglicare workers from across the organisation and affects clients in all our services. However, Anglicare does have services that work specifically to support people in need of housing, including in the private rental market. These services include

- **ACCESS**, which assists people who are homeless or at risk of homelessness and which frequently supports clients who are either struggling to sustain a private rental tenancy or are seeking to move out of homelessness into the private rental market;
- **Staying Put**, which is provided out of Anglicare's Glenorchy office and assists young people to maintain their tenancies; and
- the **Private Rental Support Service**, which delivers Government-funded financial assistance with bond, rent in arrears, rent in advance and moving costs to low income households in the north and north-west. Colony 47 delivers a similar service in the south.

This submission is based on the contributions of Anglicare workers from ACCESS and the Private Rental Support Service, as well as workers from other services across Anglicare. It also draws heavily on Anglicare's extensive research and policy expertise in this area, and on the wider evidence base where applicable.

THE CONTEXT FOR REFORM

The *Residential Tenancy Act 1997* in its current form takes a light-handed approach to regulation. The legislation's second reading speech (Tasmania, House of Assembly 1997) makes this clear: the bill was considered to be 'much less intrusive than similar legislation in most other States and Territories' and rather than specifying the content of tenancy agreements, '[created] minimum standards' for those agreements. The Government seemed particularly concerned not to intervene too much in the private rental market – for example, the decision not to follow most other states in establishing a bond board was made on the basis that such a move 'would be an excessive intrusion into the marketplace'.

However, the Government has belated recognised the need to assert greater regulatory control over the private market. For example, the recent establishment of My Bond, Tasmania's rental deposit authority, allows for greater fairness and a more level playing field in relation to the return of bonds at the conclusion of a tenancy. This review of the Residential Tenancy Act offers an opportunity to extend greater fairness into other areas of Tasmania's residential tenancy legislation as well. Anglicare

welcomes the opportunity to participate in the review and looks forward to joining in the further consultations flagged by the discussion paper (Consumer Affairs and Fair Trading 2009, p. 4).

The purpose of the Act

There seems to be an assumption within Consumer Affairs and Fair Trading, based on discussions Anglicare has had with key representatives, that residential tenancy agreements should be treated as simply another contract in the market. This attitude is also evident in the Act's[1] second reading speech (Tasmania, House of Assembly 1997). Anglicare submits that, for tenants at least, residential tenancy agreements are quite different to other contracts, because housing, while culturally treated as a commodity, is actually not one. It is a basic human right, and its realisation is essential to the realisation of other rights. While the purpose of the Act may be 'to regulate the contractual relationship between tenants and property owners', as stated in the discussion paper (Consumer Affairs and Fair Trading 2009, p. 5), Anglicare submits that, in light of the long-term, bi-partisan Government decision to scale back investment in public housing, the purpose of residential tenancy legislation needs to be viewed more broadly and explicit protection extended to those who are vulnerable.

Once, low income earners unable to find appropriate, affordable housing in the private rental market could turn to the public housing system and have a reasonable expectation that they would be accommodated. However, successive federal and state Governments have retreated from the provision of public housing as a tenure for all low income earners, and it has become increasingly residualised as a tenure for only those with the most complex needs (Flanagan, K 2010, pp. 206-7). Anglicare notes the recent injection of funds through the Nation Building and Economic Stimulus Package, which is expected to result in an additional 500 social housing dwellings in Tasmania (Thorp 2009), but stresses that 500 dwellings does not constitute a commitment to public housing as a tenure for all and will not even meet current demand from categories 1 and 2 on the Housing Tasmania waiting list.[2]

The result of the retreat from public housing is that the State Government has made a de facto decision that the private rental market is where most low income earners will live. This means that the private rental market will need to accommodate people on very low incomes, people with complex needs such as mental illnesses or disabilities, and people facing considerable personal challenges such as serious illnesses or family breakdown. The State Government therefore has a responsibility to ensure that policy settings not only encourage investment in the private rental market but also protect tenants, and specifically those tenants on low incomes or those with special needs. This is particularly the case when there is a considerable emphasis at a national level on the responsibility of governments to prevent homelessness. The Australian, State and Territory Governments have agreed to work towards halving homelessness by 2020 (Australian Government 2008, pp. 16-17) This goal cannot be achieved if residential tenancy legislation counteracts efforts to reduce homelessness by actually facilitating homelessness. Tasmania's residential tenancy legislation must be framed in such a way as to support stable housing and homelessness prevention.

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[1] In this submission, the term 'the Act' refers to the Residential Tenancy Act 1997. Section numbers relate to the Residential Tenancy Act unless otherwise specified.

[2] The public housing waiting list is segmented into four categories. Those whose housing need has been assessed as being most urgent are placed in category 1. According to figures provided by the Minister at the most recent Estimates Committee hearings, as at April 2009, there were 330 people in category 1 and 1172 in category 2 (Tasmania, House of Assembly, Budget Estimates Committee 2009, p. 75). In practice, both categories represent urgent need – for example, homeless people living in emergency accommodation are usually placed in category 2.

The impact on the market

A particular concern of the discussion paper appears to be the potential for any reforms to affect the level of investment in the private rental market (e.g. Consumer Affairs and Fair Trading 2009, pp. 8, 9, 15). This is despite the fact that an arguably greater reform, the original introduction of the Act in 1997, did not appear to have such an influence. Any impact on the market was not considered sufficiently important by individuals and organisations submitting to the post-implementation review consultation process to even mention: the review report notes that '[n]o 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' (Consumer Affairs and Fair Trading 2000, p. 54).

It is therefore useful to consider whether the concern about market impact is in fact supported by research evidence. A recent project by the Australian Housing and Urban Research Institute (AHURI) considered the motivations of investors in the private rental sector (Seelig, Burke & Morris 2006; Seelig et al. 2009). The research was based on semi-structured interviews with industry stakeholders and with individual rental investors. It found that investors do not make decisions based on a dispassionate assessment of the economic and regulatory environment, but instead decide on their investment due to a range of reasons that include both financial incentives and personal or family reasons (Seelig et al. 2009, pp. 21-3). In light of these research findings, it is reasonable to ask whether adjustments to legislative settings would in fact drive large numbers of investors out of the property sector and/or inhibit new investors seeking to enter the sector. The Tenants' Union of New South Wales cites research which found that any 'psychological impact' of tenancy law reform was short-lived and did not result in any net reduction in the level of investment; the main focus of investors is capital growth, which is not influenced by legislative changes (Tenants' Union of New South Wales 2007, p.3). The AHURI researchers found that '[t]enancy law simply did not rate a mention as the main influence on investment decisions, and only appeared as an issue with larger portfolios' (Seelig et al. 2009, p. 32). In fact,

> there was … virtually no mention of tenancy legislation in terms of it being a consideration in investment decisions, and limited indications that it was something investors were particularly familiar with. Indeed, during the interviews, it proved extremely difficult to engage investors on tenancy law as an issue, let alone an important factor connected to investment decisions (Seelig et al. 2009, p. 60).

Like the research cited by the Tenants' Union of New South Wales, the AHURI research suggested that where the motivation to invest was financial, the focus was on capital gain: it was the greatest motivator even if the investor intended to live off the rental revenue in the interim, and for most, capital gain was how success or otherwise in property investment was measured (Seelig et al. 2009, pp. 35, 39). If this is the case, then legislative provisions that would result in improved property values, such as a requirement to maintain the property to a minimum standard, may in fact be viewed benignly by the majority of investors.

It is important to note that the landlords in the AHURI study appeared to be 'good' landlords. For example, in relation to housing standards, most were keen to maintain their properties to their own standard as an owner-occupier (Seelig et al. 2009, p. 46).[3] Given the conditions some Anglicare clients are expected to live in, it is clear that not all landlords are interested in protecting the value of their investment. It is true that such landlords are likely to be reluctant to invest the funds required to

[3] Anglicare also notes that 'very few investors [in the AHURI study] were currently seeking to provide lower cost housing, and many investors were clearly not interested in doing so. They saw it as a government responsibility to house the low income [sic], not the job of the private investor' (Seelig et al. 2009, pp. 70-1).

bring their properties up to any minimum standard that would be set by legislation and as a result, these properties would no longer be legally available for rent and supply would consequently be reduced, at least in the short-term. In this context however, it is worth asking: is any supply good supply? Is it reasonable, for the sake of not endangering the investment by substandard landlords in substandard housing, to expect people to continue to live in conditions that are unsafe and hazardous to their health and wellbeing?

Is there a need for a whole-of-Government approach?

