ANGLICARE
TASMANIA

Submission on

Residential Tenancy Databases – Model Provisions

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Note: Tasmania's residential tenancy legislation, the *Residential Tenancy Act 1997*, is currently under review. This is presumably the piece of legislation that will be used to enact the model provisions. This submission comments on the situation in Tasmania under the existing legislation but Anglicare acknowledges that this may change as a result of the review.

About Anglicare

Anglicare is one of Tasmania's largest community organisations, and provides services to the Tasmanian community in the areas of accommodation, employment, counselling, family support, alcohol and other drugs, disability, aged care and acquired injury support and mental health. Anglicare has over 640 paid employees and more than 100 volunteers working in six offices state-wide, as well as through a number of outreach and in-home services. Of particular relevance to this submission are our accommodation support services, which offer support to people at risk of homelessness as well as early intervention and long-term accommodation options. Two of our largest services in particular provide support to clients who are either currently in or seeking to enter the private rental market:

- **ACCESS** provides assistance to families and individuals or are homeless or at risk of homelessness, through supporting them to stabilise their existing housing or find alternative long-term housing, brokering crisis accommodation and providing case management.
- The **Private Rental Support Service** provides financial assistance to households seeking to enter or remain in the private rental market. It provides support with bonds, rent in advance or arrears and the cost of removals, as well as related support such as information and referral.

Many of Anglicare's clients are particularly vulnerable in the private rental market. They do not have stable tenancy histories: they may have had to move regularly due to unaffordable increases in rent, the property being poorly maintained or sold or family breakdown. They experience high levels of financial stress and may be in difficult family situations. The vast majority are dependent on income support payments as their main source of income. Stable, appropriate and affordable housing with ongoing support from community services is critical for them to be able to address other issues in their lives such as relationship breakdown, poor employment prospects or substance use. With the chronic shortage of crisis and transitional accommodation and the long waiting lists for public housing, private rental housing is often the only option, yet many of our clients face high levels of discrimination from landlords and agents. The difficulties our clients experience in the private rental market and the need for intervention on their behalf is the primary reason for Anglicare's interest in the issue of residential tenancy databases.

Introduction: context for Anglicare's comments

Anglicare Tasmania Inc. welcomes the opportunity to make comment on the model provisions for the regulation of residential tenancy databases distributed by the Ministerial Council on Consumer Affairs ('the model provisions').

There is a substantial body of literature on the issues associated with residential tenancy databases (e.g. Douglas et al. 2001; Guthrie 2002; Special Government Backbench Committee 2002; Adkins et al. 2003; Short et al. 2004; Mission Australia 2004; MCCA/SCAG 2006; Victorian Law Reform Commission 2006). The recent Senate inquiry into the *Privacy Act 1998* (Legal and Constitutional References Committee 2005), the Privacy Commissioner's review of the private sector provisions of the Privacy Act (Curtis 2005) and the Australian Law Reform Commission's comprehensive review of privacy legislation (Australian Law Reform Commission 2008) also highlighted important concerns.

That there is such a substantive body of literature, and that this body of literature is generally consistent in its findings, serves to underline the point that the operation of residential tenancy databases over the last decade

or so has been characterised by serious abuses of power and privacy with severe consequences for the most vulnerable members of the community. These databases have been so abused and have been so detrimental to low income and disadvantaged tenants that respected organisations in the welfare sector have called for their abolition and continue to argue that this is the only appropriate response.

However, the Ministerial Council of Consumer Affairs and Standing Committee of Attorneys-General working party on this issue chose not to recommend the prohibition of these databases on the grounds that they are 'a legitimate risk management tool provided that [they] are operated fairly and lawfully' (MCCA/SCAG 2005, p. 46). Instead, the debate is now focussed on what kind of regulatory environment should apply to the residential tenancy database sector. It is in this context that Anglicare makes this submission.

