

# Policy Report

## Review of the *Residential Tenancies Act 1987 (WA)*

Policy Report - January 2008



Department of Consumer  
and Employment Protection  
Government of Western Australia





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and Employment Protection  
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**Consumer Protection**

**Review of the**  
***Residential Tenancies Act 1987 (WA)***

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**Associated Documents:**

“Statutory Review of the *Residential Tenancies Act 1987* (WA): Final Report: August 2002” by Stamfords Advisors Consultants

**Department of Consumer and Employment Protection (Consumer Protection)**  
**Review of the *Residential Tenancies Act 1987* (WA): Policy Paper (January 2008)**

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## LIST OF COMMON ABBREVIATIONS

Category	Abbreviation	Word/Phase in full
<b>Legislation</b>	REBA Act	<i>Real Estate and Business Agents Act 1978 (WA)</i>
	RT Act	<i>Residential Tenancies Act 1987 (WA)</i>
	RT Regulations	<i>Residential Tenancies Regulations 1989 (WA)</i>
	RT Act (ACT)	<i>Residential Tenancies Act 1997 (ACT)</i>
	RT Regulations (ACT)	<i>Residential Tenancies Regulations 1998 (ACT)</i>
	RT Act (NSW)	<i>Residential Tenancies Act 1987 (NSW)</i>
	RT Regulations (NSW)	<i>Residential Tenancies (Residential Premises) Regulation 1995 (NSW)</i>
	RT Act (NT)	<i>Residential Tenancies Act 1999 (NT)</i>
	RT Regulations (NT)	<i>Residential Tenancies Regulations 1999 (NT)</i>
	RT Act (QLD)	<i>Residential Tenancies Act 1994 (QLD)</i>
	RT Regulations (QLD)	<i>Residential Tenancies Regulations 1995 (QLD)</i>
	RT Act (SA)	<i>Residential Tenancies Act 1995 (SA)</i>
	RT Regulations (SA)	<i>Residential Tenancies (General) Regulations 1995 (SA)</i>
	RT Act (TAS)	<i>Residential Tenancy Act 1997 (TAS)</i>
	RT Regulations (TAS)	<i>Residential Tenancy Regulations 1998 (TAS)</i>
	RT Act (VIC)	<i>Residential Tenancies Act 1997 (VIC)</i>
RT Regulations (VIC)	<i>Residential Tenancies Regulations 1998 (VIC)</i>	
<b>Organisations</b>	CHCWA	Community Housing Coalition of WA
	DHW	Department of Housing and Works
	DOCEP	Department of Consumer and Employment Protection
	MIDLAS	Midland Information, Debt & Legal Advice Service
	POA	Property Owners Association of WA (Inc.)
	REBA	Real Estate and Business Agents Supervisory Board
	REIWA	Real Estate Institute of Western Australia
	Stamfords	Stamfords Advisors Consultants
	TAS	Tenants Advice Service Inc.
	WACOSS	Western Australian Council of Social Service Inc.
<b>Common terms</b>	owner	property owner/landlord/lessor
	tenant	lessee *Note: sometimes it will be necessary to distinguish between the tenant (whose name is on the lease agreement) and the occupant (whose name is not on the lease agreement)

property manager	owner's agent/real estate agent *Note: "agents" are not always real estate agents – there can be an "owner's agent" and a "tenant's agent"
tenant advocacy groups	e.g. TAS, Shelter WA, WACOSS
owner advocacy groups	e.g. Property Owners Association of WA, Landlords' Advisory Service
day	calendar day
Commissioner	Commissioner for Consumer Protection
Court	Magistrates Court
Review	review of the <i>Residential Tenancies Act 1987 (WA)</i>
Phase 1 of the Review	Stamfords Advisors Consultants' review of the RT Act
Phase 2 of the Review	State Government's review of the RT Act
Stamfords' Report	"Statutory Review of the Residential Tenancies Act 1987 (WA): Final Report: August 2002" by Stamfords Advisors Consultants
VCAT	Victorian Civil and Administrative Tribunal

## Executive Summary

The current statutory review of the *Residential Tenancies Act 1987 (RT Act)* is required under section 90 of the Act. Section 90 states that the Minister shall cause to be carried out a review of the operation of the RT Act as soon as practicable after the expiration of 5 years from the coming into operation of Part Three of the *Real Estate Legislation Amendment Act 1995 (WA)*.

The Review of the RT Act commenced in late 2001 with the appointment of independent consultants, Stamfords Advisors Consultants (Stamfords) to the project. A Discussion Paper was released in February 2002 and Stamfords facilitated an intensive period of public consultation, including public forums in metropolitan and regional Western Australia.

This first consultation phase was comprised of the receipt of written submissions, public meetings, focus groups and individual stakeholder meetings. Stamfords analysed the results of this public consultation and published a report entitled "*Statutory Review of the Residential Tenancies Act 1987 (WA) – Final Report*" (the Stamfords Report). The Stamfords Report containing 183 recommendations was finalised in August 2002, and in accordance with the RT Act, was tabled in Parliament.

The Department of Consumer and Employment Protection (DOCEP) released the Stamfords Report to stakeholders for a second phase of public consultation (Phase 2). Written submissions to this phase closed in December 2002. A total of 49 written submissions were received.<sup>1</sup> During the analysis of these submissions, it became apparent that the range and complexity of issues involved necessitated splitting the Review into two separate projects. Accordingly, in mid-2003, DOCEP developed and submitted a proposal to the then Minister for Consumer and Employment Protection, the Hon John Kobelke MLA, to split the Review process into the following two projects: (1) park home tenancies and caravan parks; and (2) general residential tenancy matters.

Minister Kobelke agreed to priority being given to finalising and implementing the Review as it related to park home tenancies and caravan parks, so that the Government's 2001 election commitment to create more certainty for park home owners and other residents in caravan parks and could be met. Since that time, the *Residential Tenancies Regulations 1989 (WA)* have been amended to address some park home ownership issues, and the *Residential Parks (Long-Stay Tenants) Act 2006 (RPLST Act)* commenced on 3 August 2007.

In mid-2004, the Government's focus returned to addressing general residential tenancies issues under the RT Act. Public submissions and ministerial correspondence relating to the Review were analysed, further consultation with stakeholders was conducted, and a comparison of residential tenancy legislation in other Australian jurisdictions was undertaken.

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<sup>1</sup> Refer to *Appendix A: Review of the RT Act – Phase 2 – List of Submitters*.

In order to learn about current changes and trends in the residential tenancies market, DOCEP held a series of dialogue sessions with key stakeholders representing tenants, owners, agents and the court system. Policy officers held numerous workshops with DOCEP's Building and Tenancy Industries Branch and the Indigenous Community Education Team in order to obtain up-to-date information about complaints received from tenants, owners, and agents. At these workshops, information was also obtained about significant issues affecting parties to tenancy agreements, DOCEP's tenancy-related services, public and community housing, and the court system.

This policy report has been prepared as a comprehensive response to the 183 recommendations contained in the *Stamfords Report*. The sequence of chapters broadly mirrors the chain of events involved in a residential tenancy, including: the determination of the application of the RT Act; the formation of a tenancy agreement; the performance of a tenancy agreement; the termination of a tenancy agreement; dispute resolution; and matters relating to compensation and offences in the RT Act. Each sub-chapter begins with the relevant *Stamfords* recommendation; provides background discussion including appropriate research into residential tenancy laws in other Australian jurisdictions; summarises stakeholder feedback to Phase 2 of the Review; sets out the policy position on the issues; and concludes with the policy proposals for reform. The proposals generally fall into three categories: legislative amendment; community education; and further research. Some topics, such as the proposed regulation of boarding and lodging house tenancies, require targeted research and consultation before any detailed legislative amendments can be determined.

The Review of the RT Act has been conducted in the context of the Government's "Consumer Justice Strategy" which emphasises the strengthening of the rights of consumers and improving avenues of redress.<sup>2</sup> A range of state and national Government and non-Government policies, reports, and research papers have been taken into account in the development of this policy report, including publications such as the 2002 State Homelessness Taskforce titled "Addressing Homelessness in Western Australia", and the 2005 National Indigenous Consumer Action Plan Working Party report titled "Taking Action, Gaining Trust: A National Indigenous Consumer Strategy Action Plan 2005-2010".<sup>3</sup>

Extensive research and public consultation has been invested in this Review in recognition of the imperative to ensure any amendments to existing residential tenancy laws in WA operate for the overall benefit of the community. It has been recognised in literature about residential tenancies, and confirmed by stakeholder feedback, that there is often an inherent power imbalance between owners and tenants, and each jurisdiction attempts to address this imbalance by granting a fundamental set of statutory rights and obligations.

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<sup>2</sup> DOCEP, *Consumer Justice Strategy: 2002 – 2003 Implementation Plan*, p. 5.

<sup>3</sup> Refer to *Appendix B: Bibliography* for a full list of publications.

In recent times, low interest rates combined with strong capital growth and increasingly flexible lending practices have encouraged a considerable number of investors to purchase residential properties. It is likely that this trend has brought a large number of owners into the residential tenancy market without sufficient knowledge of the laws and procedures under the RT Act. A lack of knowledge has led to increasing levels of disputation between parties to tenancy agreements in some areas of the market, and highlights the need for clear, understandable laws. The Government recognises that any changes to the RT Act will need to balance the protection of tenants' rights with a regulatory environment which is also fair to owners; and will need to be accompanied by an appropriate community education campaign which is sensitive to the incredibly diverse backgrounds of tenants, owners, agents, as well as public and community housing providers.

## Summary of Proposals

### 1. APPLICATION OF THE ACT

#### 1.1 Structure and Objectives of the Act

##### Proposal 1

That, after the policy position on all amendments to the RT Act are finalised, DOCEP work together with Parliamentary Counsel to make any necessary changes to the structure and long title of the RT Act.

#### 1.2 Boarders and Lodgers

##### Proposal 2

That DOCEP conduct targeted research and consultation to identify the issues and concerns of stakeholders within the boarding house sector, regarding the proposed inclusion of boarders and lodgers within the RT Act.

##### Proposal 3

That the RT Act be amended to include a definition of “boarders” and “lodgers” (or such other term as appropriate).

#### 1.3 Educational Institutions

##### Proposal 4

That the current exemption of “any part of an educational institution” from the RT Act be retained, but qualified to exclude:

- accommodation which is not a college, ‘hall of residence’, or similar class (i.e. accommodation that is not contingent upon a student’s enrolment at the educational institution); and
- accommodation which is independently owned and/or operated, irrespective of whether the operator has a written agreement with an educational institution, and provided on a for-profit basis.

##### Proposal 5

That DOCEP consult with affected stakeholders in the student accommodation industry in formulating appropriate laws for the boarding/lodging house sector.

#### 1.4 Residents of Accommodation Intended for Holiday Use

##### Proposal 6

That the current exemptions in the RT Act for:

- agreements that are entered into for the purpose of a holiday; and
  - any part of a hotel or motel,
- be retained.

##### Proposal 7

That the RT Act be amended to exempt all short-stay agreements (i.e. for three months or less) for premises ordinarily used as holiday accommodation.

##### Proposal 8

That DOCEP consult with relevant stakeholders in order to ascertain whether people residing in hotels/motels as their principal place of residence should be covered under any future boarding/lodging laws.

## 1.5 Bodies Corporate

### Proposal 9

That DOCEP conduct further research and consultation with Indigenous people's stakeholder groups, government agencies, and non-government organisations, and obtain legal advice, as to:

- the current application of the RT Act to Indigenous community housing;
- the likely effects of amending the RT Act to ensure that it applies to Indigenous community housing; and therefore
- whether it is appropriate that the RT Act should apply to all Indigenous community housing.

### Proposal 10

In the event that it is recommended that the RT Act should apply to all Indigenous community housing, DOCEP is to develop a comprehensive, culturally-appropriate education campaign for affected Indigenous stakeholders to be delivered during an extended transition phase.

## 2. TENANCY ORIGINATION

### 2.1 Nature of Tenancy Agreements

#### 2.1.1 Standard Tenancy Agreements

### Proposal 11

That the RT Act be amended to prescribe the minimum terms and conditions to be included in a typical tenancy agreement.

### Proposal 12

That the RT Act be amended to state within the Act itself (rather than in the Regulations) that tenants are to be provided with a copy of Schedule 2 of the RT Regulations prior to or at the start of a tenancy agreement.

### Proposal 13

That Schedule 2 of the RT Regulations be amended to provide for a declaration, to be signed and dated by the tenant and the owner, confirming the giving and receipt of the Schedule 2.

### Proposal 14

That the RT Act be amended to make it an offence for an owner to fail to provide the tenant with a copy of Schedule 2 of the RT Regulations prior to or at the start of a tenancy agreement.

#### 2.1.2 Oral Tenancy Agreements

### Proposal 15

That the RT Act be amended to make it clear that oral tenancy agreements are regulated by the Act and thus incorporate the minimum terms and conditions as prescribed in the Act.

### Proposal 16

That the RT Act be amended to require owners to provide tenants with two copies of Schedule 2 (Information for Tenant) of the RT Regulations signed and dated by the owner, within 14 days of the creation of the written tenancy agreement.

### Proposal 17

That the RT Act be amended to require tenants to sign and date the two copies of Schedule 2 (Information for Tenant) of the RT Regulations, and return one of the copies to the owner within 14 days of receiving it from the owner.

## 2.2 Terms in Agreements

### 2.2.1 Additional Terms

#### Proposal 18

That the RT Act be amended to require any additional terms or conditions to be in a separate section of the tenancy agreement, clearly marked “Additional Terms and Conditions”, including a statement, to be signed by the tenant, acknowledging their understanding that the additional terms and conditions are fully negotiable and not required by law, and a statement, to be signed by the owner, declaring that none of the additional terms or conditions are inconsistent with the RT Act.

### 2.2.2 Tenant’s Place of Employment

#### Proposal 19

That section 53 of the RT Act be amended to replace the term “occupation” with the term “employment”.

### 2.2.3 Minimum Age of Tenant

#### Proposal 20

That the RT Act be amended to make it clear that tenancy agreements may be entered into by minors and that those agreements will be enforceable in the same way as if entered into by an adult.

### 2.2.4 Discriminating Against Tenants with Children

#### Proposal 21

That the RT Act be amended to repeal section 56(3), thereby removing the exception that enables discrimination against tenants with children.

## 2.3 Contracting Out

#### Proposal 22

That the RT Act be amended to remove the ability for parties to contract out of those sections of the RT Act identified in section 82(3), other than sections 38 (Tenant’s responsibility for cleanliness and damage) and 46 (Owner’s right of entry).

#### Proposal 23

That the RT Act be amended to require any tenancy agreement, which purports to contract out of sections 38 or 46 of the RT Act, to include a statement signed by the prospective tenant acknowledging that they understand contracting out is fully negotiable and not required by law.

#### Proposal 24

That the definition of “premises” in section 40 of the RT Act be amended so that the right to vacant possession may be modified to exclude particular parts of the property, other than the main place of residence.

#### Proposal 25

That the definition of “premises” in section 3 of the RT Act be amended to include the phrase “*unless otherwise specified in this Act*” after the word “includes”.

## 2.4 Tenant’s Copy of Agreement

#### Proposal 26

That the RT Act be amended to reduce the timeframe in which an owner is required to forward a copy of the executed tenancy agreement to the tenant from 21 calendar days to 14 calendar days from when it was signed and returned to the owner/agent by the tenant, or, where that is demonstrably impractical, within such longer period as is practicable.

## **2.5 Property Condition Reports**

### **2.5.1 Compulsory Reports**

**Proposal 27** That the RT Act be amended to require written property condition reports to be completed at the beginning and end of a tenancy agreement.

**Proposal 28** That the RT Act be amended to prescribe the minimum contents to be included in a property condition report.

**Proposal 29** That the RT Act be amended such that if photographic evidence depicting the condition of the property is provided to a tenant as part of a property condition report, no fee may be levied on the tenant in relation to the provision, replacement or return of that photographic evidence.

**Proposal 30** That the RT Act be amended so that any reasonable request for a written property condition report to be completed or updated cannot be denied by either party to a tenancy agreement.

**Proposal 31** That DOCEP make freely available a sample property condition report that may be used by tenants, owners and agents.

### **2.5.2 Completion and Delivery of Property Condition Reports**

**Proposal 32** That the RT Act be amended to allow appropriate timeframes for the completion of property condition reports to be prescribed in the RT Regulations.

**Proposal 33** That the RT Act be amended to impose a penalty for failure by the owner to provide a completed property condition report to the tenant within the prescribed timeframe.

**Proposal 34** That the RT Act be amended to require that tenants (or their representatives) be given a reasonable opportunity to be present to conduct with the owner (or their agent) the final inspection of a property and complete the property condition report at the termination of a tenancy agreement.

## **3. FEES AND CHARGES OTHER THAN RENT AND BONDS**

### **3.1 Rent In Advance**

#### **3.1.2 Ongoing Rent in Advance**

**Proposal 35** That the RT Act be amended to limit the amount of ongoing rent in advance which an owner/agent can require from a tenant at any time during a tenancy, to two weeks' rent, irrespective of the level of rent for the property.

#### **3.2.2 Other Additional Costs**

**Proposal 36** That the RT Act be amended to prohibit owners and agents from requiring a tenant to pay any fee other than those allowed in the Act.

### **3.3 Application and Option Fees**

#### **3.3.1 Disclosure**

**Proposal 37**

That the RT Act be amended to remove the ability to charge option fees.

### **3.4 Utilities Fees**

#### **3.4.1 Disconnection and Reconnection Charges**

**Proposal 38**

That DOCEP conduct community education (and amend DOCEP publications accordingly) to encourage owners and tenants to negotiate and incorporate as terms in the tenancy agreement, the utilities and services that should remain connected to a property for the duration of a tenancy agreement.

#### **3.4.2 Charges for Utilities Consumption**

**Proposal 39**

That the RT Act be amended to prohibit an owner requiring a tenant to pay any utility related fee unless:

- the household's consumption is metered and the fee relates directly to the amount consumed by the tenant; or
- the parties agree to an alternative method of calculation for the cost of unmetered utility consumption as an additional term in the tenancy agreement; and
- that method of calculation is disclosed to the tenant and recorded in the tenancy agreement.