The discussion paper asks whether the Residential Tenancy Act is in fact the 'appropriate vehicle' to deal with the concerns raised by the community sector and suggests instead a 'whole of government approach' (Consumer Affairs and Fair Trading 2009, p. 6). While a more coordinated approach to all housing issues in Tasmania would be welcome, it would not be effective without a lead agency, and this lead agency would face a monumental task as such an approach would be extremely difficult to implement successfully and would require considerable cultural change. The likely result in the short and even medium-term would be no change at all and no improvements for tenants. Furthermore, a policy and bureaucratic approach does not eliminate the need for many of these abuses of tenants' rights to be prohibited in law and pursued as such, nor the need to tighten up loopholes in the Act and extend legislative protections to currently excluded groups of tenants where that is justified.

There is also value in centralising provisions relating to rental housing within a single piece of legislation. It is the experience of Anglicare workers that many landlords, particularly private landlords, are not aware of the existence of other pieces of legislation. It would be extremely difficult, for example, to find anyone, outside the small residential tenancy policy and advocacy circle, who would be aware of the existence of the *Substandard Housing Control Act 1973*. Certainly very few landlords would know of it. Our workers report that in their experience, landlords go to the Residential Tenancy Act first and only. If something is not explicitly covered by that legislation, they assume it is not covered by any legislation. Whether the various relevant pieces of legislation are harmonised into one or a system of cross-referencing within different pieces of legislation is used, there needs to be a legislative 'one-stop-shop' to ensure absolute clarity for landlords – and tenants.

The role of the Act in responding to the shortfall in supply

The discussion paper asks whether the Residential Tenancy Act has a role in responding to 'marketplace issues' such as the shortfall in Tasmania's supply of low-cost rental housing (Consumer Affairs and Fair Trading 2009, p. 6). In the same section, the discussion paper links the shortage of supply to the imbalance of power between tenants and landlords and asks whether the Act 'is the appropriate vehicle to address an imbalance of power' (Consumer Affairs and Fair Trading 2009, p. 5).

It is true that the Tasmanian rental market is a constrained one, and these constraints do contribute to the imbalance of power between landlords and tenants. However, they are not the only contributing factor. There are other issues: education levels, literacy, personal vulnerability, level of family or community support, disability or mental illness. Anglicare workers report that some landlords, well known for leasing substandard properties and breaching provisions of the Act, deliberately lease their properties to certain groups of tenants, such as young single mothers or newly arrived refugees, because these tenants are easier to exploit and less likely to complain. This suggests there is greater complexity to the imbalance of power issue than suggested by the discussion paper. Anglicare believes that at least some of the factors contributing to this imbalance can be appropriately managed through

legislation, and that appropriately-enforced legislation can also assist in levelling the playing field between landlords and tenants.

The cost of reform

Anglicare makes this submission in the hope that the review results in concrete reforms that improve the circumstances of people dependent on the private rental market. However any reform must be properly resourced if it is to have an impact. Therefore Anglicare is concerned about comments in the discussion paper such as that contained in the section on dispute resolution: that although 'there is clearly value in having further discussion to explore … options' for improving the dispute resolution process, '[u]ltimately, the options will be limited by cost' (Consumer Affairs and Fair Trading 2009, p. 13). Surely a cost-benefit analysis will be applied to any proposed reform that will take into account more than simply the impact on the bottom line. There are many benefits to improvements to the existing process that could well justify additional 'cost', including a reduction in homelessness. In meetings with key Consumer Affairs and Fair Trading representatives, Anglicare received the impression that the recommendations arising out of this review would have to be revenue neutral if they were to be accepted. Anglicare is disappointed if this is in fact the case as calling for a review in the absence of resources to appropriately implement its recommendations raises expectations that cannot be fulfilled and potentially wastes the time of people who participate in such a review in good faith.

Learning from other jurisdictions

This review raises many issues which are not unique to Australia. In fact, the challenge of providing affordable, appropriate, long-term housing to low income earners through market mechanisms is one felt in countries around the world. As a recent review of international trends in housing issues notes, while the size of the private rental sector varies greatly from country to country – from about 10% of the market in the United Kingdom to 59% in Switzerland – 'private rental sectors in all countries house a significant share of lower-income and excluded households often living in some of the poorest-quality housing' (Lawson & Milligan 2007, p. 81).

Anglicare is not holding up any one country as a model to emulate, but does believe there are opportunities for Tasmania to learn from the responses of other countries to these issues – and equally from mistakes made along the way. In particular, Anglicare would be keen to look at what other countries might have to teach in relation to improving the length of tenure in the private rental market, although there are also other areas of interest, such as strategies to ensure affordable rents or improve the quality of private rental housing. Anglicare notes that the Australian Housing and Urban Research Institute is currently conducting a research project which is reviewing and assessing international models for providing secure occupancy for renting households (AHURI 2010), and looks forward to the findings of that research.

Public housing: The focus of much of the discussion in this submission relates to the private rental market. However, Anglicare does acknowledge that Housing Tasmania's 11,000-plus properties do come under the provisions of the Residential Tenancy Act and that there is and should be an equal expectation of compliance applied to Housing Tasmania in relation to the standard of dwellings and property management. In fact, in some cases the expectations placed on Housing Tasmania should be higher than those applied to private landlords because of Housing Tasmania's role as the 'landlord of last resort'.

ISSUES WITHIN THE MARKET

Issue 1: The lack of security

The benefits of secure tenure, whether obtained through home ownership or in public housing, are well documented and include reduced stress levels, improved self-esteem, motivation and capacity to address personal problems and develop supportive community networks and relationships, greater family stability, better school performance by children and increased levels of community participation (Lewis 2006). These benefits clearly extend beyond the individual household and improve the level of cohesion and integration within communities. In a study of low income private and social renters in Victoria and New South Wales, Hulse and Saugeres (2008, p. 2) concluded that housing insecurity, which they defined as including frequent residential moves and changes of residence beyond the control of the individual, 'was integrally linked to insecurities in other aspects of the lives of those interviews: financial, employment, health, insecurity of self and family instability.' Housing insecurity appears to be a particular problem in the private rental market: a survey of the Tasmanian community found that 46% of people renting through a real estate agent and 25% of people renting through a private landlord had moved at least once in the previous year, compared to 11% of home purchasers and 5% of home owners (Madden & Law 2005, p. 17).

Amending the provisions of the Residential Tenancy Act in order to enhance security of tenure would not mean that a landlord would lose all control over how long a tenancy would last, but it would improve the certainty tenants have in relation to how long they may be living in a particular property. It would also remove the risk that tenants would have to move on for unjustified or spurious reasons.

Should tenants be able to extend an agreement where the owner intends to rent a property for a further period? Tenant advocates in other states note with approval the limitations on no-grounds eviction in Tasmania's residential tenancy legislation (e.g. Pippen 2010, p. 22). A commitment to review the impact of no-grounds eviction in other states and its contribution to increased homelessness is included in the Australian Government's White Paper on homelessness (Australian Government 2008, p. 27). There is however a loophole in Tasmania's legislation: as noted in the discussion paper, tenants can 'be evicted at the end of a fixed term agreement where the tenant has complied with their obligations under the agreement and where the owner intends to continue renting the premises', and provided this is done within 28 days of the expiry of the agreement, the landlord does not have to provide a reason for their decision (ss. 42(1)(b), 42(1)(d)).

There are two reasons why the landlord might choose to exercise their right under ss. 42(1)(b) or 42(1)(d) and issue a notice to vacate within 28 days of the expiry of fixed term agreements, even though they intend to go on renting the property and the tenant has complied with all their obligations. The first is the reason noted in the discussion paper: an extended agreement would be subject to unreasonable rent increase provisions, while a new agreement would not (Consumer Affairs and Fair Trading 2009, p. 7). The second is that by taking up this option, landlords can evade the limitations on no-grounds eviction and evict a tenant without needing to provide any other reason than that the fixed-term agreement has expired. The experience of tenant advocates is that some landlords are thereby able to disguise the fact that they are actually evicting the tenant for reasons including discrimination or personal dislike. Anglicare supports calls by other community organisations to close both these loopholes by allowing tenants to elect to extend their agreement if the landlord intends to continue renting the property for a further period.

Eviction: According to another AHURI research report, this one on eviction, few people move immediately into mainstream housing after they are evicted. Instead, they rely on family or friends to provide immediate shelter or are left homeless. A considerable percentage end up in institutional settings including hospitals and jails (Beer et al. 2006, pp. 6-7). The Tasmanian component to the research, which focussed on single men and young people, found that eviction is a severe crisis which is followed by housing instability or homelessness (Beer et al. 2006, p. 39). The most common reason for eviction among participants in the study was rent arrears (Beer et al. 2005, p. 20). Given the severity of the consequences, it is reasonable to apply a considerable level of protection for tenants in this area so that the ultimate penalty is not disproportionate to the original offence.

