LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Economic Policy Scrutiny Committee

Inquiry into the Residential Tenancies Amendment Bill 2018

May 2018

Contents

Chair's Preface

The Committee's inquiry into the Residential Tenancies Amendment Bill 2018 received significant attention, particularly from community, social and legal services who raised a range of issues in submissions.

The purpose of the Bill is to implement the Residential Tenancy Database Model Provisions which set out the minimum rights, obligations and limitations on the use of residential tenancy databases. All of the submissions supported the intent of the Bill, however a number of submitters proposed recommendations to include provisions beyond the minimum standards prescribed in the model provisions.

The model provisions were drafted through consultation with all jurisdictions and national consistency is paramount to ensure that national database operators are able to comply with the regulations in each jurisdiction. A number of submissions flagged concerns about the operation of the *Residential Tenancies Act* more broadly which, while outside the scope of this Bill inquiry, warrant further consideration by the Government. The Committee has therefore recommended a comprehensive review of the Act.

The Northern Territory is the only jurisdiction that has not yet regulated the use of residential tenancy databases. While the Committee acknowledges that there are broader issues of concerns relating to residential tenancies, it is imperative that there are no unnecessary delays implementing the Bill to provide certainty to Territorians about the use of residential tenancy databases and to ensure that people do not remain on such lists indefinitely which may prevent them from securing housing. The Committee welcomes this important Bill which will enable this to occur.

On behalf of the Committee, I wish to thank all of the organisations that made submissions to the inquiry and the Department of the Attorney-General and Justice for appearing before it at a public briefing. I would also like to thank the Department of the Legislative Assembly for the support it provided to the Committee and the Committee Members for their support in the examination of this Bill.

Tony Sievers MLA

Chair

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Acknowledgments

The Committee acknowledges the individuals and organisations that have made written submissions to this inquiry and appeared as witnesses at the public briefing.

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

(1) Standing Order 178 is suspended.

(2) The Assembly appoints the following scrutiny committees:

  (a) The Social Policy Scrutiny Committee

  (b) The Economic Policy Scrutiny Committee

(3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

(4) The functions of the scrutiny committees shall be to inquire and report on:

  (a) any matter within its subject area referred to it:

    (i) by the Assembly;

    (ii) by a Minister; or

    (iii) on its own motion.

  (b) any bill referred to it by the Assembly;

  (c) in relation to any bill referred by the Assembly:

    (i) whether the Assembly should pass the bill;

    (ii) whether the Assembly should amend the bill;

    (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:

      (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

      (B) is consistent with principles of natural justice; and

      (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

      (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

      (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

      (F) provides appropriate protection against self-incrimination; and

      (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:

(A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(C) authorises the amendment of an Act only by another Act.

(5) The Committee will elect a Government Member as Chair.

(6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Residential Tenancies Amendment Bill 2018 with the proposed amendment set out in Recommendation 2.

Recommendation 2

The Committee recommends proposed subsection 129(1)(b) be amended to increase the time a person has to review personal information to 28 days.

Recommendation 3

The Committee recommends the Government undertake a comprehensive assessment to determine the most appropriate way to provide protections for people that may be unjustly listed on a residential tenancy database.

Recommendation 4

The Committee recommends the Government undertake a comprehensive review of the *Residential Tenancies Act* to identify opportunities for improvement and propose amendments to contemporise the Act.

1 Introduction

Introduction of the Bill

1.1 The Residential Tenancies Amendment Bill 2018 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 8 February 2018. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by 1 May 2018.[1]

Conduct of the Inquiry

1.2 On 9 February 2018 the Committee called for submissions by 9 March 2018, although it received some submissions after the due date. The call for submissions was advertised via media release, the Legislative Assembly website, Facebook, Twitter feed, email subscription service and letters to identified stakeholders.

1.3 The Committee received 10 submissions and held a public briefing with the Department of the Attorney-General and Justice on 21 March 2018.

Outcome of Committee's Consideration

1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals; and

(iv) whether the bill has sufficient regard to the institution of Parliament.

1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the proposed amendment set out in Recommendation 2.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Residential Tenancies Amendment Bill 2018 with the proposed amendment set out in Recommendation 2.

[1] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, Residential Tenancies Amendment Bill 2018 (Serial 43), Explanatory Speech, Northern Territory Legislative Assembly, 8 February 2018.

Report Structure

1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.

1.7 Chapter 3 considers the main issues raised in evidence received.

2 Provisions of the Bill

Purpose and Overview of the Bill

2.1 The Residential Tenancies Amendment Bill 2018 is intended to implement the Residential Tenancy Database Model Provisions (model provisions) developed by the former Standing Committee of the Attorneys-General and the former Ministerial Council on Consumer Affairs. When introducing the Bill, the Attorney-General and Minister for Justice stated:

> This Bill ensures that the model provisions are put in to effect in the Northern Territory. The primary purpose of this Bill is to provide a framework for the use of residential tenancy databases. The Bill sets out the parameters of how landlords, real estate agents and database operators can use, record and access personal information about tenants and potential tenants listed on a residential tenancy database.[2]

2.2 As noted in the Explanatory Statement, the Bill sets out the nationally agreed minimum level of rights, obligations and limitations in relation to residential tenancy databases by providing:

- Notification requirements in relation to the use of residential tenancy databases
- Restrictions on information that can be placed on residential tenancy databases
- Obligations to correct information that is inaccurate, incomplete, ambiguous or out-of-date
- Obligations to provide information relating to a person if the person requests it
- Time limits for keeping personal information on residential tenancy databases.[3]

2.3 The general notes accompanying the Residential Tenancy Database Model Provisions, prepared by the Parliamentary Counsel's Committee, state:

> In relation to residential tenancy databases, the model provisions confer minimum rights on tenants or potential tenants, and impose minimum obligations and limitations on lessors, agents and database operators. A jurisdiction may add to the rights, obligations or limitations, including by adopting a higher standard for them. For example, a jurisdiction may—
>
> (a) apply the model provisions to a database kept by an entity for its own use; or
>
> (b) further limit the types of breaches for which a person may be listed in a database; or
>
> (c) allow a person to apply for a [tribunal] order preventing a lessor or agent listing a person.[4]

2.4 The Northern Territory is the only jurisdiction that has not implemented legislation to regulate the use of residential tenancy databases. During her explanatory speech, the Attorney-General and Minister for Justice stated:

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[2] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, Residential Tenancies Amendment Bill 2018 (Serial 43), Explanatory Speech, Northern Territory Legislative Assembly, 8 February 2018.
[3] Explanatory Statement, Residential Tenancies Amendment Bill 2018 (Serial 43), p. 1, https://parliament.nt.gov.au/committees/EPSC/43-2018
[4] Parliamentary Counsel's Committee, *Draft for Ministerial Council on Consumer Affairs*.