While the model provisions, when enacted in state and territory legislation, will apply to all landlords and tenants in the private rental market, in practice, the tenants most affected by them will be those tenants at the residualised end of the private rental market, those with insecure tenancies and those with personal issues, such as mental illness, that complicate their ability to comply with the conditions of a residential tenancy agreement. It is these tenants who are most likely to be listed on a residential tenancy database and the most likely to be refused accommodation as the result of a listing. The characteristics of these tenants must be borne in mind when framing the final version of the model provisions. In particular, the model provisions must take into account the likelihood that many tenants will have issues of literacy and numeracy and previous negative experiences with authority, particularly courts and tribunals. The model provisions must also address the significant imbalance of power that exists between landlords and tenants on low incomes or with special needs. This imbalance is partly a function of constrained supply and partly due to the very high levels of disadvantage experienced by tenants which makes them particularly vulnerable to and unlikely to contest poor treatment by landlords.

The current crisis in the private rental market, particularly the historically low vacancy rates applying in many areas, is also important. If concerns or disputes about the content or process of listings arise, they are likely to arise when a tenant is seeking another property. In a tight market, competition for available properties is intense and landlords are able to exclude large numbers of applicants from consideration without compromising their capacity to find a tenant for their property. The risk that a tenant will face homelessness as the result of an adverse listing is high. This is an extremely serious consequence and the standard of protection that must therefore apply to tenants in any regulation of residential tenancy databases must be proportionately high.

Effectiveness of the provisions

1. Do the model provisions provide an effective framework for regulating the conduct of lessors, agents and database operators in relation to residential tenancy databases?

If not, please explain your view and if possible, provide suggestions for how the model provisions might be amended to address your concerns.

When a listing can be made: The model provisions as drafted permit the listing of a tenant if they have breached their residential tenancy agreement and because of this breach, either the tenant owes money to the landlord[1] in excess of their bond or the tribunal has made an order terminating their agreement (s. 4[2]). In a submission to the Australian Law Reform Commission's privacy legislation review (Anglicare Tasmania 2007), Anglicare argued in support of the regulatory model for residential tenancy databases put forward by the

[1] The term 'landlord' in this submission refers to either the lessor of the property or the real estate agent managing the property.

[2] Section numbers used in this submission relate to the model provisions and match those in the consultation draft issued by the Tasmanian Office of Consumer Affairs and Fair Trading.

Victorian Law Reform Commission. The Commission's recommendation was that a listing only be permitted when a court (or tribunal) order had been issued against the tenant for a breach of the agreement. In addition, if the agreement were to include a time period in which the tenant could rectify a breach, a listing could not occur until that time period had elapsed. Once it had elapsed, the landlord would have to provide both a copy of the court order and a statutory declaration stating that the tenant has not yet complied (Victorian Law Reform Commission 2006, pp. 47-8).

Anglicare's interpretation of the model provisions as written is that the landlord is not required to provide any proof that a claim that a tenant owes them money is justified (s. 4(c)(i)). The experience of Anglicare's housing support workers is that unjustified claims do occur: that is, landlords claim that a tenant owes them money but when their claims are tested this is found to be not the case. Unfortunately in other cases the claim is never tested because tenants fear the consequences of asserting their rights, either because of the risk that it will lead to a poor reference from the landlord or because they know that if they do complain, they will be unable to lease from that landlord again which effectively means they will be unable to rent privately again in that area – there are some parts of Tasmania where the housing market is so small that one or two private landlords own all the private rental stock in that particular community. This would be true in other regional areas as well. It is true that under the model provisions a tenant could dispute a listing made under s. 4(c)(i), but this would take time and, as pointed out above, if a tenant is homeless at the time of the dispute, this delay could prove extremely detrimental.

Anglicare recommends confining listings to situations where a court order has been issued (such as requiring the tenant to pay for damage to the property). This ensures that the landlord's claims have been subject to some kind of objective assessment of the evidence, and that both sides have been given an opportunity to state their case. Anglicare is aware that this will increase the effort required by the landlord to pursue a listing, but given the potentially devastating consequences to the tenant of a listing, considers this to be reasonable.