**Proposal 40**

That the RT Act be amended to require that, where an owner passes on a charge by a supplier, the owner must provide the tenant with full account details, including (where appropriate) meter readings, supply charges, common charges, and GST.

**Proposal 41**

That the RT Act be amended to require that where scheme water is unavailable at a property, an owner must disclose this information to a prospective tenant and advise them of the availability of potable water, prior to signing any tenancy agreement with that prospective tenant.

### **3.5 Letting Fees**

**Proposal 42**

No further action is required given that on 5 April 2007 the Government formally re-proclaimed the relevant sections of the *Real Estate Legislation Amendment Act 1995* to prohibit the charging of letting fees to tenants.

### **3.7 Compensation**

#### **3.7.2 Evidence for Compensation of Loss**

**Proposal 43**

That the Magistrates Court application forms for residential tenancy disputes (Forms 6 and 12) be amended to encourage applicants to, where practicable, attach documentary evidence to substantiate claims for compensation associated with loss.

## **4. BONDS**

### **4.1 A Centralised Bond Administrator**

**Proposal 44** That the RT Act be amended to require that all persons/organisations that receive bond monies from tenants lodge those monies with the Bond Administrator (DOCEP).

**Proposal 45** That the RT Act be amended to remove Homeswest's exemption from the requirement to lodge bond monies with the Bond Administrator (DOCEP).

**Proposal 46** That DOCEP and DHW work together to ensure an efficient transition of all public housing tenants' bond monies from Homeswest to the proposed Central Bond Administrator, and agree on guidelines under which Homeswest could apply for a proportion of interest on bond monies for suitable public housing programs.

### **4.2 The Bond Administration Process**

**Proposal 47** That DOCEP continue to monitor the bond administration process and address any inefficiency in a timely manner.

**Proposal 48** That DOCEP develop and implement a community education program to promote the expanded role of the Bond Administrator.

### **4.3. Bond Amount**

**Proposal 49** That DOCEP note the availability of landlord protection insurance in its publications on tenancy issues.

### **4.5 Pet Bonds**

**Proposal 50** That the RT Act be amended to appropriately define the term 'animal'.

**Proposal 51** That the RT Act be amended so that an owner may require a bond for any animal kept by a tenant as a pet.

**Proposal 52** That the RT Act be amended to prohibit an owner requiring a pet bond for an assist animal.

**Proposal 53** That DOCEP research the cost of residential fumigation and the RT Regulations be amended accordingly.

### **4.6 Higher Bonds for Higher Rents**

**Proposal 54** That the amount prescribed for section 29(2)(a) of the RT Act, which allows owners of properties where the weekly rent is \$500 or more to charge any level of bond, be reviewed to take into consideration the changes in market rents since 1987.

### **4.7 Unlimited Bond Amount for Owner's Previous Residence**

**Proposal 55** That section 29(2)(b) of the RT Act be repealed, thereby removing the exemption that enables owners who have lived in a property for the three months prior to it becoming a rental property to charge any amount as a bond.

#### **4.8 Bond Instalments**

**Proposal 56**

That the RT Act be amended to allow community housing providers and Homeswest to receive and lodge bonds in instalments with the Bond Administrator as soon as practical, and within a maximum period of 14 days after receipt from the tenant.

**Proposal 57**

That DOCEP participate in the next bond assistance scheme review conducted by DHW.

#### **4.11 Deposit of Bonds**

**Proposal 58**

That the RT Act be amended to require all persons/organisations that receive bond monies from tenants to deposit bonds with the Central Bond Administrator as soon as practicable, and within a maximum of 14 days of receiving the money.

#### **4.13 Surplus Interest in the Rental Accommodation Fund**

**Proposal 59**

That the RT Act be amended to require the Treasurer to consult with the Minister responsible for the administration of the RT Act prior to allocating any surplus income from the Rental Accommodation Fund to public housing.

#### **4.14 Bonds and Sub-tenancies**

**Proposal 60**

That the RT Act be amended to clarify that bond collection, lodgement, and disposal between head-tenants and sub-tenants is to be regulated in the same way as the process applicable to owners and tenants.

#### **4.15 Bond Recovery**

##### **4.15.2 Default Court Orders**

**Proposal 61**

That the RT Act be amended to require that upon any application to the Magistrates Court under this Act, the respondent be served with notice of the application, advising them to indicate to the Magistrates Court by notice in the prescribed form, whether they intend to dispute the application.

#### **4.16 Fair Wear and Tear**

**Proposal 62**

That DOCEP conduct further community education to provide practical examples of what constitutes “fair wear and tear”, to highlight items which owners cannot lawfully claim reimbursement from tenants, and to inform tenants of their rights when such reimbursements are claimed.

#### **4.18 An Owner’s Bond**

**Proposal 63**

That DOCEP instigate a community education program to advise tenants about their ability to access the dispute resolution system to compel owners to meet their obligations under the RT Act.

**Proposal 64**

That the RT Act be amended to confer upon the Commissioner for Consumer Protection the power to require owners who habitually fail to meet their maintenance obligations under the RT Act, to lodge a security bond with the Bond Administrator that can be accessed by tenants for compensation.

## 5. ISSUES RELATING TO RENT

### 5.1 Setting Rent Levels

**Proposal 65** That there be no introduction of rent level setting or capping in the RT Act.

**Proposal 66** That the Government continue to explore ways of addressing excessive rent levels in regional areas undergoing substantial economic growth.

### 5.2 Amount and Frequency of Rent increases

**Proposal 67** That the RT Act not be amended to prescribe maximum allowable rent increases either directly or indirectly.

**Proposal 68** That the current restriction on the frequency of rent increases of not more than once every six months be retained.

### 5.3 Notice Period for Rent Increases

**Proposal 69** That the current 60-day period of notice required to be given before a rent increase be retained.

### 5.4 Tenancies Where Rent is Calculated as a Percentage of Income

**Proposal 70** That the exemptions for employment-linked tenancy agreements provided in the RT Regulations be retained.

**Proposal 71** That regulation 5C of the RT Regulations be amended to require 60 days notice to be given of any change in the basis of calculating rent (e.g. increase in percentage of income payable as rent) and to limit such increases to once every 6 months.

**Proposal 72** That the RT Act and RT Regulations be amended to exempt public and community housing providers, which charge rent based upon a specified calculation linked to income, from the standard restrictions on rent increases, provided that the specified calculation does not change during the course of a tenancy.

**Proposal 73** That the RT Act and RT Regulations be amended such that public and community housing providers must give 60 days notice of any change in the specified calculation of rent payable, and to limit such changes to once every 6 months.

**Proposal 74** That DOCEP consult further with DHW about the issue of rent increasing due to Homeswest's recalculation of a tenant's *household* income (as opposed to individual income), and that DHW consider introducing mandatory notification of any recalculation of household income.

### 5.5 Challenging Excessive Rent

**Proposal 75** That the grounds for an excessive rent application in section 32(2) of the RT Act be expanded, allowing a tenant, within 30 days of receiving a notice of rent increase, to apply to the Magistrates Court for an order that the proposed rent increase is excessive.

**Proposal 76**

That the RT Act be amended to empower the Magistrates Court to backdate excessive rent orders to the date of a rent increase, or the date that there was a significant reduction in the chattels or facilities provided with the property, subject to consideration of the relative hardship to both the owner and the tenant before making such an order.

**Proposal 77**

That the current ability to challenge excessive rent in section 32(2) of the RT Act be available to tenants at any time during a tenancy, and that the new ground in proposal 5.11 (with its 30-day application time limit) also allow for “out of time” applications to be heard at the discretion of the Magistrates Court.

### **5.6 Varying Rent at the Commencement of a New Tenancy**

**Proposal 78**

That the RT Act be amended to allow rent to be increased at the commencement of a new tenancy that follows a fixed term tenancy, and that owners be required to provide at least 30 days notice of any rent increase to be applied at the commencement of the new tenancy.

### **5.7 Electronic Payment of Rent**

**Proposal 79**

That the RT Act be amended to require that, where rent is paid electronically under an agreement between an owner and tenant, the owner be required to issue to the tenant, on at least a quarterly basis, a statement of such payments that contains the same information as that required to be given on a standard rent receipt.

**Proposal 80**

That the RT Act be amended to require that, unless a term contained in the agreement requires that payment be made in a certain form (or forms), an owner may not restrict a tenant from paying rent in any generally accepted form.

**Proposal 81**

That the RT Regulations be amended to remove Homeswest’s exemption from section 33 of the RT Act, which requires owners to issue receipts for rent, as it is Homeswest’s current practice to issue quarterly statement (thereby negating the need for fortnightly receipts to be issued).

## **6. ACCESS, INSPECTIONS AND QUIET ENJOYMENT**

### **6.1 Tenant’s Right to Quiet Enjoyment**

**Proposal 82**

That the RT Act be amended to impose a penalty for a breach of a tenant’s quiet enjoyment.

**Proposal 83**

That the RT Act be amended to enable a magistrate to make a compensation order in favour of a tenant, if the magistrate deems it appropriate, in addition to sentencing an owner for breach of a tenant’s right to quiet enjoyment.

### **6.2 Tenant Databases**

**Proposal 84**

That the Government monitor the work of the national working party on tenancy database regulation and, if necessary, amend the RT Act as required, if a uniform national approach to database regulation is not settled.

### 6.3 Negotiated Entry

**Proposal 85**

That the RT Act be amended to state that, where an owner is required under the Act to give notice to the tenant before entering the property, the owner is required to make a reasonable attempt to negotiate an appropriate time of entry onto the property, and to take into account the circumstances of the tenant.

### 6.5 Entry and Inspection when Collecting Rent

**Proposal 86**

That the RT Act be amended to remove the owner's current right to inspect the property when collecting the rent.

**Proposal 87**

That the RT Act be amended to limit the number of times an owner/agent may carry out a general inspection of a property to a maximum of once every two months.

### 6.6 Definition of Reasonable Hour

**Proposal 88**

That the RT Act be amended to define the term 'reasonable hour' as being between 8am and 6pm from Monday to Friday inclusive (excluding public holidays), between 9am and 5pm on a Saturday, or at any other time mutually agreed to by both the owner and the tenant.

### 6.7 Time for Inspection

**Proposal 89**

That the RT Act be amended to require that when giving tenants notice of their intention to access a property, owners/agents specify a three-hour timeframe within which the owner/agent/authorised person will enter the property.

### 6.8 Length of Stay on Premises After Entry

**Proposal 90**

That the RT Act be amended to state that any person exercising a right of entry onto a property under the Act:

- must do so in a reasonable manner; and
- must not stay or permit others to stay on the rented property longer than is necessary to achieve the purpose of the entry without acquiring the tenant's consent to do so.

### 6.10 "Home Opens"

**Proposal 91**

That the RT Act be amended to prohibit an owner from requiring a tenant to be absent from the property when an owner/real estate agent is showing prospective purchasers/tenants through a property.

**Proposal 92**

That the RT Act be amended to allow a tenant to apply to the Magistrates Court for an order for compensation against the owner/agent, in the event that the owner, agent, or any other person entering a property with the owner's/agent's permission steals or damages a tenant's goods.

**Proposal 93**

That the RT Act be amended to create a defence and counter-claim for a tenant who is a party to breach-related proceedings, or a party to a bond disposal dispute, that damage to a property was caused by an owner, agent, or any person entering a property with the owner's/agent's permission.

**Proposal 94**

That DOCEP conduct community education among tenants, owners, and agents to increase awareness of the defence and counter-claim in the amended RT Act in relation to damage caused by other persons entering a property with the owner's/agent's permission.

## **7. FITNESS OF PREMISES, MAINTENANCE AND REPAIRS**

### **7.1 Fitness of Premises**

#### **7.1.1 Property/Building Standards**

**Proposal 95**

Through its education program and working in conjunction with tenancy and real estate industry organisations, DOCEP endeavour to increase awareness and understanding among owners and tenants about:

- the rights and responsibilities of owners in relation to building, health and safety standards under all relevant legislation; and
- the right of tenants to make application to the Magistrates Court where an owner fails to carry out their obligations under relevant legislation.

#### **7.1.3 Security**

**Proposal 96**

That the RT Act be amended to permit minimum standards of security to be maintained by the owner of a rental property to be prescribed by regulation.

#### **7.1.4 Appliances and Utility Services**

**Proposal 97**

That the RT Act be amended to require the owner (or agent) to disclose to a prospective tenant whether any of the services, amenities or appliances in the property are not available or functioning, if upon inspection of the property, the tenant might reasonably assume that these services, amenities and appliances are available and/or functioning.

### **7.2 Maintenance and Repairs**

#### **7.2.1 Locks**

**Proposal 98**

That the RT Act be amended to require that, if either party to a tenancy agreement makes a request for the consent of the other party to alter, remove or add any lock or security device to the property, that consent shall not unreasonably be withheld.

#### **7.2.2 Alterations to the Property**

**Proposal 99**

That the RT Act be amended to prohibit a tenant from unreasonably withholding consent to allow an owner to affix any fixture or make any renovation, alteration or addition to the property.

**Proposal 100** That the RT Act prohibit an owner from withholding consent to allow a tenant to install smoke alarms or safety switches in a rental property, provided these items are installed according to all applicable installation standards.

### **7.2.3 Urgent Repairs**

**Proposal 101** That the RT Act be amended so that types of urgent repairs that may be carried out by a tenant, for which the owner will be liable, may be prescribed. It should be specified that the list of examples is not an exhaustive one.

**Proposal 102** That the RT Act be amended to enable a maximum value of allowable “urgent repairs” that may be carried out by the tenant without the owner’s consent, to be prescribed in the RT Regulations.

**Proposal 103** That, along with all other owners, Homeswest’s ability to contract out of section 43 (Compensation where tenant sees to repairs) be removed.

### **7.2.4 Nominated Contractor**

**Proposal 104** That the RT Act be amended to include a requirement that a tenant should take reasonable action to minimise the expense of any urgent repairs undertaken.

### **7.2.5 Damage**

**Proposal 105** That section 38 of the RT Act be amended to require a tenant to notify the owner as soon as practicable of any damage occurring to the property.

### **7.2.6 Ordinary Repairs**

**Proposal 106** That the RT Act be amended to require that an owner conduct all necessary maintenance and repairs within a reasonable period of time.

## **8. TERMINATION**

### **8.1 Termination Without Ground**

**Proposal 107** That the current provisions in the RT Act allowing parties to terminate a tenancy agreement without stating any ground be retained.

**Proposal 108** That the RT Act be amended to allow tenants, upon receipt of a section 64 ‘no ground’ termination notice, to apply to the Magistrates Court for an order extending the time to vacate up to an extra 60 days (i.e. a cumulative total of 120 days from the date of service of the termination notice) on the grounds of undue hardship (an “extension of time order”).

**Proposal 109** That the RT Act be amended to allow a tenant to apply for an extension of time order at any time before day 7 of the section 64 termination notice (i.e. one week into the 60-day notice period).

**Proposal 110** That the RT Act be amended to require the Magistrates Court, in granting an extension of time order, to consider the relative hardship to the private owner and tenant, and have the power to grant compensation if appropriate.

**Proposal 111** That the relevant termination forms be amended to reflect the above changes in the RT Act.

### 8.1.2 Challenging ‘No Ground’ Termination

**Proposal 112**

That the RT Act be amended to make it clear that a tenant, upon receipt of notice of termination, is able to apply to the Magistrates Court for an order against such termination on the ground that the owner was partly or wholly motivated by the fact that the tenant had complained to a public authority or taken to steps to enforce their rights as a tenant.

### 8.2 Sale of the Property

**Proposal 113**

That DOCEP conduct community education in relation to section 63 of the RT Act to:

- (1) reinforce with owners and agents the necessity for a valid contract for sale requiring vacant possession, before a termination notice for a periodic tenancy can be issued; and
- (2) inform tenants of the ability to lodge a complaint with DOCEP if they are uncertain of the truthfulness of a termination notice under section 63.

### 8.4 Expiration of Fixed Term Tenancies

**Proposal 114**

That the RT Act be amended to require that, unless either party gives adequate notice to terminate a fixed-term tenancy, after its expiry date, the fixed-term tenancy rolls over into a periodic tenancy on the same terms as the original agreement (apart from the inherent differences between fixed-term and periodic tenancies).

**Proposal 115**

That the RT Act be amended to require owners to give at least 30 days notice (and no more than a prescribed maximum time period) of termination of a fixed term tenancy. Such notice can be served up to and including the last day of the fixed term, and a tenant cannot be required to vacate the property before the expiry date.

**Proposal 116**

That Schedule 2 (*Information for Tenant*) of the RT Regulations be amended to inform tenants of:

- the notice requirements for termination of fixed-term tenancies; and
- the rights and obligations of owners and tenants following a ‘roll over’ from a fixed-term tenancy into a periodic tenancy.

### 8.5 Termination on Ground of Hardship

**Proposal 117**

That the RT Act be amended to allow:

- a tenant to apply to the Magistrates Court for termination of a fixed-term or periodic tenancy agreement on the ground that they would suffer undue hardship if they were required to terminate the agreement under any other provision of the RT Act; and
- the Magistrates Court to make an order as to the compensation of an owner for any loss caused by such termination.

## 8.6 Termination in Other Circumstances

### 8.6.1 Termination where Mortgagee takes Possession of Premises

**Proposal 118**

That section 81 of the RT Act be amended to require that a tenant receive at least 30 days notice to vacate a property by being served with an order for possession issued in a court action.

**Proposal 119**

That DOCEP consult with the Department of the Attorney General and the Supreme Court to ascertain whether complementary provisions should be included in the *Rules of the Supreme Court 1971 (WA)* to compel mortgagees to serve orders for possession on tenants 30 days in advance of the vacating date.

### 8.6.2 Termination Upon Death of Tenant

**Proposal 120**

That a provision similar to section 127 (Death of 1 of more than 2 tenants) of the *Residential Tenancies Act 1997 (ACT)* be incorporated into the RT Act, such that where one of two or more tenants dies, the tenancy agreement continues to operate with the remaining tenant(s) as sole tenant, joint tenants, or tenants in common, as the case requires.