> There have been a number of submissions to government over the years seeking to implement model database provisions. This last year has seen significant public discussion in relation to the absence of regulation of residential tenancy databases in the Northern Territory. Tenant advocacy groups have voiced concern that the absence of regulation on the use of databases in the Territory is detrimental to tenants and that the Northern Territory has been left behind on this issue.
>
> Tenancy advocacy groups have also highlighted the fact that the absence of regulation in the Territory accompanies a person who relocates interstate…
>
> Implementing these reforms is the right thing to do to bring the Territory in line with national model legislation. The amendments are intended to balance the competing interests of landlords and tenants in an environment where there is significant potential for power… imbalances between people who need housing and those who are in the position to offer that housing on a temporary basis at a price.[5]

2.5 The secondary purpose of the Bill is to make procedural amendments to rectify a previous drafting oversight by formally providing the Northern Territory Civil and Administrative Tribunal (NTCAT) with jurisdiction to hear matters arising under the former *Tenancy Act* (NT).

[5] Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, Residential Tenancies Amendment Bill 2018 (Serial 43), Explanatory Speech, Northern Territory Legislative Assembly, 8 February 2018.

3 Examination of the Bill

Introduction

3.1 This Bill will put in place laws to regulate the information on tenancy databases, giving former tenants rights to review and object to a listing and limiting the duration of any listing. It fills an important gap in the protection of the rights of tenants in the Northern Territory and, in the Committee's view, should be passed as soon as possible to put in place these overdue reforms.

3.2 All submissions to the Committee supported the intent of the Bill and the directions it is taking. However, a number of organisations recommended amendments to strengthen some of its provisions. Submitters noted that the provisions align with the minimum rights, obligations and limitations prescribed in the model provisions, and suggest that the Bill should go further than the minimum requirements, which has been the case in several other jurisdictions that have regulated the use of residential tenancy databases.

3.3 The Committee received a submission from Equifax, the provider of the National Tenancy Database, which stated the provisions are similar to those of other jurisdictions and Equifax is well placed to implement the provisions as drafted in the Bill.

3.4 The Committee notes that a number of the concerns raised in submissions do not relate directly to the Bill, which is to regulate the use of residential tenancy databases in the Territory, but raise issues with the wider operation of the *Residential Tenancies Act*. The Committee agreed that these issues warrant further examination by the Government, and considers that the Act is due for review. However, this need for review should not delay the passage of the Bill, which is a discrete reform that should be implemented as soon as possible.

Definition of Personal information

3.5 Personal information is defined in the Bill as "information or an opinion, whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion; and an individual's name".[6] The North Australian Aboriginal Justice Agency (NAAJA) expressed concerns that the definition is "entirely too broadly drafted and would not provide a limit on the person's otherwise irrelevant personal information."[7] NAAJA proposed the definition should be redrafted to limit personal information to the person's name, the address of their former tenancy and the amount of money they are said to owe the landlord.[8]

3.6 The definition in the Bill mirrors the model provisions and the personal information that can be listed on a residential tenancy database is limited by proposed subsection 128(1)(d) which requires that the personal information relates only to the breach,

[6] Proposed section 123, Residential Tenancies Amendment Bill 2018
[7] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 8.
[8] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 8.

indicates the nature of the breach, and is accurate, complete and unambiguous. Under proposed subsection 128(2), it is a strict liability offence for a landlord or database operator to list personal information on a residential tenancy database other than in accordance with proposed subsection 128(1).

Committee's Comments

3.7 The Committee is satisfied that proposed subsection 128(1)(d) places sufficient limitations on personal information that can be listed on a residential tenancy database and the examples included in the Bill for proposed subsection 128(1)(d)(ii) provide clear guidance on recording the nature of the breach.

Usual Use of a Database

3.8 Proposed section 126 prescribes the circumstances under which a landlord must provide notice to a prospective tenant of their 'usual use' of residential tenancy databases when determining whether to enter into a tenancy agreement. Top End Women's Legal Service (TEWLS) raised concerns regarding the interpretation of the word 'usually' in proposed subsection 126(1)(b), which states a prospective tenant must be informed if "the landlord usually uses one or more tenancy databases to decide whether to enter into a tenancy agreement with a person." To address this perceived ambiguity, TEWLS suggest:

> the Bill would be improved by providing guidance in respect of the adverb 'usually' … such as 'usually means uses a tenancy database for over 75 per cent of applications'. This addition would resolve issues of interpretation whilst also retaining the procedural fairness inherent in the proposed section 126 of the Bill.[9]

Committee's Comments

3.9 The Committee notes the term 'usually uses' is contained within the model provisions and all jurisdictions' legislation with the exception of NSW, which contains the term 'uses'. The Committee believes that proposed subsection 126(1)(b) is drafted in a manner that is sufficiently clear to the reader.

Co-Tenants

3.10 A number of submitters have suggested that the Bill does not provide adequate protections for co-tenants when their co-tenancy is terminated, or when they cease to reside in a rental property but do not have their name removed from the tenancy agreement.

3.11 Darwin Community Legal Service (DCLS) noted that under section 212 of the *Residential Tenancies Act 2010* (NSW), a person cannot be listed on a residential tenancy database unless "the person was named as a tenant in a residential tenancy agreement that has terminated or the person's co-tenancy was terminated".[10] DCLS suggest that proposed subsection 128(1)(a) should be amended to mirror the

[9] Top End Women's Legal Service, Submission No. 5, 2018, p. 2.
[10] *Residential Tenancies Act 2010* (NSW)

provisions contained within the NSW legislation and assert that the amendment would:

> ensure that someone who has ceased their co-tenancy as part of a tenancy agreement could not still be placed on a tenancy database for the actions of co-tenants who remain under the tenancy agreement.[11]

3.12 TEWLS and NAAJA endorse the amendment proposed by DCLS. The Committee acknowledges the concerns raised by the submitters, however does not see how the NSW legislation provides any additional protections for co-tenants who are no longer part of a tenancy agreement.