At present, under s. 43(3), if a notice to vacate is issued for failure to comply with the residential tenancy agreement but the tenant rectifies the breach within 14 days of the notice being issued, the notice to vacate becomes invalid. However, where the reason for eviction is rental arrears, and this is the third notice issued within 12 months, compliance by the tenant has no effect (s. 43(2)). This seems inconsistent and unfair. It is important to consider the context in which tenants are falling into arrears. A study in Victoria of patterns of household expenditure on rent and electricity concluded that in low income households, 'expenditure is dictated by necessity' and households 'juggle expenditures by paying their rent or energy accounts late' (Duggan & Sharam 2004, p. 5). This does not mean they are unwilling to pay, however: there is a difference between intending to pay, but paying late in order to buy food, and not intending to pay at all. Anglicare recommends that the discrepancy in s. 43 be removed, so that, provided a tenant pays the amount due within 14 days of the notice being issued, a notice to vacate is always rendered void, even if it relates to rental arrears.

Under s. 43, a notice to vacate takes effect between 14 and 28 days after it is issued, depending on the reason. It is Anglicare's view, based on extensive service delivery experience, that two to four weeks is not enough time for a tenant to find an alternative property in the current rental market. Eviction under such terms is, for many people on low incomes, tantamount to eviction into homelessness. Anglicare recommends the extension of notice periods from 14-28 days to 90 days. The time permitted to rectify breaches could still be set at a shorter period. A period of 90 days' notice however allows a tenant a more reasonable amount of time in the current rental market to find alternative accommodation and would be consistent with national strategies to prevent homelessness.

In addition to these amendments to the provisions in s. 43, colleagues in the sector have suggested introducing an alternative option for landlords and tenants in the event of either party failing to comply with the agreement. This would be the option of issuing a 'notice to remedy'. The 'notice to remedy' would require the party to rectify the breach within 14 days, but without carrying the threat of immediate termination of the agreement for non-compliance. This would allow for breaches to be resolved without the pressure of eviction, and potentially homelessness, hanging over the tenant, and without the stress and difficulty of losing a tenant and having to find another one hanging over the landlord. It could contribute to a better, more equitable relationship between tenant and landlord. Obviously failure to comply with a 'notice to remedy' would be grounds for the issuing of a notice to terminate or a notice to vacate. Anglicare recommends further consideration of this option.

Finally, given the level of disruption that having to leave a property can cause to a tenant, Anglicare calls for the introduction of stronger penalties for landlords who abuse the provisions in s. 42. For example, Anglicare workers report that some clients have been issued with a notice to vacate under s. 42(1)(c), only to see the property listed as available to rent without any renovations having been performed or any sale having taken place. This is a breach of the legislation as the landlord has

effectively evicted the tenant on false premises. The incorporation of a penalty in the legislation provides a stronger form of deterrence and should assist in enforcement.

Termination of agreements by tenants: Landlords are obviously not the only parties with the right to terminate a residential tenancy agreement. Under s. 38(1), tenants may terminate an agreement that is not for a fixed period at any time, or a fixed-term agreement if an owner has failed to comply with their obligations under the agreement. However, if a tenant chooses to terminate a fixed term lease early, they are unable to do so without being made liable under s. 27B for the rent payable until the owner finds another tenant (or their original lease period finishes) and 'any other loss arising' from their early departure – in practice, costs such as advertising for a new tenant. In the experience of Anglicare workers, some tenants are being held responsible for paying rent for very long periods after departure because the landlord is unable – or unwilling – to find a new tenant. This is especially the case if the property is an isolated area or extremely substandard. To address this, Anglicare makes two recommendations. The first is to reduce the length of time for which a landlord can charge the tenant rent following early vacation of the property to four weeks from their departure date. In the current market, this is a reasonable period of time in which to expect the landlord to obtain another tenant for the property. The second is to allow the departing tenant to propose a new tenant to the landlord and prohibit the landlord from unreasonably refusing the new tenant – that is, if the person would ordinary be acceptable to that landlord, then they must accept them on this occasion.

Anglicare workers have also expressed concern that sometimes tenants are forced to leave properties early due to extenuating circumstances over which they may have reduced control. There are a number of such circumstances, but a particular cause for concern is for tenants who have been sharing a property – and responsibility for the rent – with a partner, but the partner has now been excluded from the property under a Police Family Violence Order (PFVO) or a Family Violence Order (FVO). These orders are made under the *Family Violence Act 2004*, and can require a person to vacate a premises, 'whether or not that person has a legal or equitable interest in the premises'(ss. 14(3)(a), 16(3)(a)). The decision to issue a PFVO is made by any authorised police officer 'if the officer is satisfied that the person has committed, or is likely to commit, a family violence offence' (Family Violence Act, s. 14(1)). The victim or likely victim of the offence does not necessarily have a say in whether or not an order is issued. An FVO is issued by the Court, but an application may be made by a police officer and does not have to come from the victim (Family Violence Act, ss. 15(1)-(2)). Furthermore, if the person against whom the FVO has been made is a co-tenant with the person affected by the violence, then the Family Violence Act gives the Court the power to terminate their residential tenancy agreement and establish a new one excluding the person who is the subject of the FVO (Family Violence Act, s. 17(1)). While the intent of the PFVO is to protect the victim from violence, an unintended consequence can be that the victim is left with responsibility for paying the full amount of rent on a property when they may only have an income sufficient to afford part of the rent. Anglicare recommends that the circumstances in which a tenant can terminate a fixed term agreement without penalty outlined in s. 38(1) be extended to include this situation.

Security of tenure: recommendations

- Tenants should be able to elect to extend their residential tenancy agreement if their landlord intends to continue renting the property for a further period.

- Section 43 should be amended to provided that, as long as a tenant pays the amount due within 14 days of the notice being issued, a notice to vacate is rendered void, even if it relates to rental arrears.
- Periods of notice under section 43 should be extended from 14-28 days to 90 days.
- Further consideration should be given to the option of introducing 'notices to remedy' in the event of either party failing to abide by the conditions of the residential tenancy agreement.
- Penalties should be introduced for landlords who breach the provisions in section 42.
- If a tenant elects to vacate the property early, the landlord should only be permitted to continue to charge them rent for four weeks following their departure.
- Tenants who are vacating early should have the right to propose a replacement tenant for the property, whom the landlord may not unreasonably refuse.
- Tenants who have had a rent-contributing partner excluded from the property under the Family Violence Act should be permitted to terminate a fixed-term agreement without penalty.

Issue 2: Unreasonable rents

Do you agree that rent should only be increased every 12 months? At present, the Act effectively allows a landlord to increase the rent every six months (s. 20(3)(c)). Anecdotal evidence suggests that some landlords take advantage of this and routinely increase the rent every six months. Given the very low incomes of many our clients, Anglicare would be in favour of provisions that extended the period between rent increases to 12 months. However, Anglicare recommends a provision linking this 12 month limit to the property, rather than to the lease, in order to prevent landlords manipulating lease lengths in order to evade the effect of these provisions.

Should all rent increases be subject to a reasonableness test? Anglicare has difficulty in answering this question because of the very specific way in which 'reasonableness' is defined in the paper. While Anglicare supports moves to constrain rent increases to reasonable levels, the full question in the discussion paper, taking into account the footnote attached to the question, effectively reads, 'Should all rent increases be subject to a test of whether or not the rent is greater than the average price in that suburb or area for the specific type and condition of the property?' (Consumer Affairs and Fair Trading 2009, p. 9, n. 10). This is virtually a maintenance of the status quo – at the moment, the only specific test of 'reasonableness' suggested by the Act is the 'general level of rents for comparable residential premises in the locality or a similar locality' (s. 23(2)). Anglicare believes that any test should be more comprehensive than this.

Defining the reasonableness of a rent increase in terms of market rent makes the mistake of assuming that the residential tenancy market is a perfect market – that the 'market' rent on a particular property is in fact an accurate reflection of what 'the market' would produce. But which market? Public housing properties are allocated 'market rents', which provide a ceiling on income-based rents, but public housing market rents are generally much lower than private rental market rents. And what happens in the event of market distortion, deliberate or otherwise? Tasmania has many places where one or two landlords or agents have a virtual monopoly over private rental in that area, and therefore have the capacity to artificially inflate the market. There is anecdotal evidence from some community service organisations that this in fact occurs and the discussion paper itself seems to concede this point. For example, in the section on security of tenure, the paper states that '[t]he main reason that a property owner does not wish to extend or renew an agreement is that the end of lease period provides the owner with an opportunity to increase the rent as a new agreement is not subject to the unreasonable rent increase provisions' (Consumer Affairs and Fair Trading 2009, p. 7). In other

words, the owner wishes to set a rent that is unreasonable, but is not open to challenge in the Courts under s. 23. Given that the only specific test of reasonableness currently contained in the legislation is whether or not the rent is consistent with the current 'market' rate, this section of the discussion paper appears to confirm that owners routinely set rents in excess of the 'market' rate, which over time will artificially inflate the market as the excessive rent becomes the 'new' market rent.