Anglicare also notes that the definition of 'out-of-date' in the model provisions allows for a listing in relation to money owed in excess of the bond to be considered 'out-of-date', and therefore able to be deleted, if the tenant has paid the money owed to the landlord within three months after it became due (s. 1). Three months is a very short period of time for someone on a low income to pay back a potentially significant debt. It is also an arbitrary time frame – a tenant who pays back a debt within three months has their listing removed, a tenant who takes three months and four days (for example) is listed on the database for three years. Anglicare's view is that once the tenant has acted to rectify a problem, including repaying any debt or complying with the provisions of a tribunal or court order, a listing should be removed. It is possible that landlords and real estate agents will argue that this means a tenant with a history of debt over and above the bond could evade listing by repaying their debts. However, a database system does not allow for the context in which a debt was incurred to be considered – for example, was the debt for damage to the property caused as a result of family violence? Anglicare's view is therefore that the benefit of the doubt be given to the tenant. Other methods are available and are already used to check on a tenant's history in relation to debt, including credit checks.

Timelines: At a number of points the model provisions provide timeframes within which certain actions must be taken. Anglicare has particular concerns about the following requirements:

- that if informed by a landlord that information is inaccurate, incomplete, ambiguous or out-of-date, a database operator must amend or remove the information within 14 days of receiving written notice (s. 7(2)); and
- that the landlord or database operator must provide copies of listed information within 14 days of receiving a written request (ss. 8(1)-(2)).

The preference for electronic databases as opposed to paper files arises from the fact that electronic information storage allows for rapid access to and editing of information. With even a reasonably efficient system, it should not take 14 days to amend or remove a listing, nor should it take 14 days to provide a copy of information. Allowing a 14 day period in these two instances places a tenant at a disadvantage – they must

wait two weeks for information that is incorrect to be changed or removed, which means that in the intervening period they may be refused housing based on incorrect information, and they must wait two weeks to receive a copy of their own personal information. Anglicare submits that the time periods in these two sections should be reduced to seven days, consistent with the other timeframes in other sections of the model provisions. Seven days is a generous provision and ample under the circumstances.

Disputes: Another area where timeliness is a concern is in relation to dispute resolution (s. 9). Under the model provisions as drafted, a person wishing to correct or remove personal information that is contained on a database must first contact their landlord and make a 'reasonable attempt' to resolve the dispute. Only if this is unsuccessful or the landlord does not cooperate or is not contactable can the person then apply to a court or tribunal for an order requiring the information to be amended or removed. The procedure outlined is an extensive one which would take not only a considerable amount of time, particularly in a jurisdiction such as Tasmania where there is no tribunal, but a considerable amount of energy on the part of the applicant, at a time when they are probably engaged in seeking alternative housing or are even homeless.

In addition to the timeframe, there are other concerns. Anglicare clients regularly report to housing support workers that their landlords have engaged in conduct which is prohibited by the Tasmanian Residential Tenancy Act. However, although workers advise them that they have a right to take formal action against the landlord if the landlord has not fulfilled their obligations or has deliberately contravened the Act, tenants are reluctant to do so. This is partly because Tasmania's residential tenancy legislation makes limited provision for dispute resolution outside of court, and partly because tenants are reluctant to 'rock the boat' because they fear it may jeopardise their chances of obtaining another property. Anglicare is concerned that requiring tenants to first approach the landlord about incorrect listings may discourage tenants from disputing a listing, even when their reasons for disputing the listing are legitimate and the listing is incorrect or out of date.

Anglicare recommends that the model provisions permit tenants to approach a database operator directly to have a listing corrected or removed. Obviously the tenant will require evidence for their claims, but presumably they would need evidence when approaching a landlord as well. If a database operator is not satisfied that the tenant's request is reasonable, they can then take action to verify the claim, including by requesting further information from either the tenant or the landlord or both. Anglicare also recommends that the model provisions impose some form of control over how long a dispute resolution process may take before the tenant is entitled to move to the next step. This will place greater onus on landlords to respond promptly to disputes and ensure that any disadvantage to the tenant is time-limited, particularly if the tenant is correct in claiming that the listing is out-of-date or inaccurate.