3.13 The Committee questioned the Department of the Attorney-General and Justice (the Department) about the process for a co-tenant to remove themselves from a tenancy agreement, liabilities of a co-tenant, and protections for co-tenants against being listed on a residential tenancy database. The Department advised:

> Where a co-tenant leaves and takes themselves off—they formally have themselves removed—that ends their liability under that contract. They are not responsible for anything that occurs from that day forth. But they are responsible for things that occurred while they were actually a party to the contract. So, in databases and things like that, if there was a breach of the tenancy agreement that occurred while they were a co-tenant, then technically they could be responsible and be listed.
>
> But then, you have to go through that other process, which is that the breach has resulted in them owing money that exceeds the amount of the bond, or the tenancy agreement was terminated by NTCAT. If they left before then and the tenancy agreement is still going on and it does not relate to when they were a tenant, there is no legal avenue to be listed.[12]

3.14 The Department further elaborated in their response to written questions from the Committee stating:

> Where a breach of the tenancy agreement has occurred after a person has left the tenancy (and is no longer named as a tenant on the agreement), that person could not have breached the tenancy agreement as the person was not named as a tenant.
>
> Under the circumstances, if a landlord or database operator lists the former co-tenant as having breached the agreement, the landlord or database operator may be subject to a penalty of up to 20 penalty units.
>
> If the breach occurred while the person was a co-tenant (i.e. before the person left and was removed from the tenancy), the landlord or database operator would have to establish that the co-tenant was the person that breached the agreement.
>
> If the landlord or database operator cannot establish that the co-tenant breached the agreement, the landlord or database operator may be subject to a penalty of up to 20 penalty units if they list that co-tenant.[13]

3.15 However an issue arises if a person moves out of a rental property and does not remove themselves from the tenancy agreement, as they remain a party to the

[11] Darwin Community Legal Services, Submission No. 4, 2018, p. 4.
[12] Department of the Attorney-General and Justice, Committee Transcript, 21 March 2018, p. 3.
[13] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 3.

contract and continue to be jointly and severally liable.[14] The Department noted that in such a circumstance, the person:

> remains legally responsible for the performance of obligations under the lease, such as paying rent.
>
> However, under section 128, for a listing to be made, it needs to be established that there was a breach of the tenancy agreement, and that it was the co-tenant that breached it.
>
> In the context of a co-tenant's liability for the actions of another co-tenant, tribunals are generally prepared to go behind the contractual arrangement and assess the matter on the facts of a particular situation.[15]

3.16 When asked about how easy it is for a co-tenant to remove themselves from a tenancy agreement, the Department advised:

> It is just a matter of negotiating with the landlord and saying, 'I wish to bring this to an end. I wish to be taken off'. If the landlord and the co-tenant are happy with that, it is just a matter of signing a variation, and off you go.[16]

3.17 The Department did however acknowledge that there could be circumstances where co-tenants choose to not have the tenancy agreement amended or where consensus cannot be reached by all parties to the contract to make an amendment. In a supplementary submission following the public briefing with the Department, DCLS informed the Committee:

> In our experience, the issues around the liability of co-tenancy are significant and difficult to resolve under the current legislation. It is not a simple matter for the tenant to negotiate the removal of their name from the lease, as all parties to the contract need to consent to alter the agreement. It is foreseeable that a tenant would refuse to remove a departing co-tenant from the tenancy agreement because it would increase their liability, and, in many cases, tenants are unaware that this is necessary in order to absolve them from ongoing liability. Further landlords will often refuse this as they may not be satisfied the remaining tenant or tenants can meet the obligations under the tenancy agreement themselves.
>
> At the public briefing it was suggested that the proposed section 128 of the Bill provides adequate protections to co-tenants before they will be listed. However, it is foreseeable that landlords and operators would not distinguish between co-tenants who are signatories to a tenancy agreement and instead list all persons involved in the tenancy. Then the co-tenant would have to go through the entire NTCAT process just to challenge the listing and under the proposed Bill, as it stands, they may not be successful as liability between tenants is joint and severable, regardless of fault.[17]

3.18 If a former co-tenant believes that they have been incorrectly listed on a tenancy database for a breach that occurred after they vacated a rental property, they can exercise their procedural rights contained within the Bill to object to the listing through both the landlord and the database operator, and if the dispute cannot be resolved, the person can seek a review through NTCAT.

[14] Department of the Attorney-General and Justice, Committee Transcript, 21 March 2018, p. 3.
[15] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 4.
[16] Department of the Attorney-General and Justice, Committee Transcript, 21 March 2018, p. 4.
[17] Darwin Community Legal Services, Submission 4A, 2018, p. 1.

Committee's Comments

3.19 The Committee acknowledges the concerns raised about co-tenants not understanding their contractual obligations and liabilities that arise from being party to a tenancy agreement and the potential risks for a co-tenant who has ceased a co-tenancy but not removed themselves from the tenancy agreement.

3.20 Problems regarding co-tenancy liabilities can be somewhat complex, relating to both the need for certainty and enforceability of contractual obligations and to provide adequately for the range of circumstances in which people may enter and leave shared accommodation arrangements. The Committee considers that these matters should be addressed in the review of the *Residential Tenancies Act* recommended below.

Amounts Owed to a Landlord

3.21 Proposed section 128 prescribes the conditions under which a landlord or database operator can list personal information on a tenancy database which requires that the tenancy agreement has ended; and the tenant breached the agreement; and as a result of the breach, the tenant owes the landlord more than the security deposit amount or NTCAT has made an order terminating the tenancy agreement.

3.22 Proposed subsection 128(1)(c)(i) requires that as the result of a breach, a person must owe the landlord more than the security deposit amount to be listed on a tenancy database. NT Shelter noted that there is no provision requiring landlords to have issued sufficient notices to recompense for the breaches, while DCLS suggested an amendment requiring the amount owed to be substantiated either by an order from NTCAT or an admission from the tenant that the amount is owed.[18] In their submission, NAAJA supported the amendment proposed by DCLS stating:

> without such a safeguard there is a ***high*** risk that tenants will be listed for disputed debts arbitrarily decided by the landlord or agent even though that conduct may not amount to a breach of agreement under the *Residential Tenancies Act* or if the Tribunal decides that the landlord is owed less than the security deposit.
>
> NAAJA makes this submission based on our experience in representing both private and public tenants at the Tribunal where it is routinely found that a landlord's initial estimate of what is owed on a rental debt is different to what the Tribunal finds to be the true rental debt or include improper charges prohibited by the *Residential Tenancies Act*.[19]

3.23 Part 12, Division 2 of the *Residential Tenancies Act* regulates the return of a security deposit when a tenancy is terminated. Within seven days of vacant possession or abandonment of a rental property, a landlord must:

- provide written notice to the former tenant of their intention to retain any of the security deposit and the purpose for which it will be retained; and
- attach a statutory declaration attesting to the truth of the claim; and

[18] Darwin Community Legal Services, Submission No. 4, 2018, p. 5; NT Shelter, Submission No. 5, 2018, p. 2.
[19] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, pp. 5-6.

- attach a statutory declaration attesting that invoices and receipts relate to the matters for which the security deposit is being retained or the amount of unpaid rent or money owing under the tenancy agreement.[20]

3.24 In response to written questions from the Committee, the Department confirmed the requirement for a debt to be substantiated by NTCAT or agreement by the former tenant before a listing can be made:

> As the security deposit is the tenant's money, any claim against it by the landlord must be verified by an application to NTCAT in accordance with sections 112 and 122. For a listing to note a debt, that debt must exceed the security deposit, which would require the necessary finding by the NTCAT of that fact, or agreement of the tenant, before it could be considered to be accurate, complete and unambiguous.
>
> This has been recognised in many tribunal decisions around Australia. For example, in *Robson v Realize Properties* [2016] SACAT 17, Executive Senior Member Stevens stated at 13: "In my view, a matter cannot properly be listed on a database (without verification). In the absence of a finding and order of the Tribunal establishing that the tenant owes money to the landlord for repairs or cleaning or the like, it has not been established that such amount is owed. The mere claiming of the amount does not suffice."[21]

3.25 The Department further advised that in relation to disputes regarding the return of a security deposit:

> Currently under the Act, if a tenant disagrees with a landlord's assertion that they owe money under the lease, and the landlord refuses to release the tenant's bond, the tenant will need to apply to NTCAT under section 113 for return of the bond. The proposed amendments do not change this.[22]

Committee's Comments

3.26 The Committee is satisfied that the *Residential Tenancies Act* contains appropriate provisions regarding substantiating debts at the termination of a tenancy agreement and avenues of appeal for both landlords and former tenants where disputes arise regarding security deposits.