And what happens if the 'market' rent is indeed 'the average price in that suburb or area for the specific type and condition of property', but it nevertheless defies any sort of 'reason'? One Anglicare client, for example, was paying $180 a week to live in a wooden carport with no heating and no access to even basic facilities, such as a toilet. Paying rents such as this to a live in a shed or carport is not uncommon in the experience of our workers. In a constrained market, $180 a week may in fact be 'the average price' for a wooden carport with no facilities. But it is not by any stretch of the imagination a reasonable price.

Anglicare believes that rent increases should be subject to a reasonable test, but also that this test should not be defined solely in terms of market rent. Anglicare supports the position previously put forward by the Tenants' Union of Tasmania, which includes the introduction of a mathematical formula to determine whether an increase is on the face of it reasonable or unreasonable, such as linking increases to the Consumer Price Index, a reversal of the onus of proof onto the landlord if the increase is unreasonable according to this formula, and the introduction of a more prescriptive list of matters which the Court must take into account in determining the reasonableness of any increase above this formula (see Tenants Union of Tasmania 2006). Factors that could be taken into account in determining whether an increase is reasonable include the condition of the property, any work undertaken by the tenant and the tenant's individual circumstances, including whether hardship would result from the increase.

Anglicare acknowledges that the likely effect of such provisions in the rental market would be that nearly every tenant would have their rent automatically increased each year in line with CPI. However, it is Anglicare's view that this would be preferable to what occurs at the moment: for many tenants, especially those renting through agents and subject to annual rent reviews, annual or even six monthly rent increases occur anyway, and often at levels above CPI. Those tenants who do not receive annual increases often face even greater price shocks because the increase required to get to 'market rent' is considerable thanks to the time that has elapsed between rent reviews. Simply put, in reality, regular, large rent increases are not an unusual experience for our clients. Therefore, we consider that automatic, annual, smaller CPI-linked increases would be a better alternative that would provide greater certainty to tenants – and ensure landlords also had an accurate understanding of the likely revenue flows from their investment for the duration of the tenancy.

Rent bidding: Rent bidding (and 'banding', which achieves a similar result) does exist in Tasmania, despite assertions by industry stakeholders to the contrary (see ABC 2008). The surveys conducted by Consumer Affairs and Fair Trading that are referred to in the discussion paper (Consumer Affairs and Fair Trading 2009, p. 10) are likely to underestimate the prevalence of rent bidding as they would only detect it where it occurs openly within the advertisement. Just because a landlord advertises their property at a fixed price does not mean they are not taking bids on rent. Anglicare workers report accompanying clients to inspections only to find that the rent advertised in that morning's paper was no longer correct and that the rent being asked for was now higher. The new rent is usually out of reach of the clients, which means that they have had a wasted journey. (It is important to note that for many clients, transport costs are a burden and that a wasted journey represents expenditure

that they can ill afford). Anglicare acknowledges that rent bidding can be initiated by tenants as well as by landlords – although we would also point out that no landlord is compelled by necessity to accept any sort of bidding, while a tenant desperate for housing and placed in a bidding situation initiated by the landlord is in a much more compromised position.

Queensland recently moved to regulate rent bidding; the Queensland *Residential Tenancies and Rooming Accommodation Act 2008* states that a property must not be advertised for rent 'unless a fixed amount is stated in the advertisement or offer as the amount of rent for the premises' (s. 57(1)). Anglicare notes the view of Consumer Affairs and Fair Trading, expressed in the discussion paper (Consumer Affairs and Fair Trading 2009, p. 10) and by Consumer Affairs and Fair Trading representatives in meetings with Anglicare, that the Queensland legislation does not actually prohibit rent bidding because it merely requires advertisement at a fixed price. However, Anglicare also points out that while this may be a technically accurate interpretation of the provisions of the legislation, such a view is contrary to media and stakeholder reaction at the time. A range of diverse sources indicate that the Queensland provisions were seen as a ban on the practice, not just a regulation of advertising. For example, an LJ Hooker newsletter refers to 'the outlawing of rent bidding' (LJ Hooker Coorparoo 2009, p. 1), a *Courier Mail* story stated that the practice had been 'banned' (Lion 2008, p. 20), and the Minister's media statement about the changes claims that rent bidding is being made 'illegal' (Shwarten 2007).

Anglicare believes that in any case the issue with the Queensland approach identified by Consumer Affairs and Fair Trading can be resolved by adding a second clause to the legislation. As well as requiring all properties to be advertised at a fixed price, the Tasmanian Residential Tenancy Act should also make it an offence for a landlord to lease the property at a price that is above the advertised price. Obviously rent bidding cannot be eliminated by a legislative provision prohibiting it, any more than driving without a license, shop-lifting or physical assault can be limited by legislative provisions prohibiting these activities. However, legislative provisions can reduce the incidence of the activity, make it less acceptable and impose a penalty upon anyone who continues to engage in it.

Unreasonable rents: recommendations

- Rent increases should be limited to one per property per year.
- Rent increases should be regulated according to the model put forward by the Tenants' Union of Tasmania in 2006 in their law reform issues paper *Through the roof: unreasonable rent increases in Tasmania*.
- The Residential Tenancy Act should require all properties to be advertised at a fixed price, and make it an offence for a property to be leased at a price that is above the advertised price.

Issue 3: Inadequate dispute resolution processes

Why is this an important issue?: Last week it was reported in the media that Housing Tasmania had recently increased the 'market' rents applying to its properties, based on recent revaluations. The media coverage drew on the experience of a Devonport family of nine whose rent was increasing from $127 to $210 a week, an increase of 65% (Brown 2010b). The next day, the *Mercury* carried a follow-up article on the Minister's response. The Minister noted that 'the Residential Tenancy Act provides a dispute resolution process for tenants who believe the increase in unreasonable' and went on to say that this process was conducted through the minor civil claims division of the Magistrates Court (Brown 2010a). Anglicare cites this case not to criticise the Minister, who is correctly describing the options available to tenants in this situation, but to highlight how these alternatives may appear to

tenants reading the article. They are effectively being told that the only option they have to protest a rent increase that they believe to be unreasonable is to go to Court at a cost of nearly $50 at a time when their budget has suddenly come under significant additional pressure.[4]

The inadequacy of using the Courts as the only mechanism for dispute resolution (with the exception of disputes over bond dispersal) is noted in the discussion paper (Consumer Affairs and Fair Trading 2009, pp. 11-12). The problems with a court-based system are intensified for low income earners: research suggests that people who are economically disadvantaged are less likely to have the skills or education needed to prevent a legal problem from escalating, are less likely to have access to non-legal intervention and support services and are disproportionately likely to face a range of legal issues, including those relating to tenancies (Schetzer, Mullins & Buonamano 2002, pp. 53-4). The fact that the Courts remain the only alternative for disadvantaged people who want to assert their rights over issues such as unreasonable rent increases or uncompleted maintenance is a major flaw in the Act.

A residential tenancy tribunal: Anglicare has previously advocated for an expansion in the role of the Residential Tenancy Commissioner as a mechanism for improving dispute resolution pathways (see Anglicare Tasmania 2006, p. 3). However, further consideration of the issues has led Anglicare to conclude that the establishment of a Residential Tenancy Tribunal would be a better and fairer means of ensuring effective dispute resolution. Colleagues in the sector have raised a number of concerns with a process centred on the Commissioner, including the lack of procedural fairness, as the tenant may not always have the opportunity to present their case, and the lack of transparency regarding how the Commissioner has reached a decision, including what evidence was given weight and what factors were taken into account and why. And as the discussion paper notes, the Commissioner would in any event still be unable to examine general questions of law or disputes about contracts (Consumer Affairs and Fair Trading 2009, p. 12), which would mean that many disputes would still need to come before a Court.