**Proposal 121**

That a provision similar to section 35 (Recognition of certain persons as tenants) of the *Residential Tenancies Act 1987 (NSW)* be incorporated into the RT Act, such that where a tenant dies or no longer occupies the property, a remaining occupant may apply to the Magistrates Court to be recognised as a tenant under the tenancy agreement.

## 8.7 Abandonment

**Proposal 122**

That the RT Act be amended to set out what constitutes “reasonable grounds” for an owner believing that a property has been abandoned, in similar terms to section 221 of the *Residential Tenancies Act 1994 (Qld)*.

**Proposal 123**

That the RT Act be amended to create a right of access to a property by an owner after serving a *Notice of Entry* (giving 24 hours notice) at the property and at the tenant’s last known place of employment (if applicable), that the owner:

- believes on reasonable grounds that the property has been abandoned;
- intends to enter the property for the purposes of inspecting and making the property secure and safe; and
- may apply to the Magistrates Court for orders declaring abandonment and granting immediate possession.

**Proposal 124**

That the RT Act be amended to require owners to obtain court orders declaring abandonment and granting immediate possession before an owner can recover possession of their property, subject to further consultation with the Magistrates Court.

**Proposal 125**

That the RT Act be amended to allow owners to file an urgent application for an ‘abandonment hearing’:

- which the Magistrates Court is to list within the ‘urgent-hearing timeframe’ (e.g. two business days of filing);
- for which the owner is to serve a copy of the notice of hearing on the tenant at the rental property and the tenant’s last known place of employment (if applicable);

- which the Magistrates Court may delegate to a registrar;
- before which an owner is to attend and present evidence supporting their claim that the property is abandoned;
- where the Magistrates Court may make orders declaring abandonment, granting immediate possession, and requiring the tenant to pay to the owner all money owing under the tenancy agreement;
- after which an owner is to serve a copy of the court orders on the tenant at the rental property and at the tenant's last known place of employment; and
- after which a tenant, who fails to attend the hearing and fails to lodge an application under section 17 (Application to vary or set aside order) of the RT Act, may apply to the Magistrates Court for their section 17 application to be heard 'out of time'.

**Proposal 126**

That the RT Act be amended to require owners to:

- take reasonable care of personal documents (including photographs) abandoned, or otherwise left behind, for a period of 60 days;
- remove and/or store, but not dispose of, personal documents except in accordance with the RT Act; and
- take reasonable steps to notify the (former) tenant as to when and from where personal documents may be collected.

**Proposal 127**

That the RT Act be amended to allow owners to apply to the Magistrates Court for compensation from the Rental Accommodation Fund for the reasonable costs of removal, storage, and tenant notification in relation to personal documents which have been abandoned, or otherwise left behind.

## **9. TENANCY DISPUTES**

### **9.4 Alternatives to the Current Dispute Resolution System**

#### **9.4.2 A Residential Tenancy Tribunal**

**Proposal 128**

That the Review investigate the need for a separate residential tenancy tribunal, while also considering the possibility of empowering a number of Justices of the Peace throughout the State to constitute a Magistrates Court to hear and determine residential tenancy matters.

### **9.5 Representation**

#### **9.5.1 Representation in Court**

**Proposal 129**

That the RT Act be amended to require the Magistrates Court to, upon written authorisation by the party, permit that party to be represented by an agent without regard for the party's ability to appear personally or conduct the proceedings themselves.

**Proposal 130**

That the RT Act be amended to require that where the Magistrates Court permits one party to be represented by an agent, the other party is automatically afforded the same right.

**Proposal 131**

That the RT Act be amended to require that, when one party is to be represented by an agent or legal practitioner:

- if that party is the applicant they are to provide the required authorisation

at the time of the application to the Magistrates Court;

- if that party is the respondent they are to provide the required authorisation at the time they submit a notice of intention to the dispute.

**Proposal 132**

That the RT Act be amended to require that, when one party is to be represented by an agent or legal practitioner, the Magistrates Court notify the other party to the dispute of the intended use of representation as soon as possible following receipt of authorisation/notice.

**Proposal 133**

That the relevant court forms be amended to reflect the changes in the proposals concerning representation of parties.

### **9.5.2 Tenant Advocacy Services**

**Proposal 134**

That the RT Act be amended to make it clear that funding can be allocated to tenant advocacy services from any surplus in the Rental Accommodation Fund.

### **9.7 Timeframes for Hearings**

#### **9.7.2 Urgent Hearings**

**Proposal 135**

That the RT Act be amended to require that wherever practicable, urgent matters (the nature of which will be prescribed by regulation) be heard by the Magistrates Court within two business days of receipt of the application by the Magistrates Court or such other period as is prescribed.

**Proposal 136**

That the RT Act be amended so that in instances where matters require urgent hearing the Magistrates Court may convene for the purposes of issuing interim orders where applicable.

**Proposal 137**

That research be conducted by DOCEP to determine the nature of matters to be prescribed in the Regulations as requiring to be heard by the Magistrates Court as urgent matters within two business days.

### **9.8 Joining a Third Party**

**Proposal 138**

That the RT Act be amended to include a provision enabling the joining of a third party to residential tenancy disputes.

### **9.9 Co-tenants in Shared Tenancies**

**Proposal 139**

That the RT Act be amended to include a definition for the term 'co-tenant'.

**Proposal 140**

That the RT Act be amended to allow a co-tenant to make application to the Magistrates Court in respect of a dispute with another co-tenant, provided that:

- the dispute is likely to significantly disadvantage one co-tenant over the other due to their joint and several liability;
- any such application does not as a matter of course require the involvement of the owner or their property manager; and
- any such application does not disadvantage the owner by delaying or reducing the payment of any amount owed to him/her by the tenants.

### **9.10 Place of Proceedings**

**Proposal 141**

That the RT Act be amended to enable a magistrate or a registrar of the Magistrates Court to alter the venue of proceedings where it is deemed fair and reasonable to do so.

## **9.11 Service of Documents**

### **9.11.1 Advertising**

**Proposal 142**

That section 85 of the RT Act be amended to enable the Magistrates Court to order publication of a notice in an alternative newspaper if there are grounds to believe that the respondent is residing interstate.

**Proposal 143**

That the RT Act be amended to enable the Magistrates Court to extend the response periods associated with filing of dispute notices, in situations where the Court believes it is warranted.

### **9.11.2 Restrictions on Service**

**Proposal 144**

That section 85(1)(b) of the RT Act be amended to enable the service of notices to also be made at any other address where mail may be directed.

## **10. COMPENSATION AND PENALTY PROVISIONS**

### **10.1 Previous Breaches of Agreement by Owner**

**Proposal 145**

That section 15(4) of the RT Act be amended to require the Magistrates Court, upon application with respect to the breach of an agreement, to take into account all previous breaches of the agreement by the owner and the tenant.

### **10.3 Referral for Investigation**

**Proposal 146**

That the RT Act be amended to state that a court may, separate to the determination by the court of a residential tenancy matter, refer the matter to the Commissioner for Consumer Protection for investigation of any possible breach of the RT Act.

### **10.4 Signing an Incomplete Form 4 (Joint Application for Disposal of Security Bond)**

**Proposal 147**

That the RT Act be amended to prohibit and make it an offence for a party to request another party to sign an incomplete Joint Application for Disposal of Security Bond, and that this prohibition be stated on the prescribed Form 4.

### **10.5 Infringement Notices**

**Proposal 148**

That the RT Act be amended to extend to six months the period within which an infringement notice can be issued after the day on which the alleged offence is believed to have been committed.

**Proposal 149**

That the RT Act be amended to articulate the penalties applicable to bodies corporate.

**Proposal 150**

That DOCEP undertake a general review of the level of existing penalties in the RT Act.

### **10.6 Plain English**

**Proposal 151**

That, to the extent possible consistent with the drafting responsibilities of Parliamentary Counsel, the RT Act be reworded in plain English.

### **10.7 Gender Specific References**

**Proposal 152**

That the RT Act be amended to replace all gender-specific references with gender-neutral references.

### **10.8 Computation of Time**

**Proposal 153** That the RT Act be amended to simplify the computation of time in reference to notices of termination and breach.

### **10.9 Forms 1A, 1B & 1C**

**Proposal 154** That Forms 1A, 1B, 1C, 6 and 12 be reviewed and updated to reflect the amendments to the RT Act, to make them more comprehensible and to provide as much information as practicable to assist tenants and owners in their use.

### **10.10 Notice of Intent to end a Fixed Term Tenancy**

**Proposal 155** That DOCEP develop a form for use by owners to notify their tenants of their intention to end the tenancy agreement at the end of a fixed term period.

### **10.11 Definition of “Agent”**

**Proposal 156** That the RT Act be amended to define ‘owner’s agent’ and ‘property manager’ (or such other terms as appropriate), and to create relevant offences arising from the conduct of these entities.

**Proposal 157** That the RT Act be amended to enable both owners and owners’ agents/property managers to be held separately liable for any relevant breaches of the RT Act.

**Proposal 158** That the RT Act be amended to provide a defence in a joint prosecution of an owner and their agent/property manager, where one defendant did not have knowledge of, or consent to, the conduct of the other defendant giving rise to the offence.



## 1. APPLICATION OF THE ACT

[Note to reader: Stamfords' recommendations:

- 12, 13 and 14 are addressed in chapter 5.4 (Tenancies Where Rent is Calculated as a Percentage of Income);
- 15 is addressed in chapter 5.7 (Electronic Payment of Rent); and
- 16 is addressed in chapter 9.9 (Co-Tenants in Shared Tenancies) in this Paper.]

### 1.1 Structure and Objectives of the Act

#### **Stamfords' Recommendation 1**

*That the current legislative structure and objectives of the Act be retained.*

#### **Background Discussion**

The *Residential Tenancies Act 1987* (RT Act) is currently structured into seven distinct Parts as follows:

- Part I – Preliminary;
- Part II – Administration;
- Part III – Determination of disputes;
- Part IV – Rights and obligations of owner and tenant;
- Part V – Termination of residential tenancy agreements;
- Part VI – Miscellaneous; and
- Schedule 1 – Provisions relating to holding and disposal of security bonds and the income therefrom.

Residential tenancy acts in other Australian jurisdictions are structured in a variety of ways, such as: dispute resolution provisions appearing near the end of the Act; headings such as “Rent”, “Bonds”, and “Abandoned Goods” being used to highlight these topics; and separate Parts dealing with “Rooming Houses” and “Caravan Parks and Movable Dwellings”.

In relation to objectives, the Stamfords Report noted that the current objective of the RT Act is:

“to establish the principle of fair dealing between landlords and tenants and to provide a cheap, speedy mechanism for resolving disputes”.<sup>4</sup>

In Phase 1 of the Review of the *Residential Tenancies Act 1987* (the Review), general support was received for the broad legislative structure and objectives of the RT Act.<sup>5</sup>

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<sup>4</sup> Stamfords' Report, p. 50. Quotation is derived from: Western Australian Parliament, *Parliamentary Debates (Hansard)*, Vol 267, p. 5390 (29 October 1987).

<sup>5</sup> Stamfords' Report, p. 50.

## **Summary of Responses**

REIWA and POA supported the recommendation. The Park Home Owners Association WA Inc. opposed the recommendation. TAS agreed that the current legislative structure was generally appropriate, however, submitted that additional Parts needed inclusion to protect parties with particular interests (e.g. caravan parks, boarding/lodging houses). In addition, TAS argued that the objective of the RT Act be amended to include matters such as the international human right to housing, and the need to protect the home as a secure place to live with human dignity, physical and mental health. TAS suggested that a more detailed objective would assist with the interpretation of the RT Act.<sup>6</sup> Shelter WA supported the recommendation, however, believed that the RT Act needed a preamble containing the purpose of the RT Act and mentioning the international agreements to which Australia is a signatory.<sup>7</sup>

## **Policy Position**

Following the public release of the Stamfords Report in 2002, the Government developed the *Residential Parks (Long-Stay Tenants) Act 2006* (RPLST Act) to address the issues arising from the application of the RT Act to park home tenancies. The RPLST Act replicates a number of the standard laws in the RT Act.

It is acknowledged that the RT Act may be improved in terms of legislative structure, and proposes that DOCEP together with Parliamentary Counsel review the structure after the policy position on all amendments to the RT Act are finalised. The revised structure in the RPLST Act may serve as a helpful guide in this process.

Stamfords has highlighted a particular ‘objective’ of the RT Act. This objective (and any other wording), however, serves minimal assistance in the interpretation of the provisions in the RT Act, as it is derived from a speech made before Parliament. In real terms, the long title of an Act embodies that Act’s objective. In the event that any major policy shifts result from this review process, it is proposed that the long title of the RT Act be rewritten to reflect these changes.

### **Proposal 1**

That, after the policy position on all amendments to the RT Act are finalised, DOCEP work together with Parliamentary Counsel to make any necessary changes to the structure and long title of the RT Act.

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<sup>6</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 8 – 9.

<sup>7</sup> Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 2.

## 1.2 Boarders and Lodgers

### **Stamfords' Recommendation 2**

*That the exemption of boarders and lodgers from the Act be removed.*

### **Stamfords' Recommendation 3**

*That the Act contain a definition of "boarder and lodger".*

### **Stamfords' Recommendation 4**

*That the Act take into account the particular nature of a boarding/lodging arrangement by incorporating the list of variations for boarding houses contained in the Commonwealth Minimum Legislative Standards.*

### **Stamfords' Recommendation 5**

*That tenancies where the boarder or lodger is living in the principal place of residence of the owner continue to be exempt from the Act, provided that the number of boarders or lodgers living in the premises does not exceed two.*

### **Stamfords' Recommendation 6**

*That DOCEP conduct further research and consultation to obtain the views of relevant stakeholders regarding the proposed inclusion of boarders and lodgers in the Act, and endeavour to ensure that the proposed provisions for (and definition of) boarders and lodgers adequately take into account any concerns raised.*

## **Background Discussion**

The boarding house sector plays an important role in providing accommodation, particularly for low-income people, those with physical, psychiatric and intellectual disabilities, and other vulnerable groups within society.

People are attracted to boarding house accommodation for a number of reasons, including low establishment costs, low rental, location, and companionship. Some residents may also find it difficult to commit to a lease and prefer the flexible arrangements that boarding houses offer over the private rental market.

Boarding houses are often a housing option of last resort for disadvantaged people, and there is potential for residents to be subjected to coercive practices by boarding house operators, as well as inadequate housing conditions.

It is clear that the nature of boarding house accommodation is different to general residential tenancies, and the standard provisions of the RT Act may not be appropriate for boarding house situations. Boarding houses may provide services such as meals, laundry and personal care, leading to additional fees and charges being imposed on residents. Adherence to a set of house rules may also be a requirement of boarding house accommodation. In particular, the ability for boarding house operators to immediately evict boarders who are violent, under the influence of alcohol or illegal drugs, or causing a disturbance may be considered necessary, given that residents are living in close proximity and sharing facilities.

There has been substantial decline in recent years in the number of boarding houses in inner city areas within Australia.<sup>8</sup> The reasons cited for this decline range from the impact of GST and rising costs of insurance, to pressures on urban land usage. Increased regulation was also suggested as being a threat to the viability of boarding houses. Decreasing supply of boarding house accommodation is a concern for residents, the community-housing sector and government.

The RT Act does not currently apply to any residential tenancy agreement where the tenant is a boarder or lodger.<sup>9</sup> The failure to afford protection under the RT Act means that boarders and lodgers may be left without standard lease conditions, and may be evicted from their homes without notice or due process.

Residents of boarding houses in Western Australia come under the umbrella of the *Fair Trading Act 1987 (WA)*, and the *Consumer Affairs Act 1971 (WA)* as “consumers”, and may also have recourse to common law remedies. However, it is unlikely that boarders and lodgers, who may be vulnerable people on low incomes, have the capacity to follow through on lengthy and complicated court processes to uphold their common law rights.

Advice received from the Magistrates Court indicated that while boarders and lodgers may commence a Minor Cases Procedure claim in the Magistrates Court if the dispute involves a claim for debt or damages up to \$7,500, their rights are unclear with regard to disputes involving entitlement to occupy a property.

The terms “boarder” and “lodger” are not defined in the RT Act, resulting in ambiguity as to the residential tenancy agreements that are specifically excluded from the Act. Traditionally, “board” was considered to be the provision of accommodation and meals, and lodging referred to the provision of a room only. This distinction no longer applies and the terms boarding, lodging and rooming houses are often used interchangeably.

In particular, the distinction between a boarder/lodger and sub-tenancies is not clear, as both may involve renting part of a property and sharing of common facilities. This raises concerns, as sub-tenants are protected under the RT Act and boarders/lodgers are not. There is potential for unscrupulous owners to exploit the lack of a definition of boarders/lodgers, in an effort to avoid having to comply with the provisions of the RT Act.<sup>10</sup>

Boarders and lodgers are provided with protection under residential tenancy legislation in four Australian jurisdictions as summarised in the table below. In South Australia and Victoria, provisions for boarders and lodgers are contained within a separate section of the principal residential tenancy legislation, whereas in Queensland most boarders and lodgers are protected under a specific Act.

In the corresponding South Australian and Victorian legislation, the term “rooming house” and “rooming house resident” is used rather than “boarding house” and “boarder/lodger”.

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<sup>8</sup> Australian Housing and Urban Research Institute March 2004, *Boarding Houses and Government Supply Side Intervention*, p.2.

<sup>9</sup> Section 5(2)(d), RT Act (WA).