Notification of a Proposed Listing

3.27 Proposed section 128 requires that before a landlord or database operator can make a listing on a residential tenancy database, they must provide a copy of the proposed listing, without charging a fee, or take other reasonable steps to disclose the information to the person, and allow the person at least 14 days to object to the entry of the proposed listing on a residential tenancy database or challenge the accuracy of the information. The landlord or database operator must then consider any submissions made by the person before making a decision to list the person on a database.

3.28 In practice, listings are made by database operators at the request of a landlord, however the provisions in proposed sections 128 and129 require both the landlord

[20] Section 112 *Residential Tenancies Act*
[21] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 7.
[22] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 7.

and the database operator to notify a person of a proposed listing. The Department informed the Committee:

> While a database operator lists the information that a landlord has provided it, the database operator and the landlord are both effectively making a listing.
>
> Applying the requirements to both landlords and database operators builds in a 'redundant backup': in the event that a landlord or real estate agent elects to risk a 20 penalty unit fine ($3,060) by not complying with listing requirements, the database operator's requirements to comply will likely trigger notification of a listing and potential prosecution of the landlord/agent.
>
> Including database operators within the listing requirements also enables actions to be taken, or orders to be made, directly against the database operator, negating the need for separate and potentially legally challenging enforcement proceedings against the database operator.[23]

Timeframe to Respond to a Proposed Listing

3.29 Proposed subsection 129(1)(b) prescribes that a person must be given at least 14 days to review a proposed listing and object to its entry on a residential tenancy database or about its accuracy, completeness and clarity. The Northern Territory Legal Aid Commission proposed that this timeframe should be extended to 28 days.[24]

3.30 In response to this proposal, the Department advised the Committee:

> In respect of the period a person has to review and respond to a proposed listing, and with regard to the Committee's concerns around the timeframe for transition, the objective is to provide a relatively quick process for resolution of disagreements over listings. To increase the review period would be somewhat counterintuitive to quick resolution.[25]

Committee's Comments

3.31

3.32 The Committee notes that the Department's response links concerns about the transitional arrangements delaying some people's opportunity to challenge listings to the timeframe in which a person has to respond to a proposed listing, however the Committee would contend that these two issues are not interdependent.

3.33 The Committee understands that the time limit for making an application to NTCAT for a review of a government administrative decision (where appeal rights exist) is 28 days from when the original decision is made or 28 days from when the person is provided with reasons for the decision, if they applied for them.[26]

3.34 While the Committee is aware that the 14 day timeframe is used in other jurisdictions, the Committee considers that the 14 day timeframe proposed in the Bill is too short for the Territory, particularly in light of the mail delivery timeframes within rural and remote areas. The Committee considers that increasing the timeframe would not

[23] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 8.
[24] Northern Territory Legal Aid Commission, Submission No. 8, 2018, p. 3.
[25] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 12.
[26] Department of the Attorney-General and Justice, *Government agencies and NTCAT*, viewed on 10 April 2018, https://justice.nt.gov.au/attorney-general-and-justice/government-agencies-and-ntcat

make any material difference to the listing process, however it would make a significant difference to a person seeking advice and gathering evidence to make a submission objecting to the entry or accuracy of a proposed listing. The Committee believes that a 28 day timeframe would be more appropriate and recommends this subsection of the Bill be amended to reflect this.

Recommendation 2

The Committee recommends proposed subsection 129(1)(b) be amended to increase the time a person has to review personal information to 28 days.

Notification Exemption

3.35 Proposed subsection 129(3)(a) removes a landlord or database operator's obligation to provide a person with 14 days to review and object to the personal information to be listed, if at the time of the proposed listing, the information is also publically available from court or tribunal records. DCLS and TEWLS recommend that this subsection be removed from the Bill, due to the Territory's highly transient population and that a person may not be aware a tenancy matter has proceeded to a court or tribunal.[27]

3.36 In their written responses to questions from the Committee, the Department explained the rationale for the inclusion of proposed subsection 129(3)(a):

> The security deposit is the tenant's money, and any claim against it by the landlord must be verified by an application to NTCAT in accordance with sections 112 and 122.
>
> Having paid the bond, the tenant would ordinarily be expected to have an interest in seeking its return. This is therefore a question that concerns engagement of the tenant in the overall processes associated with ending a lease, rather than the database listing process itself.
>
> In order to access the bond (or claim compensation or seek termination of the lease for a breach by the tenant), the landlord must notify the tenant of such an intent.
>
> Tribunals and courts have consistently held that merely sending a copy to the last known address is not sufficient. More extensive endeavours are required to bring it to the tenant's attention.
>
> Having been notified, and going through litigation in relation to a breach (regardless of whether or not the tenant actively engaged in the litigation), and presumably that breach being found to have occurred, the tenant should be well aware of the event, the outcome, and ramifications, and has the right of review of that decision.
>
> It is not clear what benefit would be obtained by adding another layer of notification procedures following the conclusion of the court/tribunal process.[28]

3.37 When questioned whether there was any reason not to remove this provision, the Department stated:

[27] Darwin Community Legal Services, Submission No. 4, 2018, p. 5; Top End Women's Legal Services, Submission No. 6, 2018, p. 3.
[28] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 11.

> Having been determined by a court or tribunal that the lease had been breached, and that that breach resulted in a debt in excess of the security deposit and/or termination, there seems little scope for a tenant to challenge a listing on the grounds of inaccuracy, incompleteness or ambiguity.
>
> It would seem more preferable that the tenant engage in the initial court/tribunal process to protect the tenant's interests, as opposed to providing a post event rear-guard review that has little to no prospect of success.[29]

Committee's Comments

3.38 The Committee considers that where information to be listed on a database is publically available from court or tribunal records, it is reasonable that a landlord or database operator not be required to notify a person of a proposed listing of the information already in the public domain.

Attempts to Locate a Person

3.39 Proposed subsection 129(2) removes the requirement for a landlord or database operator to provide a copy of the personal information to be listed and allow a right of reply before the personal information is listed on a residential tenancy database, if the landlord or database operator cannot locate the person after making 'reasonable enquiries'.