Issues relating to dispute of listings are also relevant to s. 5 of the model provisions. This section requires that a landlord not list personal information about a person in a database unless they have disclosed this information to the person, given them a 'reasonable opportunity' to 'make submissions' disputing the accuracy or appropriateness of the information and 'considered any submissions made'. However, s. 5 does not specify what happens if the landlord chooses, as a result of their 'consideration', to disregard the submission. Presumably the tenant can proceed to the dispute resolution process outlined in s. 9, but there is nothing to stop the landlord, in the interim, from listing the information. This is information that could be found through the dispute resolution process to be incorrect. Anglicare believes that the model provisions should explicitly prohibit a landlord from proceeding with a listing if the content of the listing is under dispute.

Enforcement and penalties: The general notes that accompany the model provisions state that they 'do not … prescribe the consequences for a person contravening them. Each jurisdiction is to prescribe the consequences that are to apply in that jurisdiction' (n. 2). In Anglicare's view this undermines the benefits of nationally consistent regulation because it opens up the possibility that different jurisdictions will apply different levels of penalty for breaches of the legislation. This creates legal inconsistencies across jurisdictions, particularly in cases where database operators or agents provide services across state and territory borders. The lack of penalties in the model provisions also opens up the risk that jurisdictions will not impose any

penalties at all, rendering the legislation toothless and open to easy abuse. Anglicare recommends that the model provisions specify penalties for failure to comply and that these penalties are proportionate to the degree of harm caused: for example, the penalty for deliberately listing inaccurate information should be proportionate to the scale of damage that could be inflicted upon a tenant's access to housing by that listing.

Fees: The model provisions permit database operators to charge a fee for access to information within 14 days. No guidance is provided with regard to the amount that can be charged except for the fact that the fee 'must not be excessive' (s. 8(3)(a)), even though what is 'excessive' for a very low income earner will be a lot less than what is 'excessive' for a moderate or high income earner. Anglicare believes that this section of the model provisions, as drafted, will lead to fees that are unfair and unreasonable given the incomes of the people most affected. Anglicare recommends that access to information held by database operators be free, as it is for access to information held by agents (s. 8(1)), given that the information in question is the tenant's own personal information. Anglicare notes that the Victorian Law Reform Commission proposal permitted a fee for information that was required within the much shorter timeframe of 48 hours, but that their proposal was for a 'minimal' charge (Victorian Law Reform Commission 2006, p. 50).

Workability of the provisions

2. If these model provisions were adopted, as drafted, would the provisions be workable in Tasmania?

If not, please explain why, providing practical examples and whenever possible, attach relevant data or documentation to support your view.

Anglicare notes that the provisions 'have been prepared on the basis that a person who claims that personal information should not have been listed on a residential tenancy database, or that personal information listed on a residential tenancy database is inaccurate, incomplete, ambiguous or out of date, may apply to a tribunal or another entity' for redress. Anglicare draws the Council's attention to the fact that Tasmania does not have a specialist residential tenancy tribunal. Tenants in Tasmania seeking redress for breaches of the Residential Tenancy Act must apply to the courts. This is a more complex and intimidating undertaking than the mainland equivalent of applying to a tribunal and imposes an additional burden on Tasmanian tenants that does not necessarily apply to tenants in other states.

The obstacles for disadvantaged people in accessing the legal system have been well documented. Legal proceedings can be costly and subject to considerable delay. Disadvantaged people, particularly those with limited English skills, can struggle to understand the complex rules that govern the operation of courts, especially if they lack professional representation. Finally, the physical environment of courts can create 'an atmosphere of exclusion, alienation or disempowerment' which 'impinges upon the individual's access to just processes' (Schetzer, Mullins & Buonamano 2002, p. 10). In Tasmania, in relation to residential tenancy disputes, people often find court proceedings costly, time-consuming and intimidating (Tenants' Union of Tasmania 2006, p. 5-6).