<sup>10</sup> As has been demonstrated in the following case: *Landers v Voulon & Temple of Bel Pty Ltd*, 2004, Magistrates Court WA. For details, refer to DOCEP’s media release titled “Landlord fined a record \$44,000” dated 12 August 2005 at:

<[http://www.docep.wa.gov.au/Corporate/Media/statements/2005/August/Landlord\\_fined\\_a\\_rec.html](http://www.docep.wa.gov.au/Corporate/Media/statements/2005/August/Landlord_fined_a_rec.html)>

Table 1. Regulation of boarders and lodgers in other jurisdictions

<i>Australian jurisdiction</i>	<i>Application of residential tenancy legislation to boarders and lodgers</i>
ACT	No
NSW	No
NT	Yes The <i>Residential Tenancies Act 1999</i> (NT) applies where a person is one of three or more persons who boards or lodges at the residence. (Section 4 of <i>Residential Tenancies Regulations</i> )
QLD	Yes The <i>Residential Services (Accommodation) Act 2002</i> (Qld) applies to residential services where accommodation is provided for four or more residents and rooms and facilities are not self-contained.
SA	Yes Part 7 of the <i>Residential Tenancies Act 1995</i> (SA) provides for mandatory codes of conduct for rooming house proprietors and rooming house residents to be prescribed by regulation.
TAS	No
VIC	Yes Part 3 of the <i>Residential Tenancies Act 1997</i> (Vic) provides for comprehensive tenancy rights and duties for rooming house residents.

### **Summary of Responses**

Stamfords' recommendation 2, to remove the exemption of boarders and lodgers from the RT Act, was not opposed by stakeholder groups. It was suggested by tenant advocacy groups that removal of the exemption of boarders and lodgers from the RT Act would alleviate vulnerability and assist boarders and lodgers in obtaining secure accommodation. TAS<sup>11</sup> and Shelter WA<sup>12</sup> stressed that the boarding and lodging sector houses some of the most marginalised people in the community, providing a housing option of last resort for very disadvantaged people on low incomes in inner city areas.

The Country High School Hostels Authority<sup>13</sup> recommended in its submission that the RT Act should specifically define those boarding facilities that are exempt (refer to chapter 1.3 for further discussion).

<sup>11</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, pp. 9-10.

<sup>12</sup> Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, pp. 2-3.

<sup>13</sup> Country High Schools Hostels Authority, *Submission to the Review of the RT Act*, Dec 2002.

Both tenant and owner advocacy groups supported recommendation 3, to include a definition of “boarders” and “lodgers” in the Act, with TAS suggesting that the characteristics of the definition should include those established in common law. Shelter WA recommended that further consultation be conducted to determine an appropriate definition.

Consultation carried out with tenant advocacy groups in Phase 1 of the Review indicated that boarding and lodging house tenancy arrangements are substantially different to other types of tenancy agreements and caution should be taken before removing the exemption of boarders and lodgers from the RT Act.

Shelter WA and TAS recommended that a separate part of the RT Act be incorporated to address the specific rights and obligations of parties to boarding/lodging house agreements. This is consistent with provisions for boarders and lodgers contained in South Australian and Victorian tenancy legislation.

Several stakeholders, including REIWA<sup>14</sup> and POA,<sup>15</sup> supported recommendation 4, that the RT Act incorporate the list of variations for boarding houses contained in the *Commonwealth Minimum Legislative Standards*.<sup>16</sup> TAS supported the recommendation in principle, however, opposed the variation allowing for termination without ground. Shelter WA recommended further consultation to determine the variations that should apply.

POA, REIWA and MIDLAS<sup>17</sup> supported recommendation 5 to allow boarders and lodgers living in the principal place of residence of the owner to continue to be exempt from the Act, provided the number living in the premises does not exceed two. TAS and Shelter WA recommended that further consultation be conducted with regard to this recommendation.

### **Policy Position**

The Review recognises and fully supports the need to provide boarders, lodgers and boarding house owners with a set of rights and responsibilities that are embodied in the RT Act, however, it is also cognisant of the differences inherent in boarding house tenancies and the need to accommodate these differences.

It is important to work towards providing protection for boarders and lodgers, and preserving some level of flexibility for owners, within the RT Act, however, further consultation is considered crucial before developing an appropriate model for the variations from standard tenancy provisions that will be incorporated. In determining its position, the Government will take into consideration the list of variations for boarding houses contained in the *Commonwealth Minimum Legislative Standards*.<sup>18</sup>

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<sup>14</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p.4.

<sup>15</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p.1.

<sup>16</sup> Kennedy Robyn, Peter See and Peter Sutherland, 1995, *Minimum Legislative Standards for Residential Tenancies in Australia*, Report prepared for the Commonwealth Department of Housing and Regional Development, Australian Capital Territory p.92.

<sup>17</sup> MIDLAS, *Submission to the Review of the RT Act*, Dec 2002, p.2.

<sup>18</sup> Kennedy, op. cit., p. 92.

The Review acknowledges that submissions were not received from either boarding house operators or boarders/lodgers in the consultation stages of the Review. It is proposed that a targeted consultation programme is therefore necessary to identify the key issues and concerns of owners and tenants likely to be affected by the introduction of regulation of the boarding house sector. In addition, feedback from DOCEP's Indigenous Community Education Team indicates that consultation with stakeholder groups such as Aboriginal Hostels Limited, and other community organisations operating hostels, is necessary and will assist the Government in identifying some of the issues that relate to this type of accommodation.

In the interim, the Review intends to remove ambiguity with regard to the application of the RT Act, by amending the Act to incorporate a definition of "boarders" and "lodgers" (or some other term as appropriate). The Government will canvass stakeholder groups to ensure that the definition embodies the terminology in use in the sector. The definition will be broad enough to include boarders and lodgers in boarding, rooming and lodging houses in the private, public and community sectors, but will exclude short-term boarding style accommodation which falls within the holiday accommodation exemption (discussed in chapter 1.4 below). It is not intended to include under the definition of boarder/lodger the type of tenancy situation where two or less boarders or lodgers live in the principal place of residence of the owner.

#### **Proposal 2**

That DOCEP conduct targeted research and consultation to identify the issues and concerns of stakeholders within the boarding house sector, regarding the proposed inclusion of boarders and lodgers within the RT Act.

#### **Proposal 3**

That the RT Act be amended to include a definition of "boarders" and "lodgers" (or such other term as appropriate).

### **1.3 Educational Institutions**

#### **Stamfords' Recommendation 7**

*That the current exemption of educational institutions from the Act be retained, but qualified to exclude accommodation that is not considered to be a college or 'hall of residence'.*

## **Background Discussion**

The RT Act does not apply to “any part of an educational institution”.<sup>19</sup> The Stamfords Report explained that the nature of an educational institution-provided tenancy is unique in that it may be dependant upon a student’s enrolment at an institution, and that additional academic, social, religious, and counselling services may be provided as part of the accommodation.<sup>20</sup>

The Stamfords Report also mentioned another type of educational institution-provided accommodation comprising flats (on or off campus) owned or operated by the institution, but rented to private tenants (who may happen to be students or staff at the institution). It was believed that these types of tenancies bear no material difference to a conventional tenancy in the private rental market.<sup>21</sup>

Residential tenancy legislation in the Australian Capital Territory, New South Wales, Queensland, South Australia, and Victoria all provide exemptions for educational institutions.<sup>22</sup> The Victorian RT Act provides a broad exemption for:

- “(a) any premises used as a school or for education and training purposes; or
- (b) any residential premises ancillary to a school or an institution which provides education and training if those premises –
  - (i) are owned or leased by the school or the institution or formally affiliated with the school or institution; and
  - (ii) are used to accommodate students or staff using the premises referred to in paragraph (a)”<sup>23</sup>.

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<sup>19</sup> Section 5(3)(b).

<sup>20</sup> Page 61.

<sup>21</sup> *ibid.*

<sup>22</sup> RT Act (ACT) section 6F; RT Act (NSW) section 6; RT Act (Qld) section 23; RT Act (SA) section 5; RT Act (Vic) section 21.

<sup>23</sup> RT Act (Vic) section 21(1).

In Queensland, however, the RT Act (QLD) applies if the property is a person's place of residence under their employment at the institution.<sup>24</sup> In addition, the application of tenancy laws to student accommodation has been a topical issue in Queensland in the last few years due to increased demand (particularly from international students), developer activity, and investor perceptions of profitability.<sup>25</sup> Following the conduct of a *Student Accommodation Research Project* in February 2003, the Queensland Parliament clarified in May 2004 that the *Residential Services (Accommodation) Act 2002* (Qld) (RSA Act) applied to independently operated student accommodation.<sup>26</sup> The RSA Act was originally intended to regulate operators of properties housing people who were vulnerable because of disability or age. However, domestic and international students were also found to be vulnerable due to their lack of knowledge and understanding of rights and responsibilities of tenancy laws. It was concluded that because of the important advice and information role played by various participants in the student accommodation sector, and the information vulnerability of students, a clear framework of rights and responsibilities was needed as a basis for community education initiatives.<sup>27</sup>

Feedback from DOCEP's Building and Tenancy Industries Branch indicates that almost no complaints are received from students in relation to student housing.

### **Summary of Responses**

TAS and Shelter WA both opposed the recommendation. TAS argued that the exemption for educational institutions, including colleges and 'halls of residence', should be removed. TAS reiterated issues it raised in Phase 1 of the Review, such as a concern for students who might suffer arbitrary eviction without recourse to fair procedure; and academic results being withheld for reasons related to accommodation. TAS recommended incorporation of specific provisions in the RT Act in relation to colleges and 'halls of residence' (similar to boarding/lodging houses and caravan parks).<sup>28</sup> Similarly, Shelter WA believed that the exemption for educational institutions should be removed, and replaced with the same laws to be developed for boarding and lodging houses.<sup>29</sup>

POA and the Country High School Hostels Authority (CHSHA) both supported the recommendation. The CHSHA noted that the recommendation appeared to exempt 'residential colleges' such as those operated by itself and a number of private providers. It explained that these 'residential colleges' provide a boarding service to the parents of primary and secondary school students. The CHSHA recommended that the RT Act prescribe 'exempt boarding facilities', and that this exemption include all boarding schools, hostels, residential colleges etc., which provide housing for primary/secondary school students, as well as TAFE and tertiary students who are treated by the Government as dependants of their parents.<sup>30</sup>

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<sup>24</sup> RT Act (Qld), section 23(2).

<sup>25</sup> Queensland Residential Tenancies Authority Jan 2005, *Discussion Paper for the review of the Residential Services (Accommodation) Act 2002*, p. 1.

<sup>26</sup> *ibid*, p. 3.

<sup>27</sup> Queensland Residential Tenancies Authority February 2003, *Student Accommodation Research Project*, pp. 4-6.

<sup>28</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 11.

<sup>29</sup> Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, pp. 3-4.

<sup>30</sup> CHSHA, *Submission to the Review of the RT Act*, 11 Dec 2002.

The Valuer General's Office (VGO), Department of Land Administration (as it was then called) mentioned that many projects involving 'student housing' are presently being considered by private enterprises near universities and colleges. The VGO assumed that the RT Act would apply to these student housing projects which are privately owned.<sup>31</sup>

### **Policy Position**

The Review agrees with Stamford's assessment that educational institution-provided accommodation is unique in that it is often linked with enrolment of students and a wide range of additional services provided for the benefit of students. Although the concerns of TAS and Shelter WA about the current exemption are noted, DOCEP has received little indication that student housing is a problem area in tenancy disputes. In addition, the Review is wary of regulating these types of tenancies under the RT Act, given that other legislation exists to govern educational institutions and various forms of student housing; and educational institutions provide their own tailored policies and procedures in relation to student housing.

The Review further agrees with the Stamford's recommendation that the exemption be qualified to exclude non-college/'hall of residence' accommodation. In the event that educational institutions own and operate properties which are rented out irrespective of a student's enrolment at the institution, and do not provide additional support services, the Review believes these tenancies should be covered by the RT Act, as they closely resemble standard tenancies.

In addition, the Review notes the emerging problems in Queensland in relation to independently owned student accommodation; the WA VGO's comments about expansion in investment in this sector; and the CHSHA's submission about accommodation provided to minors. There are two distinct issues concerning independently owned and/or operated student accommodation: (1) operators may consider themselves exempt from the application of the RT Act via arguments that they are 'part of an educational institution' (if they have a written agreement with the institution to provide accommodation); and (2) operators may provide room-only accommodation which may fall within future boarder/lodgers laws.

In relation to the first issue, the Review believes that independently owned and/or operated (where the educational institution owns and leases the land to an operator) student accommodation, which is conducted on a for-profit basis, should fall within the scope of the RT Act.

In relation to the second issue, the Review believes the provision of student accommodation and any future boarding/lodging laws are inter-linked, and therefore proposes that DOCEP consult affected stakeholders in the student accommodation industry in formulating appropriate laws for the boarding/lodging house sector (see chapter 1.2 for further discussion).

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<sup>31</sup> Regulation and Valuation Research Branch, Valuer General's Office, Department of Land Administration, *Submission to the Review of the RT Act*, 1 Nov 2002, p. 1.

#### **Proposal 4**

That the current exemption of “any part of an educational institution” from the RT Act be retained, but qualified to exclude:

- accommodation which is not a college, ‘hall of residence’, or similar class (i.e. accommodation that is not contingent upon a student’s enrolment at the educational institution); and
- accommodation which is independently owned and/or operated, irrespective of whether the operator has a written agreement with an educational institution, and provided on a for-profit basis.

#### **Proposal 5**

That DOCEP consult with affected stakeholders in the student accommodation industry in formulating appropriate laws for the boarding/lodging house sector.

### **1.4 Residents of Accommodation Intended for Holiday Use**

#### **Stamfords’ Recommendation 8**

*That the current exemptions of:*

- *agreements that are entered into for the purpose of a holiday; and*
- *any part of a hotel or motel, be retained.*

#### **Stamfords’ Recommendation 9**

*That DOCEP conduct further community education to inform owners, tenants, and agents of the operation of the sections of the Act that determine whether or not an agreement has been entered into for the purposes of a holiday.*

### **Background Discussion**

The RT Act does not apply to any residential tenancy agreement entered into for the purposes of a holiday,<sup>32</sup> or any part of a hotel or motel.<sup>33</sup> In determining whether or not an agreement is entered into for the purposes of a holiday, the RT Act states at section 5(4):

“an agreement conferring a right to occupy premises for a fixed term of 3 months or longer shall be deemed, in the absence of proof to the contrary, not to have been entered into *bona fide* for the purpose of conferring a right to occupy the premises for a holiday”.

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<sup>32</sup> Section 5(2)(e), RT Act (WA).

<sup>33</sup> Section 5(3)(a), RT Act (WA).

The Stamfords Report commented that the wording of the above provision caused confusion among stakeholders as to what constituted ‘holiday accommodation’, however, concluded that community education was preferable to amending the RT Act to dispel any confusion.<sup>34</sup>

In December 2006, Parliament passed an amendment to the *Real Estate and Business Agents Act 1978* (REBA Act) to exempt holiday accommodation managers from the need to be licensed under that Act. The exemption, which at the time of printing has yet to come into effect, is made on the basis of the nature of the premises being rented (i.e. premises ordinarily used for holiday accommodation) rather than the purpose for which tenants use the accommodation. Focussing on the nature of the accommodation allows such premises to be used for any short-stay (three months or less) purpose (e.g. conferences) not just holidays.

In relation to the exemption in the RT Act for ‘any part of a hotel or motel’, tenant advocacy groups contended in Phase 1 of the Review that the exemption disadvantaged long-term residents of hotels and motels, and submitted that the RT Act should apply to tenancy agreements where a person was intending to reside in a hotel or motel for longer than 3 months. The Stamfords Report did not support the removal of this exemption on the basis that:

- hotel and motel accommodation was less likely to be accommodation of last resort; and
- the vast majority of hotel and motel residents were short-term residents.<sup>35</sup>

DOCEP’s Building and Tenancy Industries Branch does not appear to have received any complaints from residents of hotels or motels.

### **Summary of Responses**

The Australian Hotels Association, REIWA, POA, and MIDLAS supported recommendation 8. TAS supported the first part of recommendation 8 that the RT Act continue to exempt ‘holiday accommodation’, however, opposed the second part.<sup>36</sup> TAS submitted that a hotel/motel could constitute a person’s principal place of residence, particularly in regional areas, and referred to section 20 of the Victorian RT Act which deems that Act to apply to fixed term tenancies of more than 60 days in motels or licensed premises.<sup>37</sup>

Shelter WA similarly opposed the second part of recommendation 8 by reiterating that hotels/motels could constitute a person’s principal place of residence, and with the decline of boarding/lodging house availability, some hotels/motels were becoming accommodation of last resort. Shelter WA recommended removing the exemption for hotels/motels and treating long-term residents (e.g. more than 60 days occupation) as boarders/lodgers.<sup>38</sup>

All respondents to recommendation 9 supported the proposal that DOCEP conduct further community education.

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<sup>34</sup> Page 63.

<sup>35</sup> Page 62.

<sup>36</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 11.

<sup>37</sup> Section 20, RT Act (Vic). Note: ‘licensed premises’ are premises licensed under the *Liquor Control Reform Act 1998* (Vic).

<sup>38</sup> Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 4.

## **Policy Position**

As all stakeholders agreed with the current exemption in the RT Act for 'holiday accommodation', the Review proposes to retain this exemption. As the wording of the exemption may give rise to confusion, it is proposed to re-word the exemption to be consistent with the exemption of holiday accommodation managers under the REBA Act.

In relation to the exemption for 'any part of a hotel or motel', there seems insufficient evidence to warrant the complete removal of this exemption. To do so might have unintended consequences of imposing a strict regulatory regime over an industry where accommodation is predominantly of a temporary and very short-term nature. The Review notes the points raised by tenant advocacy groups that some people may occupy hotels/motels as their principal place of residence, and therefore it is proposed that DOCEP consult with relevant stakeholders in order to ascertain whether these residents might require coverage under any future boarding/lodging laws.

### **Proposal 6**

That the current exemptions in the RT Act for:

- agreements that are entered into for the purpose of a holiday; and
- any part of a hotel or motel,  
be retained.

### **Proposal 7**

That RT Act be amended to exempt all short-stay agreements (i.e. for three months or less) at premises ordinarily used as holiday accommodation.

### **Proposal 8**

That DOCEP consult with relevant stakeholders in order to ascertain whether people residing in hotels/motels as their principal place of residence should be covered under any future boarding/lodging laws.