3.40 NAAJA raised concerns that this term is open to interpretation and may lead to inconsistent practices in attempting to locate former tenants. NAAJA recommends guidance be provided in the Bill, and 'reasonable enquiries' should include, but not be limited to:

- Sending a letter to any known current address of the person
- Calling the person on any known telephone number
- Sending a text message to the person on any known telephone number
- Emailing the person at any known email address.[30]

3.41 NAAJA submit that a landlord or database operator should not be considered to have undertaken reasonable enquiries unless they have attempted the methods listed above.

Committee's Comments

3.42 The Committee considers that it is unnecessary for the Bill to prescribe what constitutes 'reasonable enquiries', as it could be reasonably expected that it would be in the interests of a landlord to make genuine attempts to contact a person owing them in excess of the security deposit, as their goal is to recoup the outstanding amounts. Furthermore, prescribing specific methods of contact within the Bill does not account for changes in information and communication technology, which in the future

[29] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 11.
[30] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 11.

could place unhelpful limitations on how a landlord or database operator fulfil their obligations to make 'reasonable enquiries'.

Time Limit to Make a Listing

3.43 NT Shelter and DCLS expressed concerns to the Committee that the Bill does not prescribe a time limit between when a tenancy agreement has ended and when a person can be listed, which could theoretically lead to a person being listed for a breach that occurred a decade prior.[31]

3.44 NT Shelter, DCLS and TEWLS suggest that proposed section 128 be amended to only allow details to be listed if the tenancy agreement ended within the last three years, which is in line with the length of time that a person can be listed on a residential tenancy database.[32] NAAJA agree there should be a time limitation on making listings, however they suggest that one year would be a more appropriate timeframe.[33]

3.45 The Committee questioned the Department about the absence of a time limit in relation to making a listing and was advised:

> it is not an instantaneous thing. It is not a matter of the landlord deciding you have breached the agreement and, therefore, you are listed. You have to go through that NTCAT process first in order to establish where there has actually been a breach, or money is outstanding that is in excess of the bond and things like that.
>
> So, to provide a time frame in which to do the listing, without taking into account the processes which are associated with verifying the listing before it is legally allowed to be put up—creates the possibility of somebody deciding to jump the gun and get a listing in there before that cut-off time and then run the risk of actually being in breach of the Act because they have jumped the gun.[34]

3.46 The Department further commented:

> Obviously, it is in the landlord's best interest if they are finding themselves out of pocket because of a breach. That is perfectly within the landlord's rights to commence proceedings and take care of that aspect and, from then, go about doing the listing.
>
> I suppose, on the other end of the extreme is the notion of there not being a time and a landlord that then waits 10 years or something like that.[35]

3.47 In their response to written questions, the Department further elaborated on the absence of a time limit to make a listing:

> Generally landlords offer rental accommodation on a commercial basis - that is, individual landlord financial arrangements aside, the object is to derive a level of income from renting. The absence of income occasioned through a tenant's breach of a lease would generally be expected to see a landlord seek recourse in a timely manner.
>
> While there is some possibility that a landlord may be slow in addressing such matters, such action is constrained by the need for a landlord to mitigate its loss in relation to a claim for loss or damages.

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[31] NT Shelter, Submission No. 5, 2018, p. 3; Darwin Community Legal Services, Submission No. 4, 2018, p. 4.
[32] NT Shelter, Submission No. 5, 2018, p. 3; Darwin Community Legal Services, Submission No. 4, 2018, p. 4; Top End Women's Legal Service, Submission No. 6, 2018, p. 3.
[33] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 5.
[34] Department of the Attorney-General and Justice, Committee Transcript, 21 March 2018, p. 5.
[35] Department of the Attorney-General and Justice, Committee Transcript, 21 March 2018, p. 5.

> This duty to mitigate loss is expressed in section 122(3)(e) of the Act, whereby a person seeking compensation must take reasonable steps to minimise their actual loss notwithstanding that the loss has arisen through the actions of another…
>
> The principle of the duty to mitigate loss transmits to other actions, including the promptness of recovery and ancillary actions, such as seeking Tribunal orders for compensation. This principle is reflected in the limitation imposed on when one can commence legal proceedings under the *Limitation Act.*
>
> Delayed listing does not appear to be something that has been considered by tribunals elsewhere. If anything, it appears from the case law that, if a landlord were mindful to list someone, that listing has occurred prematurely, before the relevant criteria have been established… It is therefore considered unlikely that a landlord would delay the listing of a person once the threshold to list someone has been attained.[36]

Committee's Comments

3.48 The Committee acknowledges the concerns raised by submitters and recognises that the Bill does provide the potential for a listing to be made at any time after a tenancy agreement has ended. However, the Committee notes that a landlord requires adequate time to attempt to have a breach rectified by the former tenant and seek orders through NTCAT.

3.49 Furthermore, the Committee considers that a landlord's motivation to have a breach rectified is to recoup any financial losses caused by the tenant's breach, and a landlord is likely to attempt this in a timely manner, as opposed to waiting a number of years and then listing a former tenant on a residential tenancy database. Therefore, the Committee does not believe it is necessary to prescribe a time limit between when a tenancy agreement is terminated and a listing is made.

Corrections to Listings

Obligation to Make a Correction

3.50 The Bill prescribes the obligations of landlords and database operators to amend or remove personal information listed on a database if they become aware that it is inaccurate or out-of-date. Proposed section 130 requires that within 7 days of a landlord becoming aware that personal information they have listed is inaccurate or out-of-date, the landlord must send written notification to the database operator advising of the inaccurate or out-of-date information and how the information is to be amended or removed.

3.51 Proposed section 131 requires a database operator who receives written notice under proposed section 130, to amend or remove information within 14 days of the notice being given.

3.52 DCLS recommends that proposed section 130 be amended to require the landlord to ensure that the correction is made, not simply to notify the operator of an error.[37]

[36] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, pp. 5-6.
[37] Darwin Community Legal Services, Submission No. 4, 2018, p. 5.

NAAJA endorse the proposal from DCLS and note that given proposed section 128 gives a landlord the power to make a listing, it would follow that a landlord should also be required to correct a listing, not just report it to the database operator.[38]

3.53 As previously noted, in practical terms it is the database operator who will enter, amend or remove personal information at the request of a landlord, as it is the operators' database.[39]

3.54 For the purposes of proposed section 130, the Bill prescribes that 'out-of-date' information refers to amounts owed that are paid within three months, whereas 'inaccurate' information refers to amounts owed that are paid after three months. A listing with 'inaccurate' information must be amended, which means the listing remains for up to three years from the original listing date, however it must reflect that the debt has been paid. In contrast, 'out-of-date' information must be removed, therefore the listing would be deleted from the database.