There is also the issue of impartiality. Anglicare notes with concern the reference in the discussion paper to the existing process, which occurs within the Department. It states that if in the course of conducting an investigation of a complaint by either a tenant or a landlord 'one of the parties has difficulty in presenting their case', the investigator will assist them to do so (Consumer Affairs and Fair Trading 2009, p. 12). How is an investigator to remain impartial if they are actually acting as advocate for one of the parties in a dispute? Or alternatively, how is their advocacy to be genuinely effective if they are seeking to remain impartial?

A discussion paper on the structure of tribunals in the ACT identifies a number of reasons for establishing a tribunal in preference to relying on the Courts, many of which are applicable to the situation with residential tenancy issues in Tasmania. The paper states that Tribunals tend to be established 'where the needs of a particular jurisdiction are such that they not fully met by the courts'. For example, tribunals can be established 'for informality, such as tribunals dealing with people suffering hardship or disputes where the parties will have an ongoing relationship after the dispute is resolved' (Department of Justice and Community Safety c. 2007, p. 7).

The discussion paper for the present review objects to the establishment of a Tasmanian residential tenancies tribunal on the grounds of cost: 'Tasmania's small population size and the economies of scale

[4] The filing fee of $46.55 may not appear excessive to some, but it represents a considerable sum for a low income earner. For a university student reliant solely on Youth Allowance, for example, the fee represents more than 10% of their fortnightly base income of $377 (based on Centrelink figures current for 28 January 2010).

for providing regional services mean that a specialist tribunal is unlikely to be cost effective' (Consumer Affairs and Fair Trading 2009, p. 12). Anglicare points out that a residential tenancies tribunal operates in the ACT, which similarly has a small population, and that tribunals also operate in states with populations dispersed over a far greater geographical area than in Tasmania.

The ACT discussion paper on tribunals argues that access to justice requires both ease of physical access and the capacity for remote access by phone or email (Department of Justice and Community Safety c. 2007, p. 11). Anglicare believes that in Tasmania, a number of options exist to realise these requirements: there is the option, for example, of using space in existing government buildings familiar to ordinary people, such as Service Tasmania. Continuous improvements and innovations in communication technology are also allowing for increased flexibility in service delivery. Such efficiencies would make the operation of a 'roving' Tribunal fairly simple.

Tasmania's tribunal could operate with a 'brand' distinct from the Magistrates Court, with one or two Magistrates specialising in residential tenancy matters presiding – although these Magistrates would not be required to preside exclusively over these matters. The tribunal could have a small but adequate number of dedicated staff responsible for administration, managing applications, investigating complaints and assisting parties appearing before the tribunal. In some cases, it may be appropriate for a delegated member of staff with appropriate expertise to handle complaints without recourse to the tribunal, such as determining whether a rent increase fell within the Consumer Price Index limit suggested above. A tribunal could retain the authority and dignity of a court-based approach while having a consumer-friendly focus and providing a less intimidating and more accessible environment in which tenants can present their case.

Need to maintain the role of Consumer Affairs and Fair Trading: Even with an established residential tenancies tribunal, there remains a role for Consumer Affairs and Fair Trading in monitoring and enforcing compliance with the Act. The first step for a tenant whose landlord is refusing to respond to a legitimate request for urgent repairs, for example, should not have to be a formal application to the Tribunal. They should be able to make a complaint to the consumer affairs agency and have that complaint followed up promptly and efficiently. Further discussion of Consumer Affairs and Fair Trading's role in enforcement is below.

Inadequate dispute resolution processes: recommendations

- A residential tenancies tribunal should be established in Tasmania.

Issue 4: The poor quality of housing

Should the Residential Tenancy Act include minimum standards for accommodation?

As the discussion paper notes, the standards of rental accommodation are currently covered by a number of different pieces of legislation, including the *Public Health Act 1997* and the *Substandard Housing Control Act 1973*. Anglicare notes however that the *Legislation Repeal Bill 1997* had its first reading on 3 November 2009 and that this bill, if enacted, would repeal the Substandard Housing Control Act. This presumably renders this piece of legislation irrelevant and means that the only protections around housing standards in existing properties that would apply in Tasmania would be public health legislation.

The discussion paper also refers to the HICUP group and its draft guide for environmental health officers (Consumer Affairs and Fair Trading 2009, p. 14). Some members of the HICUP group remain working within the housing and homelessness sector today, but the guide itself appears not to have ever been put into circulation – it is still in draft form – and the group to have had little long-term impact, which suggests that reviving it may not be the most effective strategy to respond to the problem of substandard housing.

In Anglicare's view, reliance on public health provisions to respond to substandard housing is not sufficient. The Public Health Act itself is not specific regarding accommodation standards. It is difficult for a member of the public to obtain information about the application of the Act across the state – in the Public and Environmental Health section of the Department of Health and Human Services website, there is no reference to accommodation standards or unhealthy premises. Going by the website, no guidelines have been publicly issued by the Director of Public Health in relation to unhealthy premises. Presumably information is available through local councils, but the discussion paper notes a reluctance by local government health inspectors to get involved in complaints regarding rental properties (Consumer Affairs and Fair Trading 2009, p. 14).

Anglicare would like to stress that when we talk about minimum standards, we are referring to very basic requirements. The discussion paper seems to imply otherwise, claiming that 'few people would argue that it is acceptable to rent a property that does not have a cooking facility, a toilet, electricity or hot and cold running water. However, should government require some form of heating in the main living room? What form of heating would be acceptable and should heating include bedrooms as well?' The quality of heating in a property is important, but the actual genesis of Anglicare's concern around minimum standards is not that our clients are leasing properties without heating in the bedrooms. It is that our clients are, to use examples provided by Anglicare workers, leasing properties with exposed wiring in the ceiling, overflowing toilets in the bathroom, raw sewerage in the garden and mildew covering the walls and ceilings. Anglicare's research into low income earners in the private rental market in 2002 uncovered reports of properties with holes in the walls, smashed windows, vermin infestations, leaking showers that had resulted in rotting floorboards in other rooms, mould and damp so extreme that bedding went mouldy, wood heaters that had rusted through and collapsed ceilings (Cameron 2002, pp. 42-7).

Anglicare acknowledges that, if appropriately enforced, many of these issues would be covered by existing public health legislation. However, this approach is a reactive one: that is, the problem must exist before the legislation comes into effect. In other words, the property must have deteriorated markedly and to the point where it is already negatively affecting the tenant's health or safety before there is a legislative solution. To reach the condition of the properties described above, there has clearly been limited or no maintenance conducted for many years. By the time the situation has become so bad that public health legislation applies, the tenant is in an untenable situation and the cost to the landlord of remedying the problem is probably out-of-reach. The result is the property is deemed unfit for human habitation and both the tenant and the landlord lose out. A much better approach would be a proactive response that mandated properties to be maintained to a certain standard and ensured that landlords actually complied.

What standards should apply? Tasmania once had regulations governing minimum standards in rental accommodation. The *Substandard Housing Control (Standards of Habitation) Regulations 1974* are

no longer in force, having been ultimately rescinded in January 2001,[5] have been described as 'vague and less comprehensive' than comparable regulations that have applied in the United States (Bradbrook 1977, p. 181), and are now quite dated in their detail and application, but they did exist. They lay out standards or requirements for housing relating to drainage, sanitation, ventilation, lighting, cleanliness, repair, construction, situation (i.e. location), damp, water supply, bathing, laundry and cooking facilities, cooking stoves and vermin infestation. Examples of some of the provisions include that '[t]he house shall be provided with ventilators and space for under-floor ventilation sufficient to protect any wooden floors therein from damp and decay', that '[t]he roof of the house shall be covered with tiles, galvanized iron, slates, or other durable material of such quality and so fixed as to not admit rain…' and that '[t]he house shall be free from infestation by vermin or rats' (Substandard Housing Control Regulations, ss. 8, 15, 30).

Anglicare is not suggesting that these regulations be revived – or at least, be revived without an extensive review to ensure that they meet contemporary standards – but point to them as evidence that Tasmanian Governments have previously seen it as possible to prescribe residential property standards in law. What was once possible is surely possible again.

A more modern consideration of appropriate housing standards has been completed by the Victorian Council of Social Service (VCOSS 2009). These standards look forward to a future where economic strategies to mitigate the effects of climate change result in additional costs being passed on to the consumer. The Council's suggested standards relate to structural elements and thermal efficiency, safety, electricity and gas, natural and mechanical ventilation, water supply and health. Examples include that the '[p]roperty must have at least one form of built in gas heating (in the main living area) with a minimum energy efficiency rating of 4 stars (or similarly efficient electric heating where reticulated mains gas is not available)', that '[a]ll properties must have roof insulation to a minimum rating of 3.5R' and that '[e]very kitchen sink, bathroom sink, shower and bath shall be connected with a hot water service in working order connected to the most efficient fuel source available' (VCOSS 2009, pp. 12-13).