Anglicare acknowledges that addressing this issue may not be within the scope of the model provisions, but it should nevertheless be taken into account, particularly when outlining avenues for redress that are to be made available to tenants.

Other comments

4. Do you have any other comments regarding the draft model provisions?

Retrospectivity: The model provisions do not indicate whether the new regulatory requirements will be applied to existing database listings or just to new listings. Anglicare recommends that the requirements apply to existing listings as well, perhaps with a phase-in period to allow database operators time to update their data and delete listings that do not comply with the new legislation.

Information for tenants: The Victorian Law Reform Commission made a number of recommendations regarding the provision of information to tenants. This is important because the experience of Anglicare's workers is that Tasmanian tenants are not fully aware of the existence and implications of residential tenancy databases, partly because they are not widely used in this state. Tenants are aware that 'blacklists' exist but are not aware of the precise details of what they are and how they operate. It is important that tenants are fully informed about the databases if a landlord is to use one, and of the consequences of any listing for their future housing situation. Specifically, the Victorian Law Reform Commission recommended that:

- communication with the tenant in relation to a breach (or alleged breach) of their residential tenancy agreement, an application to the court or a court order being served on the tenant should include a notice that a court order could result in the tenant being listed on a database; and
- tenancy agreements should include a clause notifying tenants of the conditions under which a listing may occur (Victorian Law Reform Commission 2006, p. 49).

This would ensure that a tenant is aware prior to engaging in any behaviour that might result in a listing that the risk is there. Given that the use of databases varies across different jurisdictions it will also be important to ensure that such information explains clearly what the databases are and the uses to which they can (and cannot) be put.

The language used in these notices – and in fact in any communication with the tenant – must be in plain English. Poor literacy is a widespread problem in Australia. The Australian Bureau of Statistics' survey of literacy and life skills assesses the skill levels of Australians in relation to prose literacy, document literacy, numeracy and problem solving. The survey divides respondents into five groups, according to their level of skill. People at Level 1 have the lowest level of skill, while people at Level 5 have the highest. According to the 2006 survey (Australian Bureau of Statistics 2006), 46.4% of Australians are assessed at either Level 1 or Level 2 in relation to prose literacy and 31.5% at either Level 1 or 2 in relation to document literacy. Over half, 52.5%, are at Levels 1 or 2 for numeracy, and nearly three quarters, 70.1%, at Levels 1 or 2 for problem solving. These figures indicate that a significant proportion of the community have real difficulties in correctly completing tasks like locating a single piece of information in a piece of text, entering information based on personal knowledge into a form, understanding simple mathematical operations and evaluating alternatives with regard to well-defined criteria.

With this in mind, Anglicare notes that the model provisions in several places mandate that communication between the tenant and the lessor or agent or the database operator be in writing. Anglicare accepts that it is reasonable to require a written record of communication. However, it is also important to accept that many of the tenants most likely to be affected by residential tenancy databases will have limited skills in reading and writing. Some, such as newly arrived migrants and refugees, may not have particularly good English skills either. The model provisions must allow for some form of flexibility in relation to communication to accommodate this or tenants who lack literacy or English skills will inevitably be disadvantaged and unable to assert their rights effectively.

Conclusion

Once again, Anglicare appreciates the opportunity to make comment on the model provisions. Our contribution is made out of concern for the needs and rights of low income earners and people with special needs. Residential tenancy databases are powerful tools that can lead to discrimination and increase the social

exclusion of the most vulnerable. In a restricted rental market, a listing on a database can lead to homelessness.

The Ministerial Council on Consumer Affairs has chosen to regulate, not prohibit, residential tenancy databases. In this context, Anglicare urges the Council to ensure that regulation takes into account the fact that those most affected are likely to be those who are most disadvantaged and that the standard of protection provided to tenants by the model provisions responds to this level of disadvantage.

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