3.55 NAAJA considers that the different treatment of these listings, dependent on whether a debt was paid within or after three months, is unfair and prejudicial to people who have repaid a debt after three months. NAAJA recommended the definition of 'out-of-date' in proposed subsection 130(4) be amended so that all listings become 'out-of-date' when the debt is repaid, and are therefore removed from the database.[40]

3.56 In its response to written questions from the Committee, the Department advised:

> The distinction reflects the balance between what could arguably be a minor breach - that is a small debt that is resolved shortly after termination (i.e. repaid within three months), as against a more significant breach (e.g. it took over a year to repay); and the risk profiles that those respective situations pose.[41]

Committee's Comments

3.57 A review of equivalent legislation in other jurisdictions and the model provisions reveals the distinction between 'inaccurate' and 'out-of-date' information is used consistently in all jurisdictions. The Committee considers that the Bill is drafted appropriately to ensure national consistency in amending and removing personal information listed on a residential tenancy database.

Non-Compliance Penalties

3.58 Despite proposed sections 130 and 131 placing an obligation on landlords and database operators to amend or remove database listings, the Bill does not prescribe penalties for non-compliance with these requirements. DCLS, NAAJA and TEWLS all recommended that non-compliance provisions be included for landlords and database operators who fail to comply with their obligations under these proposed sections.[42]

[38] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 6.
[39] Department of the Attorney-General and Justice, Committee Transcript, 21 March 2018, p. 6.
[40] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 9.
[41] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 10.
[42] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 6; Top End Women's Legal Service, Submission No. 5, 2018, p. 3; Darwin Community Legal Service, Submission No. 4, 2018, p. 5.

3.59 The model provisions' general notes state that each jurisdiction is able to prescribe consequences for contravening provisions regulating the use of residential tenancy databases. A review of equivalent legislation reveals that the majority of jurisdictions have included non-compliance penalties for landlords and database operators who do not comply with requirements to amend or remove information listed on a residential tenancy database.

3.60 The Committee questioned the Department why non-compliance penalties had not been included in these proposed sections and was advised:

> Access to information stored by businesses, including tenancy database operators, is governed by the *Privacy Act (1988)* (Cth). That Act sets out a number of binding principles that apply in relation to the collection, storage, use and access to, personal information…
>
> Under the *Privacy Act (1988)* (Cth), the Australian Information Commissioner may investigate and enforce breaches of the Australian Privacy Principles, including the seeking of compensation or civil penalties against database operators for, amongst other things, listing incorrect personal information, refusing to correct or remove that information, or otherwise dealing with personal information in an inappropriate manner.
>
> …the APPs do not preclude the Territory from enacting complimentary processes for the correction of personal information listed in a residential tenancy database as such processes are not specified in the APPs.
>
> Sections 130, 131 and 132 compliment the APPs by providing an alternative dispute pathway through the NTCAT where a tenant objects to either the listing, or accuracy of personal information. Where it is found that the information is inaccurate, incomplete, ambiguous or out-of-date, NTCAT may prohibit its listing, or order its removal or amendment. If the requested information is not provided, NTCAT may order its provision.
>
> Offences are not prescribed for a landlord or database operator's non-compliance with sections 130, 131 or 132 as the *Northern Territory Civil and Administrative Tribunal Act* prescribes a penalty of 100 penalty units for breach of an order of the Tribunal.
>
> The objective of sections 130, 131 and 132 is to provide quick resolution of a disputed listing, rather than seeking criminal or other sanction in the first instant. It was considered preferable that resolution be prioritised rather than sanction. In the event that sanction were required for non-compliance, it was considered preferable that that be considered following independent review of the dispute by NTCAT or the Australian Information Commissioner.
>
> This is in contrast to the offence provisions in sections 126, 127, 128 and 129, which are designed to prevent disputes in the first place, by regulating what information may be placed on databases, and dissuading the use of inaccurate, incomplete or ambiguous information by criminalising such behaviour.

Committee's Comments

3.61 The Committee is satisfied with the Department's explanation regarding non-compliance sanctions contained within the Bill.

Powers of Tribunal

3.62 Equivalent legislation in Queensland, New South Wales, Tasmania, Western Australia and the Australian Capital Territory all contain provisions which direct a

tribunal or court to consider whether a database listing would be 'unjust in the circumstances' having regard to:

- the reason for the listing
- the person's involvement in the acts or omissions giving rise to the breach
- the adverse consequences suffered, or likely to be suffered, by the person as a result of the listing
- any other relevant matter.[43]

3.63 The ACT and Queensland provisions include non-exhaustive examples of what may constitute an unjust listing, with particular reference given to situations where damage was caused through a domestic violence incident or a person was in hospital and unable to arrange payments:

> 1. Personal information about Y is listed on a tenancy database for a reason relating to damage caused to premises by a domestic associate of Y in the course of an incident of domestic violence. Because of the listing, Y can not obtain appropriate and affordable accommodation.
>
> 2. Personal information about Z is listed on a tenancy database for a reason relating to an amount of rent that remained unpaid for 2 months after it was payable. During that period, Z was in hospital recovering from a serious accident and unable to make arrangements for payment.[44]

3.64 DCLS informed the Committee they have experienced clients being listed unjustly on residential tenancy databases when they have been victims of domestic violence or there are other extenuating circumstances.[45] Anglicare NT raised concerns about the absence of provisions to protect vulnerable people such as victims of domestic violence or a person with a metal illness.[46]

3.65 Both Anglicare NT and DCLS have recommended the inclusion of 'unjust in the circumstances' provisions and examples in proposed section 134 to direct a tribunal to consider these factors when making an order to allow or prohibit a database listing.[47]

3.66 DCLS suggested protections for victims of domestic violence could be further strengthened by the inclusion of additional provisions in proposed section 134 stating:

> If the Tribunal is satisfied that;
>
> (a) the person did not cause or reasonably cause a breach of the tenancy agreement; or
>
> (b) the nature of any breach resulted from an act of domestic violence under the *Domestic and Family Violence Act* to the person

[43] s. 217 *Residential Tenancies Act 2010* (NSW); s. 99 *Residential Tenancies Act 1997* (ACT); s. 48ZF *Residential Tenancies Act 1997* (Tas); s. 461 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld); s. 82J *Residential Tenancies Act 1987* (WA).
[44] s. 461 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).
[45] Darwin Community Legal Service, Submission No. 4, 2018, p. 6.
[46] Anglicare NT, Submission No. 3, 2018, p. 1.
[47] Darwin Community Legal Service, Submission No. 4, 2018, p. 6; Anglicare NT, Submission No. 3, 2018, p. 1.