## 1.5 Bodies Corporate

### **Stamfords' Recommendation 10**

*That the Act define "company" to mean a company established under the Corporations Act 2001 (Cth), and not an organisation incorporated under the Associations Incorporation Act 1987 (WA) or the Aboriginal Councils and Associations Act 1976 (Cth) (and other relevant legislation).*

### **Stamfords' Recommendation 11**

*That, prior to any amendment being made to the definition of "company" in the Act, DOCEP consult relevant Aboriginal people's stakeholder groups to ensure that any relevant concerns of these groups are obtained and addressed.*

## **Background Discussion**

Section 5(2)(c) of the RT Act provides that the RT Act does not apply to any residential tenancy agreement:

- “where the agreement arises under a scheme under which –
- (i) a group of adjacent premises is owned by a company; and
  - (ii) the premises comprising the group are let by the company to persons who jointly have a controlling interest in the company”.

The Stamfords Report commented that this exemption might apply to some community housing providers and housing cooperatives, including a number of Indigenous communities that form corporations and lease accommodation to members of the community. It was explained that section 62 of the *Aboriginal Councils and Associations Act 1976 (Cth)* states that certain provisions of the *Corporations Act 2001 (Cth)* apply to Incorporated Aboriginal Associations (IAAs), and that, in such circumstances “a reference to a company shall be read as a reference to an Incorporated Aboriginal Association” (section 62(a)).<sup>39</sup>

Proceeding on the assumption that the reference to the word ‘company’ in section 5(2)(c) of the RT Act includes IAAs, the Stamfords Report concluded that the RT Act should be amended to narrow the exemption so as *not* to apply to IAAs. It was argued that residents in accommodation run by IAAs are being deprived of the basic rights and protections conferred by the RT Act.<sup>40</sup>

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<sup>39</sup> Page 64.

<sup>40</sup> Pages 64 – 65.

Discussion with DOCEP's Indigenous Community Education Team and further research reveals that the question of whether or not the RT Act applies to an IAA, or other type of Indigenous community/co-operative housing, is not easily answered. The issues to be considered in such an analysis include:

- Who is the owner of the land?
- Who is the owner of the premises/buildings?
- Who has day-to-day control of the premises/buildings?
- Is the owner of the premises/buildings a 'company'?
- Do all the residents have a controlling interest in the 'company'?

The provision of Indigenous housing in WA is a complex scenario involving:

- (1) some land being held by the Aboriginal Lands Trust;
- (2) the pooling of all Commonwealth, (the then) Aboriginal and Torres Strait Islander Commission (presumably now the Office of Indigenous Policy Coordination, Department of Immigration and Multicultural and Indigenous Affairs), and state housing and infrastructure funding which is now allocated using a single policy framework;
- (3) the formation in 2002 of the WA Aboriginal Housing and Infrastructure Council (AHIC) under the Indigenous Housing Agreement to, among other things, implement housing and infrastructure programs;
- (4) the provision by the Aboriginal Housing and Infrastructure Directorate, Department of Housing and Works, of programme management and secretariat support to AHIC;
- (5) the involvement of Regional Councils in formulating business plans for each region's housing and infrastructure construction, maintenance, and management (e.g. Kullari Regional Council for the Broome area); and
- (6) the Indigenous community and regional organisations themselves (e.g. the Kullari Regional Council represents 8 organisations, such as the Djarindjin Aboriginal Corporation, Beagle Bay Community Inc., Lombadina Aboriginal Corporation).<sup>41</sup>

In 2004, DOCEP's Indigenous Community Education Team consulted with regional and metropolitan Indigenous service providers and advocates throughout WA to, among other things, identify key issues affecting Indigenous consumers.<sup>42</sup> It was discovered at one regional town that residents were unsure as to whether the RT Act applied to their tenancies. An issue of particular concern was the inability to determine which entity was the 'owner' of the properties and therefore responsible for maintenance on increasingly 'run-down' buildings. It is believed that this issue is a prevalent one for the various organisations involved in the provision of Indigenous community housing.

A detailed legal analysis of each individual Indigenous community may find that the:

- State Government, in the form of DHW or some other agency; or
- IAA or Indigenous community group/co-operative,

is ultimately the owner and manager of properties rented to members of an Indigenous community and subject to the obligations and rights of the RT Act.

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<sup>41</sup> Australian Housing and Urban Research Institute, Western Australia Research Centre August 2004, *Indigenous Housing & Governance: Case studies from remote communities in WA & NT*, p. 11.

<sup>42</sup> DOCEP Regional Indigenous Consultation March – July 2004. In the regional consultation, a community meeting was held in each town, followed by advocate surveys. In the Perth metropolitan area, consultation was restricted to advocate surveys.

It is understood that an organisation in the latter category would be greatly under-resourced as compared to DHW, or some other Government agency, to properly fulfil its obligations as an ‘owner’ under the RT Act.

In respect of Indigenous consumer policy at a national level, on 1 September 2005 the Ministerial Council of Consumer Affairs (MCCA) and Standing Committee of Officials of Consumer Affairs (SCOCA) released a National Indigenous Consumer Strategy, Action Plan 2005 - 2010 titled “*Taking Action, Gaining Trust*” (the Action Plan). DOCEP is the lead agency for the Action Plan’s Implementation Group. Notably, one of the ‘National Priorities’ in the Action Plan relates to the following housing issue:

**“Issue** – some Indigenous consumers are not covered by tenancy laws.

**Actions** – recognising that legislation is a matter for government, state and territory consumer agencies responsible for tenancy laws seek to ensure as far as they can that residential tenancy laws apply to all Indigenous tenants.

**Responsibility** – state and territory consumer agencies, where necessary in collaboration with other government agencies that fund tenancy services”.<sup>43</sup>

### **Summary of Responses**

The then Aboriginal Housing and Infrastructure Unit of DHW (AHIU), CHCWA, and REIWA supported recommendation 10. TAS supported the recommendation on the proviso that Indigenous stakeholders were also in support.<sup>44</sup>

AHIU, TAS, CHCWA, and REIWA supported recommendation 11. MIDLAS submitted that: Aboriginal tenants who reside in accommodation provided by Aboriginal bodies deserve the same rights as the wider community; and many of these communities are quite isolated and the interests and safety of tenants must be protected.<sup>45</sup>

### **Policy Position**

The Review believes that there are a number of distinct issues to be addressed in relation to Indigenous community housing:

- (1) Does the RT Act currently apply to Indigenous community housing across WA? If yes, to which communities?
- (2) In those Indigenous communities where the RT Act does apply, who is the ‘owner’? Are parties aware of their respective rights and responsibilities under the RT Act?
- (3) In those Indigenous communities where the RT Act does not apply, what action needs to be taken to provide residents with a comparable set of rights and protections under tenancy laws?

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<sup>43</sup> MCCA and SCOCA 2005, *Taking Action, Gaining Trust: A National Indigenous Consumer Strategy: Action Plan 2005 – 2010*, p. 9 [<http://www.docep.wa.gov.au/cp/about/downloads/taking-action-gaining-trust-05-2.pdf>].

<sup>44</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 12.

<sup>45</sup> MIDLAS, *Submission to the Review of the RT Act*, Dec 2002, p. 3.

To properly answer these questions, the Review is aware that substantial research and consultation with Indigenous people's stakeholder groups, government agencies, and non-government organisations is required. In addition, legal advice will need to be sought as to the current application of the RT Act, and the likely consequences of any future application of the RT Act, to Indigenous community housing. Particular attention will need to be paid to the financial capacity of Indigenous community housing providers to comply with building maintenance and other obligations in the RT Act.

In the event that the RT Act applies, or will apply, to Indigenous community housing, a comprehensive culturally-appropriate education campaign will need to be developed to assist both owners and tenants to understand and comply with the myriad of rules in tenancy legislation. An extended transition period will also be needed.

#### **Proposal 9**

That DOCEP conduct further research and consultation with Indigenous people's stakeholder groups, government agencies, and non-government organisations, and obtain legal advice, as to:

- the current application of the RT Act to Indigenous community housing;
- the likely effects of amending the RT Act to ensure that it applies to Indigenous community housing; and therefore
- whether it is appropriate that the RT Act should apply to all Indigenous community housing.

#### **Proposal 10**

In the event that it is recommended that the RT Act should apply to all Indigenous community housing, DOCEP is to develop a comprehensive, culturally-appropriate education campaign for affected Indigenous stakeholders to be delivered during an extended transition phase.

### **1.6 Tenancy Agreement Arising Under a Mortgage**

#### **Stamfords' Recommendation 17**

*That the Act be amended to qualify the exemption of agreements arising under a mortgage, to exclude from the exemption agreements entered into by the mortgagee with a third party tenant.*

## **Background Discussion**

The RT Act does not apply to any residential tenancy agreement where the agreement arises under a mortgage in respect of the property.<sup>46</sup> The Stamfords Report explained that this exemption commonly applies to situations where a mortgagor (borrower) is in default of their mortgage, and the mortgagee (lender) takes possession of the property but allows the mortgagor to remain in the property for a period of time as a tenant.<sup>47</sup>

Some respondents to Phase 1 of the Review, however, believed that this exemption should not cover situations where a mortgagee in possession rents the property to a third person.<sup>48</sup>

Residential tenancy legislation in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria all contain exemptions for tenancy agreements which arise out of a mortgage of the property.<sup>49</sup>

## **Summary of Responses**

TAS and REIWA supported the Stamfords recommendation.

## **Policy Position**

It is understood that, under common law principles, a mortgagee in possession is not bound by the terms of a lease created by the mortgagor with a third party tenant (unless the mortgagee has consented to the creation of the lease).<sup>50</sup> Currently, if a mortgagor defaults on their mortgage, a mortgagee taking possession of a property pursuant to a court order can evict a tenant by giving 'reasonable notice' of the eviction.<sup>51</sup> As discussed in chapter 8.6.1 below, the Review proposes that the RT Act be amended to require mortgagees regaining possession to give existing tenants 30 days notice to vacate a property.

The Review notes the concerns of stakeholders raised in Phase 1 of the Review, however, believes that a mortgagee who or which either consents to an existing lease agreement with a tenant, or rents out a property to a third party tenant after regaining possession of that property, is already bound by the RT Act. This is because these types of tenancies do not arise out of the original mortgage, but are formed between the mortgagee and third party tenant directly. The Review, therefore, does not propose to amend the current exemption in section 5(2)(b) of the RT Act.

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<sup>46</sup> Section 5(2)(b), RT Act (WA).

<sup>47</sup> Page 69.

<sup>48</sup> *ibid.*

<sup>49</sup> Section 6D, RT Act (ACT); section 6, RT Act (NSW); section 20A, RT Act (Qld); section 5, RT Act (SA); section 6, RT Act (Tas); and section 13, RT Act (Vic).

<sup>50</sup> [295-7290] *Tenant of mortgagor in possession where tenancy not binding on mortgagee*, current to 11 July 2003, Halsbury's Laws of Australia.

<sup>51</sup> Section 81, RT Act (WA).

## 1.7 Tenancy Agreement Arising Under Contract of Sale

### **Background Discussion**

The RT Act does not apply to any residential tenancy agreement where the tenant is a party to an agreement for the sale and purchase of the property.<sup>52</sup> Feasibly, this exemption covers the following scenarios:

- (1) an existing tenant offers to buy the property which they are renting, and upon settlement, that tenant automatically becomes the new owner-occupier; and
- (2) an owner-occupier agrees to sell their property, and negotiates with the purchaser a condition of sale where they rent the property 'back' from the purchaser for a period of time, thus becoming a tenant upon settlement.

In both these scenarios, the laws in the RT Act do not apply to any tenancy agreement reached between the parties.

Residential tenancy legislation in New South Wales, Queensland, South Australia and Victoria all contain exemptions for tenancy agreements arising out of a contract of sale of a property.<sup>53</sup>

### **Summary of Responses**

REIWA raised concerns about this exemption at a dialogue session with DOCEP, citing difficulties experienced by purchasers in the second scenario where vendor-owners who become tenants refuse to comply with standard tenant obligations such as paying a bond. It was suggested that some vendor-owners do not consider themselves 'true' tenants in these situations, and may also be aware that the RT Act does not apply to their tenancy. This leaves purchasers at risk of having little recourse against tenants who may: damage their property; fail to pay rent as agreed; fail to maintain a reasonable standard of cleanliness; and fail to vacate the property on an agreed date. REIWA submitted that the exemption in section 5(2)(a) be repealed in the RT Act.<sup>54</sup>

### **Policy Position**

The Review notes REIWA's concerns about the operation of the contract-of-sale exemption, however, believes that removal of the exemption would adversely affect current freedoms in the sale and purchase of land. Currently, the exemption allows for optimum flexibility between parties to a contract for the sale of land to negotiate the terms of any tenancy agreements arising. For example, a vendor-owner may wish to remain in a property for a period of time after settlement, and rather than paying fortnightly rent to the purchaser, they may agree to a lump-sum 'discount' on the selling price (which is equivalent to market rent). In these situations, it is not in the parties' best interests to be bound by all the laws in the RT Act. The Review proposes, therefore, that the exemption in section 5(2)(a) of the RT Act be retained.

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<sup>52</sup> Section 5(2)(a), RT Act (WA).

<sup>53</sup> Section 6, RT Act (NSW); section 20A, RT Act (Qld); section 5, RT Act (SA); and section 13, RT Act (Vic).

<sup>54</sup> Dialogue session between REIWA and DOCEP on 29 Nov 2004.

## 2. TENANCY ORIGINATION

### 2.1 Nature of Tenancy Agreements

#### 2.1.1 Standard Tenancy Agreements

##### **Stamfords' Recommendation 18**

*That the Act continue to imply standard terms and conditions into every tenancy agreement, and not be amended to prescribe a standard written tenancy agreement.*

##### **Stamfords' Recommendation 36**

*That the Act be amended to require that:*

- *a written agreement clearly state the requirement for an owner to provide the tenant with the information prescribed in Schedule 2 of the Regulations; and*
- *provide space for the tenant to sign this part of the agreement to indicate that they have received this information from the owner.*

### **Background Discussion**

Sample tenancy agreements were originally developed by DOCEP for use by owners as a guide for developing their own agreements. The RT Act does not prescribe a standard tenancy agreement, however, REIWA has developed a standard tenancy agreement for use by real estate agents. The DOCEP sample tenancy agreements, which are used relatively widely by private property owners, are available in hard copy from DOCEP, can be printed from DOCEP's website and can be purchased from the State Law Publisher and various newsagents.

Consultation carried out with stakeholders in Phase 1 of the Review indicated that problems are experienced by both tenants and owners throughout the tenancy process in regard to disclosure of information about, and understanding of, the rights and obligations of each party to a tenancy agreement.

One of the primary aims of prescribing a standard tenancy agreement is to protect the rights of owners and tenants and to inform each about their obligations under the RT Act. Schedule 2 of the RT Regulations, which summarises the main provisions relating to owners' and tenants' rights and duties, goes some way towards achieving this. However, tenant advocacy groups have reported that although owners are instructed in Schedule 2<sup>55</sup> that they must provide a copy of the information contained in Schedule 2 to tenants, in their experience many tenants remain uninformed about their rights and obligations. Similarly, DOCEP's experience in conciliating residential tenancy matters indicates that many owners are also unclear about their rights and obligations under the RT Act.

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<sup>55</sup> Clause 4(a) Schedule 2, RT Regulations (WA).

Prescribed standard tenancy agreements are common in other Australian jurisdictions. The standard tenancy agreement prescribed in Schedule 1 of the New South Wales RT Act contains information relating to the rights and obligations of the parties involved in the agreement, and includes a place for the tenant to sign to indicate that they have been given a copy of the prescribed information by the owner.<sup>56</sup>

### **Summary of Responses**

Tenant advocacy groups are in favour of the RT Act prescribing a standard tenancy agreement, arguing that by creating an official document there will be less opportunity for owners to take advantage of a tenant's lack of knowledge of the Act (particularly of younger tenants, newly arrived migrants, etc). However, owners and real estate industry representative groups are opposed to the recommendation, viewing a prescribed document as being too inflexible, in light of the variety of tenancy arrangements possible.

### **Policy Position**

The Review proposes to amend the RT Act and Schedule 2 of the RT Regulations to provide greater disclosure of information and promote a better understanding of the rights and obligations of both tenants and owners, while still enabling agreements to be modified to suit differing tenancy arrangements.

The Review further proposes to increase awareness of the rights and obligations of tenants and owners through the provision of targeted education materials and wider availability of sample tenancy agreements.

#### **Proposal 11**

That the RT Act be amended to prescribe the minimum terms and conditions to be included in a typical tenancy agreement.

#### **Proposal 12**

That the RT Act be amended to state within the Act itself (rather than in the Regulations) that tenants are to be provided with a copy of Schedule 2 of the RT Regulations prior to or at the start of a tenancy agreement.

#### **Proposal 13**

That Schedule 2 of the RT Regulations be amended to provide for a declaration, to be signed and dated by the tenant and the owner, confirming the giving and receipt of Schedule 2.

#### **Proposal 14**

That the RT Act be amended to make it an offence for an owner to fail to provide the tenant with a copy of Schedule 2 of the RT Regulations prior to or at the start of a tenancy agreement.

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<sup>56</sup> Schedule 1, RT Regulations (NSW).

## 2.1.2 Oral Tenancy Agreements

### **Stamfords' Recommendation 29**

*That the definition of "residential tenancy agreement" in section 3 of the Act be amended to clearly state that this definition applies to residential tenancy agreements that are made orally as well as in writing.*

### **Stamfords' Recommendation 30**

*That the Act be amended to state that, where a residential tenancy agreement is made orally, it is assumed that parties have agreed upon the standard terms provided in the Act, with no additional terms, unless a party is able to provide sufficient evidence that the parties had agreed to any such additional terms.*

### **Stamfords' Recommendation 36**

*That the Act be amended to require that:*

- *a written agreement clearly state the requirement for an owner to provide the tenant with the information prescribed in Schedule 2 of the Regulations; and*
- *provide space for the tenant to sign this part of the agreement to indicate that they have received this information from the owner.*

## **Background Discussion**

Currently, the RT Act applies to both written and oral tenancy agreements in that it states that it applies to "any agreement, whether express or implied".<sup>57</sup> Oral tenancy agreements are deemed valid in all other Australian jurisdictions (although some jurisdictions impose a penalty for not establishing a written agreement).