Anglicare considers it reasonable that minimum standards outline requirements in relation to weatherproofing, thermal efficiency, safety, health of the occupants, ventilation, water supply, pest control and heating. This last is because in Tasmania, the quality of heating provided by a landlord and its cost – and thus availability – has a direct bearing on the health of a tenant. Anglicare's concern is for the health and safety of tenants and for the sustainability of their tenancies. Appliances that impose an unaffordable cost on a low income household would jeopardise the tenancy.

Similarly, with the extension of water and sewerage usage charges to all private renters in 2012-13[6] (Bartlett 2009), it is reasonable to require as part of the minimum standards that water efficient appliances also be provided. VCOSS recommends requiring 'the highest water efficiency currently available' (VCOSS 2009, p. 13). In Queensland, landlords are permitted to pass on full water consumption costs to the tenant 'provided ALL the minimum criteria have been met'. If the criteria are not met, the landlord must pay for some or all of the water consumption. The criteria are that the premises be individually metered, that the premises be 'water efficient' and that the tenancy agreement includes a statement that the tenant will pay for all consumption. Standards are provided

[5] Librarians at the Andrew Inglis Clark Law Library advise that the regulations were originally rescinded in 1992, but that the effect of this was postponed in 1999 until 1 January 2001.

[6] Anglicare notes that some private renters already pay for their water and sewerage usage under s. 17(3)(b).

against which the 'water efficiency' of the premises can be assessed – for example, showerheads must have a maximum flow rate of 9 litres per minute (Residential Tenancies Authority 2009).

Rent increases on substandard properties: Anglicare also draws attention to the injustice inherent in the fact that many tenants are having their rent increased on properties that are in appalling condition and degrading around them. Anglicare workers cited the case of a tenant paying $250 a week for a property with a broken roof, exposed wiring in the ceiling and constantly overflowing toilet. The landlord refused repeatedly to address any of these problems, in contravention of their responsibilities under the Act, but nevertheless issued the tenant with a notification that the rent was to increase to $280. This sort of situation illustrates the argument for expanding the list of specified matters to which the court should have regard in assessing the reasonableness of a rent increase.

Redress for maintenance: One of the issues repeatedly raised by Anglicare workers is the difficulty inherent in compelling landlords to conduct essential repairs and maintenance. Many landlords simply refuse to rectify problems, both general and urgent, even when this is a blatant breach of their obligations under the Act.

Anglicare notes that in the case of urgent repairs, tenants have the right to authorise repairs themselves if the landlord is either not able to be contacted or fails to carry out the repairs within 24 hours of being notified (s. 33(2)). If the landlord has not nominated a repairer (or, as is often the case with landlords at the lower end of the market, the landlord themselves is the nominated repairer), the tenant can arrange a 'suitable' repairer, but must pay for the service themselves and then seek reimbursement from the landlord (ss. 33(4), 35). This is probably a good option for tenants with adequate incomes, but for very low income earners, it is no option at all. Most people on limited incomes would lack the funds to pay for the repairs upfront. This is a major issue, given that many essential repairs would not be cheap: paying for the resolution of problems with exposed wiring or faulty plumbing or major structural problems are not going to be within the immediate capacity of any low income earner. Tenants would also be well aware that their chances of reimbursement are minimal, given that the landlord has already refused to complete the repairs themselves – they are unlikely to then be cooperative about reimbursing the tenant.

The Act is also unclear about what options are open to the tenant in the event that the landlord refuses to reimburse them. Under s. 36, if the landlord disputes their liability to reimburse the tenant, then the *landlord* can apply to a court to have the liability determined. There is no reference to the tenant's right to bring Court action on this issue (even if this were an affordable option for a tenant already out of pocket). A landlord refusing to reimburse the tenant is unlikely to want to pay to have the dispute resolved – it is far easier and cheaper simply to continue to refuse to reimburse the tenant, particular as the tenant has no redress available to them under the law. In this case, one option that is worth exploring would be legislating to permit the tenant to deduct any reimbursement from their rental payments. Preparatory work would need to be done to explore the implications of such a provision, including any potential for it to be abused.

According to the discussion paper, Regulations under s. 65, permitting Consumer Affairs and Fair Trading officers to issue infringement notices, are currently being developed and will allow for infringement notices to be issued early in 2010. Anglicare supports this move and looks forward to its speedy introduction.

Given that many of the cases of concern are ones where the landlord is knowingly failing to abide by their obligations, Anglicare further recommends that infringement notices for failure to complete repairs and maintenance should include substantial penalties for failure to comply.

Terminology: The discussion paper notes a number of issues with the terminology in the Act relating to repairs and maintenance. These issues include a lack of clarity relating to the distinction between fair wear and maintenance, which has allowed some repair problems to be attributed to fair wear and tear rather than be classified as a maintenance issue, and the interpretation of the words 'ceases to function', which have allowed landlords to evade the need to repair essential appliances provided they still partially function (Consumer Affairs and Fair Trading 2009, pp. 16-17). Anglicare agrees that the Act needs to be clearer around the distinction between fair wear and tear and maintenance, and also that the term 'function' under s. 33 requires clarification. We submit that 'function as designed' would be appropriate terminology to overcome the problem identified in the discussion paper.

The poor quality of housing: recommendations

- The Residential Tenancy Act should specify minimum standards for private rental properties.
- Consideration should be given to the option of allowing a tenant to deduct reimbursement payments from their rent in the event of a landlord disputing their liability to reimburse the tenant for the cost of essential repairs, but refusing to take court action to have the liability determined.
- Consumer Affairs and Fair Trading should prioritise the introduction of Regulations governing the use of infringement notices.
- Infringement notices should include substantial penalties for failure to comply.
- The Act should provide greater clarity regarding the distinction between 'fair wear and tear' and 'maintenance'.
- The term 'ceases to function' in s. 33 should be amended to read 'ceases to function as designed'.

Issue 5: Exclusionary practices by landlords

Anglicare acknowledges that in an open market, landlords can exercise their right to rent their property to whomever they choose – and their right to not rent their property to a particular person if they so choose. In practice, however, this means that there is a substantial bias within the private rental market against people living in poverty and members of other disadvantaged groups. The AHURI study on investors' motivations asked participants about their preferred tenants. It found that landlords favoured 'working families', childless couples and older renters, while they were less attracted to Centrelink clients, single parents, families with children, students or shared households (Seelig et al. 2009, p. 58).

However, it is contrary to Tasmania's anti-discrimination legislation to discriminate against another person on grounds including race, age, marital status, relationship status, parental status, disability, irrelevant criminal record or association with a person who has or is believed to have any of these attributes (*Anti-Discrimination Act 1998*, s. 16), and these provisions cover activity in connection with accommodation (Anti-Discrimination Act, s. 22(d)). The Anti-Discrimination Act also defines discrimination as including both direct or indirect discrimination and indirect discrimination

> takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who – share, or are believed to share, a prescribed attribute; or share, or are believed to share, any of the characteristics imputed to that attribute – more than a person who is not a member of that group (Anti-Discrimination Act, s. 15).

Anglicare has previously noted the difficulty low income earners in particular would face in successfully pursuing claims under the Anti-Discrimination Act (Cameron 2002, p. 62), but nevertheless, many low income earners and members of other disadvantaged groups believe, not without justification, that they are actively discriminated against by landlords. Participants in Anglicare's 2002 research into the private rental market, for example, reported discrimination on the basis of employment status, disability, parental status, age and family formation (Cameron 2002, pp. 26-31). Participants in an Anglicare research project into the experiences of newly arrived refugees reported strong perceptions of discrimination, based upon the fact that they had observed properties remaining empty or being readvertised after their applications had been denied, the lack of any explanation, reasonable or otherwise, as to why their application had been unsuccessful, and their experience of unreasonable increases in rent (Flanagan, J 2007, p. 69).

In addition to active discrimination, Anglicare believes that there are a number of 'conditions, requirements or practices' imposed or used by landlords which Anglicare believes are unreasonable and which do unfairly disadvantage low income earners and people with special needs. Anglicare believes this kind of implicit discrimination, even if it may not be strictly illegal under the Anti-Discrimination Act, is not appropriate and that legislative measures should be taken to counter it.

Tenant databases: Anglicare believes that residential tenancy databases unfairly impact upon disadvantaged tenants. Anglicare has submitted to the current national consultation on this issue and refers Consumer Affairs and Fair Trading to our response, attached to this submission.