> They may make an order prohibiting the landlord or database operator from listing the personal information about a person in a tenancy database; or
>
> Requiring a landlord or database operator to amend or remove personal information about a person that is, or is to be, listed in a tenancy database.[48]

3.67 NAAJA support the amendments proposed above, however recommended that factors outlined in subsection 122(3) of the Act should also be considered by a tribunal, especially:

- Whether the tenant has taken all reasonable steps to comply with his or her obligations under this Act and the tenancy agreement; and
- Whether the landlord has consented to the failure to comply with obligations.[49]

3.68 In response to written questions regarding whether consideration was given to including 'unjust in the circumstances' provisions and if there was any reason not to include them, the Department advised:

> Consideration was given, however a general conferral of power was preferred to enable the NTCAT to establish its own processes and jurisprudence, as opposed to a prescriptive conferral that may inadvertently limit the NTCAT…
>
> Some stakeholders suggested inclusion on the basis that it is unjust for tenants to be listed due to personality clashes, unsubstantiated claims or domestic violence situations. Listings due to personality clashes and unsubstantiated claims are…prohibited.
>
> Of the jurisdictions that do specifically direct their Tribunal to consider unjustness, only the Australian Capital Territory and Queensland specifically include guidance on what may constitute an unjust setting, and limit domestic violence as an example to property damage.
>
> Domestic violence in a tenancy setting is a matter that has been acknowledged at the Territory and national level, however there is presently no uniform approach across jurisdictions. The broader complexity associated with its impacts on leasing matters generally has necessitated consideration of this issue outside of the subject of whether to regulate databases. Domestic violence implications are being considered on the broader scale as part of a general review of the Act.[50]

3.69 When questioned about what recourse is available to a person who is listed as a result of a situation where they were a victim of domestic violence, the Department stated:

> Section 12 of the *Residential Tenancies Act* makes a tenant liable for damage to the rental premises caused by people who are not tenants, but are on the premises with the tenant's consent. The exception to this is where the person who caused the damage is in a domestic relationship with the tenant and the damage arose through an act of domestic violence. Under such circumstances, section 12(3) reverses the position, whereby the tenant is not liable.
>
> This reflects the general position that the tenant is responsible for, and has general control over, the premises, and thus should keep visitor behaviour in check. The domestic violence exception reflects the reality that in such circumstances, the tenant has no control over the situation, and therefore should not be held responsible for the actions of the perpetrator.
>
> Under such circumstances, the tenant cannot be listed, as the tenant is not legally responsible for the breach/damage.

[48] Darwin Community Legal Service, Submission No. 4, 2018, p. 7.
[49] North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 6.
[50] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 15.

> Where the domestic violence situation occurs between co-tenants, the matter becomes more complicated as both tenants are notionally jointly and severally liable, however … the case law … show that tribunals are prepared to go behind the contractual arrangement and assess the matter on the facts of a particular situation, even without specific provision.[51]

Committee's Comments

3.70 The Committee considers that there are a range of ways by which a person may become responsible for an outstanding debt under a lease that do not warrant the listing of the person on a database, such as a co-tenant under the lease being compelled to leave the residence by domestic violence. Allowing such a listing to stand, however lawful, could aggravate an already unjust situation by preventing the listed person from getting future tenancies.

3.71 The model provisions contain no references to powers of a tribunal or considerations when making an order to prohibit, amend or remove a residential tenancy database listing. However, the model provisions' general notes contain examples of a higher standard of provisions that jurisdictions may choose to adopt which include allowing a person to apply for a tribunal order to prevent a landlord from listing the person on a residential tenancy database.

3.72 In its written response to questions the Department said it "preferred to enable the NTCAT to establish its own processes and jurisprudence, as opposed to a prescriptive conferral that may inadvertently limit the NTCAT",[52] having cited some examples where a tribunal has gone behind the contractual arrangement to determine liability.[53] However, in response to being asked if there was any reason to not include an 'unjust in the circumstances' provision the Department did not raise any substantive issues.

3.73 The Committee notes that while there appears to be merit in the inclusion of these provisions, there may be unintended consequences of such provisions. The Committee is aware of the need to not unnecessarily delay the passage of the Bill, as this would postpone implementing protections for tenants listed on a residential tenancy database. Therefore, the Committee is recommending the Government undertake a comprehensive assessment to ascertain any implications of including 'unjust in the circumstances' provisions and determine the most appropriate way to provide protections for people that may be unjustly listed on a residential tenancy database.

Recommendation 3

The Committee recommends the Government undertake a comprehensive assessment to determine the most appropriate way to provide protections for people that may be unjustly listed on a residential tenancy database.

[51] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 16.
[52] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 15.
[53] Department of the Attorney-General and Justice, *Responses to Written Questions*, 10 April 2018, p. 4.

Fees to Access Personal Information

3.74 Proposed section 132 requires a landlord who listed personal information or a database operator who holds the information to provide a copy of the information to the person, if a request is made by the person in writing, and if a fee is charged, the fee has been paid. Proposed subsection 132(4) requires that the fee charged "must not be excessive; and must not apply to lodging a request for the information."[54]

3.75 The Committee received a number of submissions highlighting concerns about landlords and database operators being able to charge fees to provide a copy of personal information listed on a residential tenancy database. TEWLS consider that the wording 'must not be excessive' is open to significant interpretation and suggest the Bill would be improved by providing guidance which:

> could take the form of a range of fees to be charged by a landlord or database operator or a maximum fee able to be charged, with reference to current fees charged by database operators … or by use of the term 'reasonable'.[55]

3.76 The National Tenancy Database website states it provides a free copy of a listing via email within 10 days of a person's identity being verified, while immediate requests cost $38.50.[56] In their evidence to the Committee, DCLS stated:

> Our experience is that the predominant database operator in the Northern Territory, TICA, will not provide information without charging a fee and refuse email requests that would provide the tenant their personal information for free. Therefore, to quickly obtain information a tenant would need to telephone the operator (TICA charges $5.45 per minute and higher from mobile phone and pay phones), or fax costing $33. The only other options are via post which is a longer process ($19.80 plus the cost of a self-addressed envelope) and $55 for 12 months access to the persons 'tenancy file'. Often these costs are enough to stop many low-income tenants from accessing their personal information which can lead to inaccurate listings preventing rental applications.[57]

3.77 The Committee questioned the Department about why the Bill permits a landlord or database operator to charge fees to provide a copy of personal information listed and was advised:

> The Constitution intervenes there. Quite simply, the Commonwealth has regulated the use of databases through the Commonwealth *Privacy Act*. While it is concurrent, APP or the Australian Privacy Principle 12.8 specifically states that where an organisation charges a person to view or obtain a copy of personal information, that charge must not be excessive. We cannot regulate anything else other than that, otherwise it will be unconstitutional and run the risk of having it invalidated.
>
> The Privacy Principles operate on the presumption that it is not being regulated against. It is, therefore, legal for somebody to charge to access information. Currently, the Commonwealth, through the Privacy Principles or elsewhere, has not made it illegal to charge, so it is a legal right to charge. Where they have regulated it is to say it must not be excessive. That is as far as we can go.[58]

[54] Section 132(4) Residential Tenancies Amendment Bill 2018
[55] Top End Women's Legal Service, Submission No. 5, 2018, p. 3.
[56] National Tenancy Database, viewed on 3 April 2018, https://www.tenancydatabase.com.au/contact-us
[57] Darwin Community Legal Service, Submission No. 4, p. 3.
[58] Department of the Attorney-General and Justice, Committee Transcript, 21 March 2018, p. 8.