## **Summary of Responses**

Tenant advocacy groups and the majority of owner advocacy groups supported express recognition of oral tenancy agreements in the RT Act. They argued that defining oral agreements as "residential tenancy agreements" would clarify both that oral agreements were binding and that the associated parties were afforded the rights and protection of the RT Act.

In relation to Stamfords' Recommendation 36, almost all respondents to the Review were supportive.

## **Policy Position**

The Review proposes to amend the RT Act to make it clear that the Act applies to both oral and written tenancy agreements.

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<sup>57</sup> Section 3, RT Act (WA).

In addition, the Review supports Stamfords' Recommendation 36, however, acknowledges that it is, in all likelihood, impractical to expect that owners who form oral tenancy agreements are going to provide tenants with copies of Schedule 2 (Information for Tenant) of the RT Regulations. Therefore, the requirement to provide copies of Schedule 2 to tenants will apply only to written agreements.

**Proposal 15**

That the RT Act be amended to make it clear that oral tenancy agreements are regulated by the Act and thus incorporate the minimum terms and conditions as prescribed in the Act.

**Proposal 16**

That the RT Act be amended to require owners to provide tenants with two copies of Schedule 2 (Information for Tenant) of the RT Regulations signed and dated by the owner, within 14 days of the creation of the written tenancy agreement.

**Proposal 17**

That the RT Act be amended to require tenants to sign and date the two copies of Schedule 2 (Information for Tenant) of the RT Regulations, and return one of the copies to the owner within 14 days of receiving it from the owner.

**2.2 Terms in Agreements**

**2.2.1 Additional Terms**

**Stamfords' Recommendation 20**

*That parties continue to be able to negotiate additional terms that do not conflict with the provisions of the Act.*

**Stamfords' Recommendation 21**

*That the Act be amended to require that, where a tenancy agreement contains any additional terms:*

- *these terms are contained in a separate section of the agreement, clearly marked "Additional Terms"; and*
- *parties must sign this section to indicate that they understand that these terms are additional terms, and that they agree to such terms.*

## **Background Discussion**

Currently, the RT Act enables parties to a tenancy agreement to negotiate terms and conditions in addition to those required by the Act, provided that such terms and conditions are not inconsistent with a provision of the Act, and do not purport to exclude, modify or restrict the operations of the Act.<sup>58</sup> The RT Act also nullifies any “purported waiver of a right conferred by or under this Act”.<sup>59</sup> The addition of terms and conditions enables flexibility to be built into a tenancy agreement that may be beneficial to both the tenant and the owner, given that tenancy agreements cover a wide variety of tenancy situations.

During initial consultation with stakeholders, several tenant advocacy groups remarked that the relationship between tenant and owner is seldom an equal one, with the owner generally being in the stronger bargaining position. In these situations, the ability to add terms and conditions to a tenancy agreement would usually operate to the advantage of the owner. Tenant advocacy groups report that, coupled with the increasing shortage of low-cost housing for low-income and disadvantaged tenants, the ability to add terms to an agreement often results in the tenant having no choice but to accept terms and conditions detrimental to their interests simply to secure a place to live.

DOCEP’s experience in conciliating tenancy-related complaints indicates that complaints about owners including terms and conditions that conflict with the RT Act in tenancy agreements are quite common.

## **Summary of Responses**

Tenant advocacy groups again expressed concern at the recommendation to allow additional terms. Aside from their concern about the unequal power relationships in tenancy arrangements being abused, they noted particular problems associated with social/community housing arrangements where attendance at counselling sessions, provided through the landlord/owner, is made a term of the tenancy agreement. In these cases, failure to attend counselling constitutes a breach of the agreement and jeopardises the tenant’s living arrangements.

The tenant advocacy groups suggested including a requirement for DOCEP or court approval of any additional terms and conditions to a tenancy agreement.<sup>60</sup>

## **Policy Position**

While recognising the existence of a power imbalance between parties to a tenancy agreement, removing the ability to vary agreements with additional terms and conditions would be too restrictive. However, requiring additional terms and conditions to be officially endorsed would place an onerous burden upon DOCEP or the courts.

To balance the interests of both parties, while retaining flexibility, the Review proposes that additional terms and conditions be clearly distinguished as fully negotiable, and that both parties to the agreement acknowledge this in writing.

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<sup>58</sup> Section 82(1)(a), RT Act (WA).

<sup>59</sup> Section 82(1)(b), RT Act (WA).

<sup>60</sup> TAS, Shelter WA, Community Housing Coalition of WA, *Submissions to the RT Act Review*, Dec 2002.

### **Proposal 18**

That the RT Act be amended to require any additional terms or conditions to be in a separate section of the tenancy agreement, clearly marked “Additional Terms and Conditions”, including a statement, to be signed by the tenant, acknowledging their understanding that the additional terms and conditions are fully negotiable and not required by law, and a statement, to be signed by the owner, declaring that none of the additional terms or conditions are inconsistent with the RT Act.

## **2.2.2 Tenant’s Place of Employment**

### **Stamfords’ Recommendation 32**

*That the current provisions in the Act that prohibit a tenant from falsely stating to the owner their place of occupation, and requiring a tenant to inform the owner of any change in their place of occupation, be retained.*

### **Stamfords’ Recommendation 33**

*That the Act not be amended to require a tenant to inform an owner (or agent) of a change in their employment.*

## **Background Discussion**

Where a tenant has stated their place of occupation to the owner, the RT Act requires them to notify the owner of any change to their place of occupation, within 14 days of that change occurring.<sup>61</sup> Failure to do so may incur a \$1000 penalty.

DOCEP’s experience in conciliating tenancy-related issues indicates that owners often have difficulty locating former tenants once they have moved out of the rental property, often due to the failure by the tenant to leave a forwarding address.

Provision of the address of the tenant’s place of employment is useful in that it gives an owner a second point of contact for a tenant. It has also been noted that the ability to contact tenants through their place of employment, in case of an emergency, is also advantageous.

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<sup>61</sup> Section 53(2), RT Act (WA)

## **Summary of Responses**

Tenant advocates argued that the requirement to provide an owner with the address of a person's place of occupation could be viewed as an invasion of privacy and possibly lead to the owner making assumptions about a prospective tenant's financial capacity. Furthermore, a requirement to advise the owner of a change in the tenant's place of occupation, if that change is related to a change in the tenant's overall employment situation, could jeopardise the tenant's tenancy.

Tenant advocacy groups have also noted that a penalty of \$1000 for 'forgetting' to inform the owner of a change in employment address could be seen as unduly severe. Penalties are discussed in chapter 10 of this Paper.

DOCEP receives numerous complaints from owners about their inability to contact tenants after they have vacated the property. In situations where an owner is attempting to contact the former tenant in relation to the disposal of the bond or the tenant's possessions, the ability to contact a tenant is in the interests of both parties.

## **Policy Position**

The arguments for and against retaining the requirement that tenants advise owners of changes to their place of occupation are all valid. On balance however, the inability to contact tenants after the conclusion of a tenancy agreement is a significant ongoing problem and one that requires retention of the notification requirement.

In an effort to reduce ambiguity in relation to the term 'occupation' the Review proposes to amend the RT Act to replace the term 'occupation' with the term 'employment'.

### **Proposal 19**

That section 53 of the RT Act be amended to replace the term "occupation" with the term "employment".

## **2.2.3 Minimum Age of Tenant**

### **Stamfords' Recommendation 27**

*That DOCEP conduct further community education of owners and (prospective) tenants, regarding the ability of minors to sign a binding tenancy agreement with an owner.*

## **Background Discussion**

Currently, the RT Act lacks clarity as to the ability of minors to enter into a tenancy agreement. During Phase 1 consultation, stakeholders advised that this lack of clarity often causes confusion for both owners and prospective tenants in regard to the validity of an agreement signed by a minor.

Section 66ZG of the *Equal Opportunity Act 1984* (WA) makes it unlawful to refuse an application for accommodation by a minor on the basis of their age. While at common law a minor does not have the legal capacity to enter into a contract, contracts for necessities such as shelter are exceptions to this general rule.

Section 19 of Queensland’s residential tenancy legislation is explicit in clarifying the status of tenancy agreements between a minor and a property owner, stating:

### **“Minors**

- (1) A minor has the capacity to enter into a residential tenancy agreement.
- (2) A residential tenancy agreement entered into by a minor is enforceable in the same way as if the agreement had been entered into by an adult”<sup>62</sup>.

## **Summary of Responses**

Support for clarification of a minor’s ability to enter into a residential tenancy agreement was unanimous amongst the respondents to the Review.

## **Policy Position**

The Review proposes to amend the RT Act to make it clear that minors have legal capacity to enter into tenancy agreements by inserting a clause similar to section 19 of the *Residential Tenancies Act 1994* (QLD).

### **Proposal 20**

That the RT Act be amended to make it clear that tenancy agreements may be entered into by minors and that those agreements will be enforceable in the same way as if entered into by an adult.

## **2.2.4 Discriminating Against Tenants with Children**

### **Stamfords’ Recommendation 37**

*That section 56(3) of the Act be deleted, thereby removing the exception to the prohibition against discriminating against tenants with children.*

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<sup>62</sup> RT Act (QLD).

## **Background Discussion**

The RT Act prohibits an owner from refusing to grant a tenancy on the ground that it is intended that a child will live in the property.<sup>63</sup> However, the Act does allow the application of a prospective tenant with children to be refused if the property is the principal place of residence of the owner, or if the property adjoins the owner's (or their agent's) principal place of residence.<sup>64</sup>

## **Summary of Responses**

The majority of stakeholders agree that any exception that allows discrimination against tenants with children is unacceptable.<sup>65</sup> Objection to removing the exception was based on concern for owners who invest their savings in a duplex with a view to living in one in their retirement and renting out the other. The respondent argued that these retirees should have the option to reject applicants who have children.<sup>66</sup>

## **Policy Position**

In line with existing Equal Opportunity legislation the Review proposes to amend the RT Act to remove the ability to discriminate against tenants with children.

### **Proposal 21**

That the RT Act be amended to repeal section 56(3), thereby removing the exception that enables discrimination against tenants with children.

## **2.3 Contracting Out**

### **Stamfords' Recommendation 28**

*That the Act be amended to remove the ability for parties to contract out of the sections of the Act currently stated in section 82(3).*

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<sup>63</sup> Section 56(1) and 56(2), RT Act (WA).

<sup>64</sup> Section 56(3), RT Act (WA).

<sup>65</sup> REIWA, TAS, Shelter WA, MIDLAS, Hon Giz Watson MLC, City of Fremantle Community Legal Centre, Gosnells Community Legal Centre and the Financial Counsellors Resource Project all supported this recommendation (see appropriate submissions to the Review).

<sup>66</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p.2

## **Background Discussion**

The RT Act currently enables parties to contract out of certain prescribed rights and responsibilities upon written agreement by both parties.<sup>67</sup> The provisions that parties may contract out of include the following:

- section 38 – tenant’s responsibility for cleanliness and damage;
- section 39 – tenant’s conduct on the premises;
- section 40 – vacant possession;
- section 41 – legal impediments to occupation as residence;
- section 42 – owner’s responsibility for cleanliness and repairs;
- section 43 – compensation where tenant sees to repairs;
- section 45 – locks;
- section 46 – owner’s right of entry;
- section 47 – right of tenant to affix and remove fixtures, etc;
- section 48 – owner to bear outgoings in respect of premises;
- section 49 – right of tenant to assign or sub-let;
- section 50 – vicarious responsibility of tenant for breach by other person lawfully on premises;
- section 55 – cost of written agreement to be borne by owner; and
- section 56 – discrimination against tenants with children.

Western Australia is the only Australian jurisdiction that allows parties to contract out of so many standard provisions. A previous statutory review of the RT Act recommended that the contracting out provision be removed from the Act. The report on that review noted that the contracting out provision was being used most frequently by owners/agents to contract out of section 43, the provision relating to the payment by an owner of compensation to a tenant for costs incurred in arranging urgent repairs.<sup>68</sup>

Many of the provisions that currently can be contracted out of pertain to the basic rights of owners and tenants. As mentioned in chapter 2.2.1 (Additional Terms), the relationship between tenant and owner is seldom an equal one in terms of bargaining power. Having the ability to contract out of certain rights and obligations may increase the imbalance to the detriment of one of the parties.

An exception to this general principle is contracting out of section 38 (Tenant’s responsibility for cleanliness and damage). If an owner wants to contract out of this provision to, for example, engage a regular cleaner for the property, such an agreement would not infringe upon the tenant’s basic rights and would thus be acceptable.

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<sup>67</sup> Section 82(3), RT Act (WA).

<sup>68</sup> Ministry of Consumer Affairs, *Report to the Hon. Minister for Consumer Affairs on the operations of the Residential Tenancies Act 1987*, March 1992.

It is recognised that contracting out allows parties considerable flexibility in adapting standard laws in the RT Act to suit unique and individual tenancies. It is therefore necessary to examine the possible effects of removing the ability to ‘contract out’ on this flexibility. Two distinct issues arise in relation to removing the ability to contract out of sections 40 and 46 of the RT Act. Another issue arises in relation to section 43 (Compensation where tenant sees to repairs), which is discussed in chapter 7.2.3 (Urgent Repairs) below.

Section 40 relates to the right of a tenant to have vacant possession of “premises” on the day that they are entitled to occupy the property. The term “premises” is defined in section 3 of the RT Act as including any part of the property and that which makes up the property (e.g. land, gardens, sheds and other buildings).<sup>69</sup> The entitlement to vacant possession by the tenant should not, as a general rule, be contracted out of, however, there may be situations in which an owner may wish to retain the use of part of the property, for example, a shed in which to store goods. It is understood that currently, parties may contract out of section 40 in order to allow an owner to retain such use of part of the property.

Section 46 sets out all the circumstances in which an owner has a right to enter a rental property. For example, an owner wishing to inspect a property for a general purpose must give a tenant not less than 7 days, nor more than 14 days notice of such inspection.<sup>70</sup> Chapter 6 of this Paper contains a number of Review proposals to amend section 46 of the RT Act. The laws restricting an owner’s ability to enter a property should not, as a general rule, be contracted out of, however, there may be situations in which contracting out is necessary. A key example was provided by the Government Employees Housing Authority (GEHA, now known as the Government Regional Officers’ Housing Business Unit or GROH) as discussed below.

### **Summary of Responses**

There was strong support from tenant advocacy groups for removing the ability to contract out of any of the provisions of the RT Act. DHW also supported the recommendation. REIWA supported removing the ability to contract out of sections 42 (Owner’s responsibility for cleanliness and repairs), 45 (Locks) and 56 (Discrimination against tenants with children), but maintained that owners should be able to contract out of certain other provisions.<sup>71</sup>

Opposition to the recommendation came from respondents who were private landlords and from the POA.

GROH submitted that removing the ability to contract out of section 46 (Owner’s right of entry) would impact adversely upon all their leases. GROH explained that their tenancy arrangements include the following parties:

- a property owner (owner) who rents their property to GROH;
- GROH as the head-tenant;
- a Government agency as the sub-tenant; and
- a Government employee as the sub-sub-tenant (occupant).

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<sup>69</sup> Section 3, RT Act (WA).

<sup>70</sup> Section 46(1)(b), RT Act (WA).

<sup>71</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 8.

It is understood that there is a written lease agreement between the owner and GROH, however, there is no corresponding lease agreement between GROH, the Government agency, and the occupant. GROH currently contracts out of section 46 in order to allow sufficient notice of entry to be given 'down the line' (i.e. from the owner, to GROH, to the Government agency, to the occupant), such that ultimately the occupant receives sufficient notice. In some tenancies, it is necessary for the occupant (usually a member of the police force) to personally attend any property inspection by the owner, due to the fact that firearms are stored at the property. Contracting out of section 46 allows GROH to include a special condition in their leases making occupant attendance at inspections mandatory.<sup>72</sup>

### **Policy Position**

It is necessary to balance the preservation of basic rights and obligations in the RT Act against the need for flexibility between parties to negotiate tenancy agreements suitable to a diverse range of tenancies. The Review agrees that the ability to contract out of the majority of sections mentioned in section 82(3) of the RT Act should be removed in order to ensure parties receive a fundamental set of rights and obligations.

The Review proposes, however, that the ability to contract out of sections 38 and 46 be retained. It is believed that contracting out of section 38 (Tenant's responsibility for cleanliness and damage) will have a minimal adverse impact upon parties.

In relation to section 46 (Owner's right of entry), the Review acknowledges that the laws granting an owner right of entry onto a property are contentious, and have been the subject of much debate among stakeholders (see chapter 6 for further discussion). It is believed, however, that there are many tenancy and sub-tenancy arrangements, such as those outlined by GROH, which rely upon the ability to contract out of section 46 in order to accommodate the rights of owners, tenants, sub-tenants and occupants. Such tenancy arrangements may exist in community housing and employment-linked housing. To remove the ability to contract out of section 46 would impose restrictions on certain tenancies and sub-tenancies which would make them unworkable. The Review, therefore, proposes to retain the ability to contract out of section 46 of the RT Act.

It has been suggested that a new separate Part in the RT Act, which covers the rights and obligations of head-tenants and sub-tenants, would obviate the need to allow contracting out of section 46. The Review has considered this option, however, it believes that the complications, which would result from attempting to redraft all the standard laws in the RT Act to accommodate sub-tenancies, outweighs the perceived benefits.

In order to address the potential issue that prospective tenants may not be aware that owners are asking them to contract out of sections 38 and/or 46 of the RT Act, the Review proposes to amend the RT Act to ensure all written tenancy agreements highlight this fact (similar to the proposal in chapter 2.2.1 – Additional Terms).

In addition, the Review proposes to amend the RT Act to enable parties to negotiate the parts of a property to which a tenant is entitled to vacant possession under section 40.

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<sup>72</sup> Dialogue session between GEHA and DOCEP, 27 July 2004; GEHA, *Submission to the Review of the RT Act*, 31 Aug 2004 (provided by Solomon Brothers).

### **Proposal 22**

That the RT Act be amended to remove the ability for parties to contract out of those sections of the RT Act identified in section 82(3), other than sections 38 (Tenant's responsibility for cleanliness and damage) and 46 (Owner's right of entry).