Rent cards: As the discussion paper notes (Consumer Affairs and Fair Trading 2009, p. 18), even a small fee attached to the payment of rent each fortnight can create difficulty for households on very low incomes and such a practice therefore disproportionately disadvantages these tenants. Anglicare agrees that landlords should be required to provide at least one option, and preferably a number of alternative options, for rental payment that will be free to the tenant. It is unreasonable that tenants, particularly people on very low incomes, should be expected to effectively pay for the privilege of paying.

Anglicare notes the rationale presented in the discussion paper for the use of a rent card – so that agents do not have to provide cash receipting facilities at their offices – and points out that if the security implications are a genuine and pressing concern, agents can easily avoid having to receive cash over the counter by providing tenants with a bank deposit book so that the tenant can deposit the cash directly into the agent's account.

Application forms: As Anglicare has noted elsewhere (Anglicare Tasmania 2007), many of the questions asked on application forms are intrusive and unnecessary, given the purpose of the application process is simply to confirm the identity of the applicant and assess their capacity to pay rent and maintain their tenancy. Some of the information required by application forms examined by Anglicare include 100 points of identification, the applicant's marital status, details of any criminal record and the applicant's Centrelink reference number and type of Centrelink payment (Anglicare Tasmania 2007, pp. 8-10). The requirement for 100 points of identification imposes particular difficulties for Anglicare clients. Many do not have in their possession the required number of personal documents, and obtaining copies can be difficult and costly. One of the questions on many forms that causes particular concern to Anglicare workers is whether or not the applicant's bond is being provided through Anglicare or Colony 47 (the two providers of private rental assistance in

Tasmania). Workers report that some agents even openly refuse to accept applications from people who do receive bond assistance from these services, and there are regularly advertisements in the 'properties to rent' columns which specify 'no Anglicare bonds' (or similarly, 'no Colony 47 bonds').

Privacy legislation may have application to some if not all of the instances described above; Anglicare notes that the Privacy Commissioner's submission to the recent Australian Law Reform Commission's review of privacy actually suggested as an example that the Privacy Commissioner might provide more specific guidance on what information a real estate agent could legitimately collect from an applicant for a tenancy (Office of the Privacy Commissioner 2007, p. 221). However, the *Privacy Act 1988* is a very high level piece of legislation and bringing it down to the level of a small-scale real estate agent operating in regional Tasmania poses challenges. Anglicare believes it is appropriate that the Residential Tenancy Act include provisions, consistent with national legislation, to protect applicants for private rental properties from undue interference with their privacy.

To overcome this problem, Anglicare recommends standardising application forms and including in the Act a prohibition against using a non-standard form. This will prevent agents from asking for information that is frankly irrelevant and limit their requests to what is legitimate for their purposes. It may also assist in dealing with concerns around the 'bundled' nature of consent clauses on some application forms (see Anglicare 2007, pp. 6-7). Breaches of this requirement in the Act should incur a penalty.

Standardisation could also be extended into other paperwork associated with the Act, including leases and condition reports to avoid irregularities arising here (such as dubious clauses in lease agreements or condition reports that consist of two words, 'all okay').

Exclusionary practices by landlords: recommendations

- Landlords should be required to offer at least one, and preferably more than one, no-cost method of paying rent.
- Landlords should be required to use standardised application forms, lease agreements and condition reports, with penalties for failure to comply.

Issue 6: The lack of enforcement

Landlords who do the wrong thing: In the preparation of this submission, the author asked Anglicare housing support workers what happens when a client reports to the worker that their landlord has done something which is a breach of the Act and of the tenant's rights. The workers replied that they would offer to act as an advocate on behalf of the tenant and speak to the landlord, or that they would refer the tenant to the Tenants' Union. However, they said, on most occasions, 'what happens is that the tenant moves out.' They said that in their experience, vulnerable tenants lived in fear of their landlord. Because of this fear, they often asked workers not to speak to their landlords and instead sought somewhere else to live as a better solution compared to asserting their rights. It is not reasonable that a tenant should feel compelled to leave their home when it is the landlord who is in the wrong.

Some landlords are well aware that they are breaching the conditions of the Act. Sometimes they will use spurious excuses: needing to collect the rent in person is used as an excuse to regularly come onto the property, even if the tenant is not at home. Anglicare workers have seen cases where the landlord

has actively exploited a tenant's vulnerability. One worker reported the case of a landlord who wanted a tenant to terminate his lease early. The tenant had a disability and limited mobility. The landlord, accompanied by a relative, made constant, physically threatening visits, without permission and therefore in contravention of the Act, to the property, which the tenant, due to physical vulnerability, was unable to prevent. And it is not only private landlords who are at fault: Anglicare workers reported the case of a family experiencing overcrowding to such a degree that one member, who was contributing to the rent, was sleeping in a laundry with exposed and dangerous wiring in the ceiling. The real estate agent managing the property was well aware that this was the case, but chose not to address what is a clear safety issue. The family were recently arrived refugees and too afraid of the consequences to make a formal complaint.

What is proactive enforcement? Anglicare has long advocated for more 'proactive' enforcement of the Residential Tenancy Act (e.g. Anglicare Tasmania 2008, pp. 8-10). We have been advised by representatives from Consumer Affairs and Fair Trading that it is not clear what we mean by this term. The example below may illustrate the sense of what we mean.

An article on the effectiveness of Australian substandard housing control legislation written in the 1970s discussed the options for conducting inspections of housing alleged to be substandard:

> It is argued that complaint-oriented inspections alone are generally ineffective for three reasons: firstly, they tend to focus only on the alleged violations; secondly, random enforcement results from the fact that many violations are never reported; and thirdly, this uneven enforcement creates a sense of injustice in some owners and reduces the likelihood that they will comply voluntarily. Complaint-oriented inspections can be contrasted with area inspection programmes, in which all dwellings in a specified area are inspected and each violation is recorded (Bradbrook 1977, p. 185).

Where cost is an issue, the author recommends area-based inspections for older areas where housing is likely to be substandard, with complaint-based inspection programs operating in other areas (Bradbrook 1977, pp. 185-6). These comments may be old but they are nevertheless valid, and could apply beyond the enforcement of regulations relating to substandard housing. They provide a sense of what is meant by proactive, rather than reactive, enforcement – a focus on universal inspection and investigation in areas where there have been systemic problems identified, with the aim being to detect any violation, rather than one-offs reactions to individual complaints of specific violations.

What improvements can be made to enforcement of the Residential Tenancy Act?

> Enforcement by regulators is one of several strategies that are essential to promoting compliance. …[W]hen push comes to shove, a rules-based system cannot work without effective application of sanctions (CHOICE 2008, p. 2).

The discussion paper puts forward a number of explanations for perceived failings in Consumer Affairs and Fair Trading's approach to enforcement. These include the 'private nature of rental relationships' which means that compliance officers 'are not informed' of illegal activity, the lack of sufficient evidence to present in court, and the unwillingness of tenants to appear as witnesses in court (Consumer Affairs and Fair Trading 2009, p. 18). However, even if tenants are willing to appear in Court, it is reasonable to ask whether Consumer Affairs and Fair Trading is equally willing to prosecute. The Department of Justice's annual report for 2008-09 records just one prosecution under the Residential Tenancy Act in 2008-09, which was withdrawn (Department of Justice 2009, p. 66). Consumer Affairs and Fair Trading attributes much of the difficulty in obtaining enforcement outcomes to the failure of tenants to formalise complaints in Court, but has also previously expressed a reluctance to undertake formal proceedings. In the report on the post-implementation review of the

Residential Tenancy Act in 2000, Consumer Affairs and Fair Trading put forward the following view in response to concerns about the lack of enforcement of the legislation:

> 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 (Consumer Affairs and Fair Trading 2000, p. 60).

This statement was made a decade ago, but Anglicare has seen little evidence of a change of view.

The paper also hints that the cooperation of the community sector has not been forthcoming: '[a]s officers rely on referrals from other organisations there may be value in informing community organisations of the role that can be played by Consumer Affairs and Fair Trading' (Consumer Affairs and Fair Trading 2009, p. 18). Community organisations are actually aware of the role that *can* be played by Consumer Affairs and Fair Trading, but several also express considerable frustration and dissatisfaction regarding the outcome of their referrals. This may contribute to a reluctance to refer any further matters.

Anglicare does acknowledge that tenants are generally reluctant to become involved in court proceedings. Any consideration of how to improve the enforcement process must therefore firstly consider why tenants do not come forward or do not wish to pursue legal action or give evidence in court. Anglicare workers report that there are many reasons why people do not formalise complaints, either through the Tenants' Union or through court or even, if many cases, through their worker advocating on their behalf to the landlord, but the principal reason is the fear of eviction and consequent homelessness – and workers point out that the risk of homelessness as the result of eviction or having to leave because the relationship with the landlord has become untenable is a very real and very justified fear in the current market. Cost, time and the need to prioritise finding alternative housing are other reasons.