3.78 In a supplementary submission to the Committee following the public briefing with the Department, DCLS stated:

> We submit that the current charging of fees may be contrary to the Australian Privacy Principles (APP). Under the APP paragraph 12.77, 'an organisation cannot impose upon an individual a charge for the making of the request to access personal information.' Currently, database operators charge tenants in the Northern Territory for requests to access personal information and will not divulge whether a person is listed without the payment of a fee. We therefore propose that a fee should not be charged where a person is simply lodging a request for information. This is consistent with section 99J of the South Australian *Residential Tenancies Act*.
>
> Under APP paragraph 12.78 'an organisation may, however, impose a charge for giving access to requested personal information, provided the charge is not excessive (APP 12.8). We submit that the current charges for access to personal information are excessive. It is our view that it is contrary to the APP that a person should not be entitled to freely access personal information where that information is used to inform a decision about whether they are eligible for housing and support the addition of provisions in the Bill to prevent charging for accessing personal information.[59]

3.79 DCLS refer section 99J of the South Australian *Residential Tenancies Act 1995* in respect to charging fees to provide a copy of a database listing. The Committee has reviewed the South Australian legislation and the provisions regarding charging fees for providing personal information appear consistent with those proposed in the Bill, contained within the model provisions, and the Australian Privacy Principles.

Committee's Comments

3.80 The Committee acknowledges the concerns expressed about fees being charged to provide personal information and recognises that, depending on a person's financial resources, these fees may be considered high. However, the Committee notes that there are a number of opportunities for a person to obtain a copy of their personal information for free.

3.81 The first occurs when both the landlord and database operator intend to make a listing, as they are both required to notify the person, provide a copy of the personal information and allow 14 days for the person the object to the listing. This information must be provided free of charge.

3.82 Subsequent opportunities arise when a landlord uses a residential tenancy database to search for a prospective tenant, as they must notify the person in writing that they are listed on a database, along with details of the personal information listed, who made the listing and how the listing can be amended or removed.

3.83 In light of the restrictions on regulating fees as prescribed by the *Privacy Act 1988* (Cwlth), and the opportunities a person has to obtain a free copy of personal information that is or is intended to be listed, the Committee is satisfied with provisions contained within proposed subsection 132(4).

[59] Darwin Community Legal Services, Submission No. 4A, 2018, p. 3.

Transitional Provisions

3.84 The transitional provisions prescribe that for the first three months following commencement, Part 14 (tenancy databases provisions) only applies to tenancy agreements and database listings made on or after the commencement date. After the expiry of the three months, Part 14 applies to all tenancy agreements and database listings made before, on or after commencement.

3.85 TEWLS consider these provisions may cause confusion to tenants and landlords, and suggest that Part 14 apply to all tenancy agreements and listings from the commencement date, however a policy or legislative provisions should prescribe that penalty provisions not occur during the first three months.[60]

3.86 DCLS submit that the transitional period may be prejudicial to people who were listed before the commencement date and are seeking to challenge that listing, and the transitional period would unnecessarily delay a person from seeking immediate recourse. DCLS and NAAJA propose that a person that has an existing listing should be able to challenge the listing from the commencement date.[61]

3.87 The Committee questioned the Department about why the transitional arrangements were drafted in this manner and was advised:

> They were designed to provide immediate cover for those listings that came into effect after commencement and to allow a database operator the opportunity to retrospectively apply all the requirements to their existing databases. As you could probably appreciate, that would be a reasonable volume of information that had to go through to try to backdate it.
>
> Why we did not apply the appeals process—for want of a better description that is required—is you end up having the unintended consequence of diverting those database resources to dealing with complaints, rather than getting in and addressing the underlying issue of historical records that should not be there anymore. At the end of the three months, anything that is three years old or more is removed. The primacy of it was to get everyone up to speed. It is certainly acknowledged that there is a three-month window there in which somebody may have an issue because they are listed.
>
> An application to NTCAT is not necessarily there, but even if it was, you would probably still have that same three-month period in which to get it addressed. If you were going that way, it does not remove your ability to approach the database operator directly. In fact, you will be alerted to it if you are applying for something from commencement on—that you have been listed.
>
> So, you are getting that protection insofar as you are being made aware that you are listed. It then gives you the opportunity to address it through standard means of dealing with the database operator and explaining the situation, as well as explaining the situation to the prospective landlord. In fact, it is a balancing effect.[62]

[60] Top End Women's Legal Services, Submission No. 6, 2018, p. 3.
[61] Darwin Community Legal Services, Submission No. 4, 2018, p. 7; North Australian Aboriginal Justice Agency, Submission No. 7, 2018, p. 7.
[62] Department of the Attorney-General and Justice, Committee Transcript, 21 March 2018, p. 9.

Committee's Comments

3.88 The Committee is satisfied with the Department's explanation of the rationale behind the transitional arrangements contained in the Bill.

Review of the *Residential Tenancies Act*

3.89 Through the course of this inquiry, a number of issues relating more broadly to the *Residential Tenancies Act* have been brought to the Committee's attention. While the Committee acknowledges there are some valid concerns, they are outside the scope of the Bill which is primarily about introducing regulation of residential tenancy databases. The issues raised with the Committee include:

- Establishing an independent bond board to act as an independent adjudicator of disputes over security of deposits and to minimise misuse of bond funds
- Creating a landlord and real estate agent database
- Increasing the notice periods to terminate tenancies
- Providing protections for co-tenants where tenancy disputes arise
- Providing protections for victims of domestic and family violence.

3.90 The Committee notes that in recent years, a number of jurisdictions have proposed or implemented reforms to modernise their residential tenancy legislation. The Committee considers that some of the concerns raised through this inquiry warrant further investigation and the entire *Residential Tenancies Act* should be reviewed and amendments made to ensure the rights and interests of both tenants and landlords are protected.

Recommendation 4

The Committee recommends the Government undertake a comprehensive review of the *Residential Tenancies Act* to identify opportunities for improvement and propose amendments to contemporise the Act.

Appendix A: Submissions Received and Public Briefing

Submissions Received

1. Law Society NT
2. Equifax
3. Anglicare NT
4. Darwin Community Legal Service and Central Australian Women's Legal Services

4A. Darwin Community Legal Service

5. NT Shelter
6. Top End Women's Legal Service
7. North Australian Aboriginal Justice Agency
8. Northern Territory Legal Aid Commission
9. Northern Territory Council of Social Services

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- Douglas Burns: Senior Policy Lawyer, Department of the Attorney-General and Justice
- Fiona Hardy: Senior Policy Lawyer, Department of the Attorney-General and Justice

Note: Copies of submissions and public briefing transcript are available at: https://parliament.nt.gov.au/committees/EPSC/43-2018

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