### **Proposal 23**

That the RT Act be amended to require any tenancy agreement, which purports to contract out of sections 38 or 46 of the RT Act, to include a statement signed by the prospective tenant acknowledging that they understand contracting out is fully negotiable and not required by law.

### **Proposal 24**

That the definition of "premises" in section 40 of the RT Act be amended so that the right to vacant possession may be modified to exclude particular parts of the property, other than the main place of residence.

### **Proposal 25**

That the definition of "premises" in section 3 of the RT Act be amended to include the phrase "*unless otherwise specified in this Act*" after the word "*includes*".

## **2.4 Tenant's Copy of Agreement**

### **Stamfords' Recommendation 34**

*That the timeframe in which an owner is required to forward a copy of the executed agreement to the tenant be reduced from 21 days to 14 days after it has been signed and delivered by the tenant, or, where that is not reasonably practicable in the circumstances, within such longer period as is so practicable.*

### **Background Discussion**

The RT Act currently requires an owner to forward a copy of the executed agreement to the tenant within 21 days of signing, or as soon as practicable thereafter.<sup>73</sup> Tenant advocacy groups have advised that this timeframe is problematic for low-income tenants who are eligible for rental assistance from Centrelink. Applicants are required to provide a copy of the executed tenancy agreement to Centrelink prior to rent assistance payments being approved. Thus, the 21 day timeframe in forwarding an executed copy of the agreement can delay the ability of a tenant to access rental assistance, placing further financial stress on them at a time when they have significant tenancy establishment costs.

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<sup>73</sup> Section 54(1)(b), RT Act (WA).

## **Summary of Responses**

All stakeholders agreed with the recommendation to reduce the timeframe for supplying tenants with a copy of the tenancy agreement.

### **Policy Position**

The Review proposes to reduce the timeframe for providing tenants with an executed copy of the tenancy agreement from 21 days to 14 days. Flexibility will be built in to the amended provision with the inclusion of the ability to provide the agreement to the tenant “within such longer period as is practicable”.

#### **Proposal 26**

That the RT Act be amended to reduce the timeframe in which an owner is required to forward a copy of the executed tenancy agreement to the tenant from 21 calendar days to 14 calendar days from when it was signed and returned to the owner/agent by the tenant, or, where that is demonstrably impractical, within such longer period as is practicable.

## **2.5 Property Condition Reports**

### **2.5.1 Compulsory Reports**

#### **Stamfords’ Recommendation 24**

*That a sample property condition report be produced as a non-prescribed form, and DOCEP encourage parties to make use of this form (or an alternative document) to prepare and complete property condition reports at the commencement and conclusion of a tenancy.*

#### **Stamfords’ Recommendation 25**

*That the Act be amended to state that a request by a tenant that a property condition report be completed should not be unreasonably withheld by the owner (or agent).*

## **Background Discussion**

Property condition reports (PCRs) are not compulsory in Western Australia however, it appears that they are fairly widely used. They are commonly used in other jurisdictions, being compulsory in NSW and Queensland when written tenancy agreements are entered into, and in Tasmania and Victoria when a tenancy agreement requires that a bond be paid.

DOCEP's experience in conciliating tenancy-related issues indicates that disputes relating to the condition of a property at the end of a tenancy are common. It is probable that the introduction of compulsory PCRs would reduce the number of disputes of this type and also assist in resolving disputes that do happen.

In long-term tenancy arrangements (of greater than 5 years for example) it may be in the interests of both the tenant and the owner to complete periodic PCRs, so that property deterioration and/or improvements can be formally noted by both parties.

### **Summary of Responses**

The majority of stakeholders were in favour of a requirement to complete PCRs. The use of PCRs is standard in tenancies managed by real estate agents and computer software of electronic versions of PCRs is reportedly widely used in the real estate industry.<sup>74</sup>

Opinion was divided as to whether the RT Act should prescribe a standard property condition report. Tenant advocacy groups were in favour of a prescribed form while owner advocates were opposed to it being prescribed. REIWA also objected to the recommendation that a copy of the PCRs be completed for tenants at the end of tenancy agreements, advising that tenants did not receive a copy of the amended report at the end of a tenancy.<sup>75</sup>

### **Policy Position**

Property condition reports are a useful tool in preventing and resolving disputes about the condition of a property at the end of a tenancy agreement. They are completed at the beginning of a tenancy agreement for use by the owner/agent at the end of the agreement to compare the state of the property. Their use is widespread amongst real estate agents and private property owners, thus legislating to make their use compulsory formalises current widespread practice.

Photographs are sometimes provided to the tenant by the owner or agent as part of a PCR. With the advent of digital cameras, costs associated with the provision of hard copies of photographs have declined. Some lease agreements used by property managers require tenants to return these property condition photographs at the end of the tenancy. Failure to return them may result in the deduction of money from the bond.

The provision of hard copies of photographs to a tenant by an owner/agent at the start of a tenancy is voluntary and thus, the Review believes that if the owner/agent chooses to provide photographic evidence of the condition of the property to the tenant, any costs associated with the provision and replacement of that evidence should not be levied upon the tenant. In addition, property condition photographs may form important evidence in any bond dispute and thus it is considered inappropriate that a tenant be compelled to return such photographs to the owner/agent at the end of a tenancy agreement where they may need them to argue their position.

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<sup>74</sup> Stamfords' Report, p. 76.

<sup>75</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 8.

It is unlikely that all elements of all possible rental properties that required noting on a PCR could be included on a prescribed form in the RT Act. Therefore, the Review proposes to amend the RT Act to prescribe the minimum contents to be included in a property condition report. DOCEP will also make available both in hard copy, and for printing from its website, a sample PCR for use as a guide to constructing a PCR.

Furthermore, it is proposed that the RT Act be amended to provide that any reasonable request that a property condition report be completed should not be denied by either party.

**Proposal 27**

That the RT Act be amended to require written property condition reports to be completed at the beginning and end of a tenancy agreement.

**Proposal 28**

That the RT Act be amended to prescribe the minimum contents to be included in a property condition report.

**Proposal 29**

That the RT Act be amended such that if photographic evidence depicting the condition of the property is provided to a tenant as part of a property condition report, no fee may be levied on the tenant in relation to the provision, replacement or return of that photographic evidence.

**Proposal 30**

That the RT Act be amended so that any reasonable request for a written property condition report to be completed or updated cannot be denied by either party to a tenancy agreement.

**Proposal 31**

That DOCEP make freely available a sample property condition report that may be used by tenants, owners and agents.

## 2.5.2 Completion and Delivery of Property Condition Reports

### **Stamfords' Recommendation 26**

*That, where a property condition report is prepared and completed, the Act require that:*

- *three copies of the property condition report be completed (before the commencement and/or at the conclusion of a tenancy);*
- *where the report is completed before the commencement of a tenancy, two copies of the property condition report be given to the tenant prior to or at the time of the tenant occupying the property;*
- *where the report is completed before commencement of a tenancy, the tenant sign and indicate (where relevant) that they agree or disagree with all or any part of the property condition report, and return the property condition report to the owner within seven days; and*
- *where the tenant fails to return the property condition report within the specified timeframe, it is assumed that the tenant accepts the property condition report in its entirety.*

### **Background Discussion**

Appropriate timeframes are required for the tenant to receive, review and return a PCR to the owner. The timeframes should be sufficient enough for the tenant to review the PCR, however, too long a period could be problematic in that damage could occur in the interim period.

After consideration of residential tenancies legislation operating in other Australian jurisdictions the model below is being considered.

At the beginning of a tenancy:

- three copies of a property condition report are to be completed and signed by the owner (or agent), two of which are to be provided to the tenant on the day of occupation of the property, or within a timeframe as is prescribed in the Regulations;
- the tenant is to review, amend if necessary and sign both copies of the PCR and forward 1 copy to the owner (or agent) within 7 business days of occupation, or within a timeframe as is prescribed in the Regulations; and
- where a tenant fails to return the PCR within the timeframe prescribed, it is taken that the tenant accepts the PCR in its entirety.

At the end of the tenancy:

- at, or as soon as practicable after the termination of the tenancy, the tenant (or their representative) be given a reasonable opportunity to be present at the final inspection, at which time a third copy of the PCR would be completed to indicate the condition of the property at the end of the tenancy.

The presence (where possible) of both parties at the rental property while the final inspection is being carried out is beneficial in that it provides an opportunity for resolving potential disputes quickly. It enables the tenant to respond to any claims of damage etc. made by the owner (or agent) at the time of the inspection. Furthermore, it ensures that the tenant has the opportunity to view the property after the tenancy agreement has ended (in order to inspect in relation to any claims being made by the owner), something that is not always possible once the property has been re-let.

### **Summary of Responses**

There was wide support for this recommendation, though the support by some stakeholders was conditional. As mentioned previously, REIWA did not see a need for the tenant to receive a copy of the condition report at the end of a tenancy. Tenant advocacy groups were concerned that, because of the upheaval that accompanies moving house, seven days was too short a period of time for a tenant to complete and return the PCR to the owner.

### **Policy Position**

In order to take into consideration issues relating to remote and/or isolated properties it is proposed that appropriate timeframes for the completion and delivery of PCRs (other than in relation to the final inspection) be prescribed in the Regulations to the RT Act. Prescribing the timeframes will make it possible to address different circumstances and adjust timeframes to take account of those different circumstances.

The Review also proposes to amend the RT Act to require the tenant (or their representative) be given a reasonable opportunity to inspect the property and complete the PCR together with the owner (or their agent) at the end of a tenancy agreement.

**Proposal 32**

That the RT Act be amended to allow appropriate timeframes for the completion of property condition reports to be prescribed in the RT Regulations.

**Proposal 33**

That the RT Act be amended to impose a penalty for failure by the owner to provide a completed property condition report to the tenant within the prescribed timeframe.

**Proposal 34**

That the RT Act be amended to require that tenants (or their representatives) be given a reasonable opportunity to be present to conduct with the owner (or their agent) the final inspection of a property and complete the property condition report at the termination of a tenancy agreement.

### 3. FEES AND CHARGES OTHER THAN RENT AND BONDS

#### 3.1 Rent In Advance

##### **Stamfords' Recommendation 38**

*That the Act be amended to prohibit an owner from requiring more than one calendar month's rent at any time during a tenancy, in addition to the current restriction prior to and during the first two weeks of a tenancy.*

##### **Stamfords' Recommendation 39**

*That the restriction on rent in advance contained in the Act continue to apply to all rental housing, regardless of the level of rent charged.*

#### **Background Discussion**

Under the RT Act an owner cannot require a tenant to pay more than 2 weeks' rent in advance before or during the first 2 weeks of the tenancy agreement. After this initial 2 weeks, the Act imposes no limit on the amount of rent in advance an owner can require from a tenant. However, once an owner has accepted a payment of rent, they cannot require another payment of rent in advance "until the period of the tenancy in respect of which any previous payment has been made has elapsed".<sup>76</sup>

The RT Act does not prohibit a tenant from electing to pay more than 2 weeks' rent in advance, or an owner from accepting that payment.

While a limit on on-going rent in advance appears to be standard practice in a number of Australian jurisdictions, specific provisions for this vary, as detailed in the following table.

**Table 2. Period of rent paid in advance**

<i>Australian jurisdictions</i>	<i>Maximum period of rent in advance</i>	<i>Section</i>
ACT	1 calendar month	28
NSW	2 weeks (if rent is <\$300 pw) 4 weeks (if rent is >\$300 pw)	38
NT	No more than 1 rental payment per rental payment period.	39
QLD	1 month	49
SA	2 weeks initially, then unlimited	54
TAS	4 weeks	18 & 19
VIC	1 month (if rent is <\$350 pw); unlimited (if rent is >\$350 pw).	40
WA	2 weeks initially, then unlimited	28

<sup>76</sup> Section 28, RT Act (WA).

### 3.1.1 Initial Rent in Advance

#### **Summary of Responses**

A number of respondents said that rent in advance and other up-front costs can act as barriers to obtaining rental accommodation, particularly for low-income earners, and recommended that the maximum permissible amount of rent required in advance be reduced to 1 week for the first 2 weeks of the tenancy.<sup>77</sup> Shelter WA further recommended that no minimum limit be placed on the level of weekly rent at which these restrictions were to apply, so as not to discourage investment in the low-cost end of the rental market.<sup>78</sup>

The DHW supported Stamford's recommendation, commenting that it would help people on low incomes access private rental accommodation.<sup>79</sup> DHW raised the issue of difficulty for tenants who may have to 'catch up' when paying rental arrears, if the required level of rent in advance was increased.

The POA submitted that the current restriction on rent in advance did not provide enough protection for owners, recommending that 1 calendar month's worth of rent be permitted.<sup>80</sup> Further, the POA argued that the tenant should be allowed to pay more than 1 month's rent in advance if they wish to do so.

#### **Policy Position**

The Review believes that the current provision in the RT Act limiting the amount of rent in advance an owner may require from a tenant in the first 2 weeks of the tenancy to 2 weeks' worth of rent is appropriate.

### 3.1.2 Ongoing Rent in Advance

#### **Background Discussion**

As the previous table indicates, most other Australian jurisdictions limit the payment of on-going rent in advance. The Commonwealth Report "*Minimum Legislative Standards for Residential Tenancies in Australia*", recommends 2 weeks' rent in advance as an appropriate maximum at all times.<sup>81</sup> The basis for this being that the establishment costs of a tenancy (2 weeks' rent in advance, bond, the costs of utility connections and moving costs) represent a significant barrier to accessing rental accommodation for low-income earners. A further outlay two weeks later of (at least) one month's rent in advance can place extreme stress upon a low-income earner's finances. For tenants in receipt of Centrelink payments, paying rent one month in advance may be inconvenient as Centrelink payments are made fortnightly.

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<sup>77</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 22.

<sup>78</sup> Shelter WA, *Submission to the Review of the RT Act*, Apr 2002, p. 13.

<sup>79</sup> DHW, *Submission to the Review of the RT Act*, Dec 2002, p. 7.

<sup>80</sup> POA, *Submission to the Review of the RT Act*, Apr 2002, p. 3.

<sup>81</sup> Kennedy, Robyn; See, Peter; Sutherland, Peter; May 1995, *Report Prepared for the Commonwealth Department of Housing and Regional Development*, Australian Government Publishing Service, Canberra, ACT, p. 65.

A tenant may wish to pay more than two weeks' ongoing rent in advance for reasons of convenience. For example, an employee who is paid on a monthly basis may agree to have their rent deducted directly from their salary by an employer-owner, or a tenant who is regularly away from the rental property may find monthly rent payments more convenient.

### **Summary of Responses**

In a dialogue session with DOCEP, REIWA expressed the view that there is no "buffer" for owners when the rent is paid in advance only up to the date when the rent is again due. REIWA argued that ongoing rent in advance should be increased to 3 weeks' rent, which would provide for 1 week's rent in advance being held at all times during the tenancy.<sup>82</sup> As was noted in the Stamfords Report, this would effectively create a one week 'rental bond' and contravene section 28(2) of the RT Act, which prohibits an owner from requiring further rental payments until the period of the tenancy elapses for which any previous payment has been made.<sup>83</sup>

Tenant advocacy groups welcomed a restriction on the ability to require rent in advance, however, were critical of the recommendation of one month's rent in advance, arguing that any more than 2 weeks' rent in advance places significant strain on the finances of low-income earners, as well as their ability to manage those finances.<sup>84</sup>

Most submissions did not support the idea of applying a limit on rent in advance only for properties with a weekly rent below a certain figure, arguing that such a distinction was an unnecessary complication to the existing provision and may result in a decline in investment in lower-cost rental housing.

### **Policy Position**

The Review believes that tenants should have the option to pay a greater amount of ongoing rent in advance, however, this should only occur if expressly requested by the tenant. Otherwise, the amount of rent payable in advance should be limited to 2 weeks, in particular to assist low-income earners manage rental payments.

It should be noted that increased rent in advance does not protect owners from tenants defaulting on rental payments, as an owner must wait until the rent is in arrears before commencing action to recover the rent due to them. The Review proposes to amend the RT Act to prohibit an owner from requiring more than 2 weeks' rent in advance at any time during the tenancy agreement.

After the amendments are implemented, it is anticipated that owners who are signatories to existing calendar monthly lease agreements and long-term lease arrangements will still be able to negotiate to retain these lease agreements if this is acceptable to their tenants.

Applying the 2 week limit on rent in advance to properties below a certain weekly rental level may cause some owners and agents to artificially raise rental rates to avoid these restrictions. Therefore, the Review proposes that the limit apply to all rent levels.

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<sup>82</sup> DOCEP dialogue session with REIWA, 29 Nov 2004.

<sup>83</sup> Stamfords' Report, pp. 91-92.

<sup>84</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002. pp. 22-3; Shelter, *Submission to the Review of the RT Act*, Apr 2002, p 13.

### **Proposal 35**

That the RT Act be amended to limit the amount of ongoing rent in advance which an owner/agent can require from a tenant at any time during a tenancy, to two weeks' rent, irrespective of the level of rent for the property.

## **3.2 Additional Costs**

### **3.2.1 Preparation and Execution Costs**

#### **Stamfords' Recommendation 40**

*That the current requirement for owners to be responsible for the cost of preparation of an agreement (section 55 of the Act) be retained.*

## **Background Discussion**

Under Western Australian legislation, the cost of the preparation of a lease agreement is currently borne by the owner.<sup>85</sup> In comparison, New South Wales' legislation allows the cost to be shared evenly by the tenant and the owner.<sup>86</sup>

## **Summary of Responses**

There was general support for retaining the current requirement that owners bear the costs of preparation of the tenancy agreement. One private submission proposed that the cost of the written agreement be borne by the owner but that the cost of subsequent written agreements with the same tenant be borne by that tenant.<sup>87</sup>

REIWA suggested that agents be able to charge tenants and prospective tenants a disbursement fee for "entering a lease, renewal, extending or continuing a residential agreement".<sup>88</sup>

## **Policy Position**

The Review believes that the cost of preparing a tenancy agreement is a cost associated with the income derived from an investment and should therefore be borne by the owner. Accordingly, the Review does not propose to amend section 55 of the RT Act.

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<sup>85</sup> Section 55, RT Act (WA).

<sup>86</sup> Section 12, RT Act (NSW).