However, it is not good enough to simply acknowledge that this fear exists and accept the consequence will be reduced levels of enforcement activity. Instead, if the current approach is not working, then alternative approaches need to be explored.

Anglicare notes, for example, the references in the discussion paper to the compliance strategy accompanying the introduction of My Bond (Consumer Affairs and Fair Trading 2009, p. 19). Some of these strategies, such as telephone follow up of advertising landlords, could be extended to other areas where tenant advocates report systemic problems with non-compliance. Another possibility is the introduction of a registration system for landlords, accompanied by the inclusion in the legislation of provisions making it an offence to lease out a property if not a registered landlord and making continued registration conditional upon ongoing compliance with the provisions of the Act. Inspections – the kind of proactive program discussed above – could be conducted to ensure this is occurring. This takes the onus off the tenant to report wrongdoing and would therefore reduce fear of retribution. A registration system need not be made particularly onerous or costly for landlords, particularly small-scale landlords, with the infrastructure to support it being linked to My Bond.

Even with successful enforcement activity, what penalty is attached to a breach of the legislation? At present, only some breaches incur a monetary penalty and these penalties tend to be small. There is

evidence that small monetary penalties are of limited deterrent value and also act as a disincentive for consumer affairs agencies to pursue enforcement through the courts (Kennedy, See & Sutherland 1993, p. 88). Anglicare recommends investigation of the level of maximum penalties within the Act. Penalties should be proportional to the consequences of the breach for the other party and should carry an appropriate deterrent value.

Finally, while consumer education is no substitute for proactive enforcement, there may be value in targeted and specific consumer education for tenants regarding their rights under the legislation and the actions they can take to assert those rights. The precise format and content of the information could be developed by Consumer Affairs and Fair Trading in consultation with tenant advocates and consumers themselves to ensure it is appropriate and accessible. Under s. 14 of the Act, landlords must 'give the tenant of the premises a copy of any information relating to rights and obligations under residential tenancy agreements as the Director of Consumer Affairs and Fair Trading may direct'. This may provide an appropriate and useful avenue for reaching Tasmanian tenants directly.

The lack of enforcement: recommendations

- Consumer Affairs and Fair Trading should be resourced and empowered to adopt programs of proactive inspection in areas where systemic issues have been identified by advocacy groups.
- Whether or not Tasmania should establish of system of registration for landlords should be investigated.
- Penalties under the Act should be reviewed to ensure that they are appropriate.
- The Director of Consumer Affairs and Fair Trading should direct landlords under s. 14 of the Act to provide tenants with information on their rights, with the information to be developed in consultation with tenant advocates and consumers.

OTHER MATTERS

Exemptions: crisis accommodation

The issue of exemptions is a complex one, particularly where they apply to crisis accommodation. Anglicare is a provider of shelter-based and community-based emergency accommodation and transitional accommodation and many of our properties fall under the crisis accommodation exemption. Anglicare believes there is a strong case for extending the protection of the Residential Tenancy Act to occupants of community-run temporary accommodation. As the National Association of Tenants' Organisations has argued, '[i]t is essential that all tenants who have been granted the right to occupy residential premises as their principle place of residence be protected by tenancy legislation' (Blunden, Martin & National Association of Tenants' Organisations, cited in Pippen 2010, p. 22).

However we are also aware of the real concerns held by some of our colleagues in the sector, particularly those which provide services specifically for very vulnerable clients, such as services for women escaping domestic violence. The issues they raise are complex and nuanced. It is important that these issues receive thorough attention and it may not be possible to provide that attention if a consideration of the crisis accommodation exemption is rolled into this wider review process. Therefore Anglicare recommends the allocation of funds for a specific and separate consultation program that works with organisations providing temporary accommodation and with the clients of that accommodation to resolve the issues. Ensuring a funding allocation is attached to the consultation program will allow for special strategies to be employed to reach all stakeholders and especially

clients, and will allow a position to be reached whereby the rights of people living in temporary accommodation are protected rigorously and extensively but organisations retain flexibility and the capacity to integrate their provision of accommodation with programs of support.

Exemptions: caravan parks

In recent years, Anglicare workers have witnessed the growing usage of caravan parks as a form of interim accommodation for people excluded from the private rental market or public housing system. People are occupying cabins or caravans as their main place of residence, yet it is not clear whether they are entitled to claim the protection of the Act. The confusion in part arises because 'any premises ordinarily used for holiday purposes', which could arguably include caravan parks, is not covered by the Act (s. 6(2)(b)).

The code of practice for caravan parks operators developed by Consumer Affairs and Fair Trading and the Caravan Industry Association of Tasmania does not provide any real clarity. The provisions relating to people using caravan parks as their principle place of residence fill just half a page of the 14 page document (see Caravan Industry Association of Tasmania 2007, p. 13). These provisions state that '[w]here a caravan or cabin is rented out as a person's principal place of residence, the provisions of the Residential Tenancy Act *may* apply' (emphasis added). The code further states that '[t]he park operator should seek legal advice if in any doubt about whether or not the Act applies'. It also specifically refers the park operator to Part 4 of the Act, claiming that this 'sets out, in detail, what is required of the park operator'. Part 4 is the section of the Act which relates to the termination of agreements. There is no specific direction to the park operator to refer to other sections of the Act, such as those relating to rent, security deposits, repairs and maintenance or dispute resolution.

Anglicare considers that this lack of clarity about the application of the Act to caravan park occupants, including the extent to which the Act applies, needs to be urgently addressed.

Share houses

Another issue of concern for Anglicare workers is the growing practice of leasing out share houses by the room, with bond charged. Anglicare has raised this issue with Consumer Affairs and Fair Trading and has been advised that these cases fall under the boarding house provisions of the Act – which of course makes the collection of a bond unlawful. Tenants living in these situations are often not aware of this however, and are as a result vulnerable to other exploitation and abuses. There is also some ambiguity in the Act: the definition of a 'boarding premises' in s. 3 could be read as not applying, even if in every other respect the arrangement meets the boarding premises definition, provided all the tenants involved are university students. Anglicare believes that the best approach to this issue would be one combining greater legislative clarity and a systemic investigation of these arrangements by Consumer Affairs and Fair Trading, with the application of sanctions if found to be warranted.

The vulnerability of share house tenants in general is a concern to Anglicare workers. Workers have raised a range of issues in relation to share house arrangements, including situations where co-signed tenants have organised a replacement tenant with the landlord without obtaining the approval of other tenants living in the property and where co-signed tenants have removed their name from the lease without the approval of their co-tenants and therefore removed themselves from having liability for debts which they themselves have incurred. It is not immediately clear from the Act whether changes to a residential tenancy agreement can or cannot occur without the agreement of all parties to the agreement, including any co-tenants. Anglicare recommends clarifying this situation.

Other matters: recommendations

- Funding should be allocated for further consultation with temporary accommodation providers and their clients regarding the exemption of crisis accommodation from the Act.
- The application of the Act to permanent-stay residents of caravan parks should be clarified.
- The Act should provide greater clarity in relation to the application of the provisions relating to boarding houses and tertiary students.
- Consumer Affairs and Fair Trading should investigate the practice of leasing share houses by room with a particular focus on whether these arrangements constitute breaches of the boarding house provisions of the Act.
- The Act should be clarified to specifically require that any variations to a residential tenancy agreement have the agreement of all parties to the agreement, including any co-tenants.

CONCLUSION

Anglicare welcomes the opportunity to participate in this review and congratulates the State Government on taking the decision to undertake it. In closing, we note the comment that the discussion paper appears to focus entirely upon tenants 'because almost exclusively, the people calling for change are doing so from a tenant perspective' (Consumer Affairs and Fair Trading 2009, p. 20). Anglicare respectively submits that if it is the case that the only calls for reform are coming from people speaking on behalf of tenants, while the real estate industry and landlords remain silent, this may suggest one of two things. Either the legislation is blatantly weighted in favour of landlords rather than providing a sustainable compromise between the rights of the two parties, and therefore landlords have no reason to complain and in fact an incentive to remain silent, or the alarmist statements in the paper that changes to the legislation may result in investor withdrawal are unfounded because landlords are actually quite disinterested in the provisions of the legislation. Either way, Anglicare believes that the reforms proposed in this submission will result in a fairer, more sustainable rental market in Tasmania and a reduction in the homelessness and social disruption caused by housing insecurity. We urge the Government to give these reforms serious consideration.

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ATTACHMENTS

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