<sup>87</sup> Private submission no. 24, *Submission to the Review of the RT Act*, Dec 2002, p. 4.

<sup>88</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 11.

### 3.2.2 Other Additional Costs

#### **Stamfords' Recommendation 41**

*That the Act not be amended to permit the owner or agent to charge any additional fees to the tenant.*

#### **Background Discussion**

Section 27 of the RT Act prohibits charging a tenant any fees other than rent, a security bond, a letting fee or an option fee (which must be refunded to the tenant or put towards the rent payable by the tenant).

DOCEP has become aware that real estate agents may be charging tenants a range of additional fees by incorporating them into various clauses in their standard tenancy agreements. Examples of these fees include:

- a fee for documentation at the end of a lease;
- a fee for inspections and re-inspections;
- charges for the services of a debt collection agency;
- a fee for all documentation (e.g. copies of utilities bills) sent to the tenant; and
- a fee for breach of the tenancy agreement by the tenant.

It has also been noted that DHW charges some tenants a fee for the hire of a heater.

DOCEP has sought legal advice as to whether any of these fees constitute a breach of the RT Act. Discussions with DHW and REIWA are ongoing to ensure clarity on the issue of fees allowed under the Act.

#### **Summary of Responses**

The tenant advocacy groups were supportive of this recommendation while being critical of DHW for its practice of charging tenants amenity hire fees.<sup>89</sup> REIWA and the POA opposed the recommendation.

#### **Policy Position**

The Review believes that some of the costs incurred by an owner in managing a tenancy should not be passed on to a tenant, as those costs are more appropriately classified as expenditure necessarily incurred by the owner in producing rental income. The Review also believes that in order to provide some certainty to tenants in regard to the cost of establishing a tenancy, fees should be limited to those proscribed in the RT Act.

Therefore, it is proposed to amend the RT Act to make it clear that owners and agents are prohibited from requiring a tenant to pay any other fee aside from those prescribed in the Act itself.

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<sup>89</sup> See for example: TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 23.

### **Proposal 36**

That the RT Act be amended to prohibit owners and agents from requiring a tenant to pay any fee other than those allowed in the Act.

## **3.3 Application and Option Fees**

### **Stamfords' Recommendation 42**

*That the current provision for option fees (section 27 of the Act) be amended to require an owner/agent who is holding an option fee (or fees) to disclose to a prospective tenant the number of option fees they are holding, before accepting an option fee from the prospective tenant.*

### **Stamfords' Recommendation 43**

*That the Act be amended to state that an applicant cannot waive their right to a refund of the option fee where:*

- *the applicant withdraws prior to acceptance; or*
- *the owner does not accept the application.*

### **Stamfords' Recommendation 44**

*That the Act be amended to state that option fees collected by an agent from a tenant (as permitted under section 27(2)(a) of the Act) be considered as monies received on trust by an agent for the purposes of section 68 of the Real Estate and Business Agents Act 1978.*

## **Background Discussion**

Section 27 of the RT Act enables an owner or agent to require payment of a fee from a prospective tenant to ensure that the owner takes into consideration the applicant's request to enter into a tenancy agreement (an 'option fee'). The option fee paid by a tenant who subsequently is offered and accepts the tenancy agreement must be refunded to the tenant or applied towards the rent payable under the agreement. Any option fee paid by applicants who are not offered a tenancy agreement must be refunded.

The concept of an option fee in regard to a lease application does not appear in any Australian jurisdiction other than Western Australia and the Northern Territory. Section 24 of the Northern Territory RT Act prohibits the use of option fees. Section 17(2)(a) of the Tasmanian RT Act prohibits the collection of any money for or in relation to making an application to rent a residential property.

*Holding* fees are permitted in some Australian states<sup>90</sup> however, a holding fee differs from an option fee in that the fee is paid to *guarantee* the applicant first option on the tenancy agreement. As such, an applicant seeking rental accommodation need only pay one holding fee when applying for a tenancy agreement. Both NSW and ACT legislation prohibit the collection of holding fees.<sup>91</sup>

### **Summary of Responses**

REIWA was supportive of agent disclosure of option fees.

Tenant advocacy groups and Giz Watson MLC were opposed in principle to option fees, recommending that they be abolished completely.<sup>92</sup> These respondents argued that option fees are an unnecessary barrier to obtaining accommodation, particularly for low-income earners. The requirement to pay an option fee may limit a tenant's housing choices where they cannot afford to pay more than one option fee at a time. The payment of an option fee does not guarantee an offer of a tenancy agreement, and thus, if an applicant is unsuccessful in their application they may be unable to pursue another tenancy application that requires the payment of an option fee until their option fee is refunded. If it is refunded by means of a cheque (as is often the case) the applicant is then required to wait until the cheque is cleared by the bank before they can place another application with an option fee. If for example, an applicant was unsuccessful in two bids to obtain a tenancy agreement in this manner, by the time they receive their option fee back the second time their current tenancy agreement may have ended and they may well be faced with homelessness.

While remaining very strongly opposed to option fees, the tenant advocacy groups recommended that, should option fees be retained, the RT Act should specify that an owner can charge only one option fee for a property at any given time. As a last preference, these groups agreed that owners/agents be required to disclose to a prospective applicant the number of option fees they are holding.<sup>93</sup>

In its submission to Phase 1 of the Review, DHW expressed the opinion that the charging of an option fee for every application is prohibitive for most low-income earners, partly because of the size of the fee, but also because it is usually refunded in the form of a cheque, requiring clearance, and the refund is not always readily available. DHW recommended that, if such an option fee is necessary, then it should be set at 10% of the weekly rent, payable in cash by the applicant and immediately available as a refund in cash if the application is unsuccessful. (Also, that if the applicant fails to advise the agent/owner that they no longer require the property prior to it being offered to them, then the agent/owner should be entitled to retain the 10% option fee as compensation.)<sup>94</sup>

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<sup>90</sup> RT Act (Vic), RT Act (Qld) and RT Act (Tas).

<sup>91</sup> Section 36, RT Act (NSW); section 18, RT Act (ACT).

<sup>92</sup> *Submissions to the Review of the RT Act*, Dec 2002 by: City of Fremantle Community Legal & Advocacy Centre; Gosnells Community Legal Centre; Financial Counsellors Resource Project Inc.; MIDLAS; TAS; Shelter WA.

<sup>93</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 24; Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 10.

<sup>94</sup> DHW, *Submission to the Review of the RT Act*, May 2002, p. 12.

The question of abolishing option fees was not specifically posed in either the Discussion Paper or in the Stamfords Report. Thus, none of the owner advocacy groups presented an argument for retaining option fees. However, the general arguments in support of a need for option fees include the following:

- the payment of an option fee by a tenant is a "show of faith" that they are genuinely interested in renting the property;
- charging an option fee discourages tenants from lodging multiple tenancy applications on the same day;
- tenants are more likely to inform an owner if they no longer want to be considered for the tenancy if reimbursement of the option fee is contingent upon this; and
- option fees can be retained by owners to offset losses incurred by them where "successful" applicants, who fail to withdraw their application, elect not to proceed with a tenancy agreement offered to them.

### **Policy Position**

The Review acknowledges that option fees provide some level of security for owners while they are assessing tenancy applications, however, the financial burden imposed on applicants in having to pay one or more option fees while seeking accommodation is having a disproportionately adverse effect on low income earners.

It is therefore proposed that, rather than adopting Stamfords' recommendations 42, 43 and 44, which simply regulate the option fee transaction, the RT Act be amended to remove the ability to charge option fees altogether.

The Review agrees with the points raised by the tenant advocacy groups that low income earners may experience difficulties in paying option fees, which are often equivalent to one week's rent, and therefore are unable to lodge tenancy applications to be considered for private rental properties. Applicants may also experience considerable inconvenience and financial hardship if option fees are not refunded quickly (after their application has been rejected), or are refunded by cheque which may take several business days to clear. It is believed that removing option fees will benefit tenants across the board, and in particular, low income earners, by alleviating some financial stress during the tenancy application process.

#### **Proposal 37**

That the RT Act be amended to remove the ability to charge option fees.

### 3.4 Utilities Fees

#### 3.4.1 Disconnection and Reconnection Charges

##### **Stamfords' Recommendation 45**

*That the Act be amended to require that, where any action or non-action of a tenant results in the disconnection of a service, the tenant is responsible for any fee charged for the reconnection of this service.*

##### **Background Discussion**

The RT Act is silent on the question of who is liable for costs associated with the reconnection of a service that has been disconnected due to the action or inaction of a tenant. The matter is not addressed in legislation in other Australian jurisdictions.

##### **Summary of Responses**

Opposition to this recommendation came from the tenant advocacy groups that claimed that such an amendment would result in the tenant always being liable for reconnection costs irrespective of the circumstances.<sup>95</sup> These groups put forward the example of a tenant who chose to use a mobile phone service rather than a landline service. Were the RT Act amended in accordance with recommendation 45, the tenant would be liable for the monthly service charge for the land line, a service they did not use or want, and to have the service reconnected upon termination of the tenancy agreement. The same would apply in a situation where a pay TV service was connected and the tenant did not (for financial reasons or otherwise) wish to maintain the service.

The tenant advocacy groups also questioned the inequity of not requiring the owner to disclose to a prospective tenant the standard of available amenities of a property (as is proposed in the Stamfords recommendation 118) while holding the tenant responsible for maintaining those amenities.<sup>96</sup>

##### **Policy Position**

Section 15 of the RT Act enables an owner to apply to the Magistrates Court for compensation from a tenant in relation to a breach of, or dispute arising under the tenancy agreement. It is arguable however, whether the failure of a tenant to maintain services connected to a property constitutes a breach of a tenancy agreement. This may depend upon the agreed terms of the tenancy agreement; if the agreement does not specify that it is the tenant's responsibility to maintain connection of the services, it may be argued that an owner could not claim compensation under section 15 of the RT Act.

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<sup>95</sup> See for example, TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 25; Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 10.

<sup>96</sup> *ibid.*

Therefore, rather than amend the RT Act to provide owners with a very specific right of redress in relation to reconnection fees, the Review believes that owners and tenants could benefit from community education about the need to negotiate which services should remain connected for the duration of a tenancy. The agreed outcome of the negotiations would then form part of the tenancy agreement.

#### **Proposal 38**

That DOCEP conduct community education (and amend DOCEP publications accordingly) to encourage owners and tenants to negotiate and incorporate as terms in the tenancy agreement, the utilities and services that should remain connected to a property for the duration of a tenancy agreement.

### **3.4.2 Charges for Utilities Consumption**

#### **Stamfords' Recommendation 46**

*That the Act be amended to prohibit an owner charging any fee for consumption of a utility unless:*

- *the household's consumption is metered and the fee relates directly to the amount consumed; or*
- *the parties agree to an alternative method of calculation for the cost of unmetered utility consumption as an additional term of the agreement.*

#### **Stamfords' Recommendation 47**

*That the Act be amended to require that, where an owner passes on a charge by a supplier, the owner provide the tenant with full account details, including (where appropriate) meter readings, supply charges, common charges, and GST.*

### **Background Discussion**

Under the RT Act, the owner of a property is responsible for paying local council rates, land tax and water supply service charges.<sup>97</sup> A tenant is responsible for paying the costs of any gas, electricity and water used during the period of a tenancy agreement.

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<sup>97</sup> Section 48, RT Act (WA).

In contrast, Victorian legislation states that if utility services at the property are not separately metered, the owner is liable for all charges in regard to the supply or use of electricity, gas, oil and water by the tenant.<sup>98</sup> Under Queensland legislation, if the utility services are not separately metered, the tenant is liable for gas, electricity and water charges only if it is so specified in the tenancy agreement.<sup>99</sup> The agreement must specify which service charges are payable, how the tenant's portion will be calculated, and how the charges are to be collected from the tenant by the owner/agent.

### **Summary of Responses**

Tenant advocacy groups maintain that tenants should only be held responsible for payment of utility costs which can be directly attributed to their consumption (i.e. where separate meters are provided). Strongly opposed to negotiable alternative arrangements, they argue that an imbalance of bargaining power exists between the owner and the tenant which could, for example in apartment blocks, result in some tenants being forced to subsidise other tenants' consumption.<sup>100</sup>

TAS reports that their advice line is receiving an increasing number of calls from tenants in rural and regional areas who, dependant upon rainwater supplies, are running out of water. TAS submits that as access to clean water is a basic necessity of life, the RT Act should require an owner of a property to ensure that a water supply is available at all times.<sup>101</sup>

DHW expressed concern about how this recommendation would affect its practice of charging an amenity fee to public housing tenants, to cover the cost of heating water in complexes where water consumption is not separately metered.

The recommendation that owners provide tenants with full utility account details attracted no opposition from stakeholders.

### **Policy Position**

The Review proposes to amend the RT Act to prohibit an owner from charging a tenant any fees for consumption of a utility unless it is a charge solely for the amount consumed, or, in situations where utility consumption is not metered separately, the parties agree to an alternative method of calculation as an additional term of the tenancy agreement. The tenant should be advised of the method of calculation to be used and that method should be recorded in the additional term of the tenancy agreement.

Water is a necessity of life. Therefore, the Review proposes to amend the RT Act to require that owners disclose to prospective tenants prior to them signing a tenancy agreement, the availability of potable water to a rental property. By doing so, a prospective tenant can make an informed decision whether or not to commit to a tenancy agreement for a property that may not have an easily accessible supply of water.

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<sup>98</sup> Section 53, RT Act (Vic).

<sup>99</sup> Section 91(2), RT Act (Queensland)

<sup>100</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 26.

<sup>101</sup> *ibid.*

### **Proposal 39**

That the RT Act be amended to prohibit an owner requiring a tenant to pay any utility related fee unless:

- the household's consumption is metered and the fee relates directly to the amount consumed by the tenant; or
- the parties agree to an alternative method of calculation for the cost of unmetered utility consumption as an additional term in the tenancy agreement; and
- that method of calculation is disclosed to the tenant and recorded in the tenancy agreement.

### **Proposal 40**

That the RT Act be amended to require that, where an owner passes on a charge by a supplier, the owner must provide the tenant with full account details, including (where appropriate) meter readings, supply charges, common charges, and GST.

### **Proposal 41**

That the RT Act be amended to require that where scheme water is unavailable at a property, an owner must disclose this information to a prospective tenant and advise them of the availability of potable water, prior to signing any tenancy agreement with that prospective tenant.

## **3.5 Letting Fees**

### **Stamfords' Recommendation 48**

*That the Act be amended to prohibit agents from charging a letting fee to tenants.*

### **Background Discussion**

The RT Act currently allows a tenant to agree to pay all or a portion of the letting fee charged by a real estate agent for arranging a tenancy agreement.<sup>102</sup> It is common practice in the real estate industry for an agent to charge the owner a letting fee equivalent to one week's rent, and the tenant a letting fee equivalent to one week's rent.

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<sup>102</sup> Regulation 13, RT Regulations (WA).

The issue of letting fees has a contentious history in Western Australia. In June 1996, on the recommendation of a 1992 Statutory Review of the RT Act,<sup>103</sup> legislation was proclaimed to prohibit agents from charging tenants a letting fee<sup>104</sup>. However, two and a half months later (some four months before the legislative amendment was to come into operation), the then State Government requested the Governor to revoke the previous proclamation, and this was done on 30 August 1996.<sup>105</sup> The following year, the State Government commissioned Murdoch University to conduct an economic impact assessment of prohibiting the charging of letting fees to tenants.<sup>106</sup> The executive summary of the report stated:

“Consideration of the major features of the market for private residential tenancies together with a formal analysis of the letting fee and re-letting fee proposals indicates that the change to the liability rules to prevent agents from charging letting fees to tenants, will be largely neutral in its financial impact, and will improve efficiency and equity in the market”.<sup>107</sup>

In 2001, the current State Government established a taskforce to develop a State Homelessness Strategy. The report of the State Homelessness Taskforce recommended that the ability to charge a letting fee to a tenant be abolished, as it posed a significant barrier to accessing accommodation for low-income earners.<sup>108</sup>

Western Australia is the only Australian jurisdiction that allows real estate agents to charge a letting fee to tenants.

Owners who manage their own rental property are prohibited from charging tenants a fee for arranging a tenancy agreement.<sup>109</sup>

### **Summary of Responses**

The recommendation to prohibit real estate agents charging tenants a letting fee generated substantial comment from stakeholders. Several tenant advocacy groups, DHW and many individuals supported the recommendation. The following reasons were advanced in support of abolishing letting fees:

- agents are already paid by owners for arranging tenancy agreements;
- letting fees are a fee for service provided as part of a contractual arrangement between the owner of a property and an agent, where the agent acts on behalf of the owner. Third parties (tenants) should not be responsible for these costs;
- for tenants, letting fees are a significant part of the sizable up-front costs associated with renting a property and, as such, present a barrier to securing accommodation for low-income earners;

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<sup>103</sup> *Report to the Hon. Minister for Consumer Affairs on the Operations of the Residential Tenancies Act*, Ministry of Consumer Affairs, Mar 1992.

<sup>104</sup> See sections 11, 46 and 52, *Real Estate Legislation Amendment Act 1995 (WA)*.

<sup>105</sup> See Edwardes, C, Personal Explanation – Minister for Fair Trading, Hansard, 5 Sep 1996, pp. 5323-4.

<sup>106</sup> Flatau, et.al., *Economic Impact Assessment: Letting and Re-Letting Fees in the Western Australia Residential Tenancy Market*, Murdoch University, Nov 1997.

<sup>107</sup> *ibid*, p. xv.

<sup>108</sup> State Homelessness Taskforce, *Addressing Homelessness in Western Australia*, Jan 2002.

<sup>109</sup> Section 27, RT Act (WA).

- no other Australian state allows real estate agents to charge tenants a letting fee; and
- the State Homelessness Taskforce recommended abolishing letting fees.

REIWA, two real estate agents and three property owners opposed the abolition of the tenant's letting fee on the following grounds:

- the suggestion that owners will pass the cost of paying the full letting fee themselves on to tenants through increased weekly rents;
- the claim that compared to other Australian jurisdictions, tenants in Western Australia pay the lowest level of upfront costs in establishing a tenancy (claim unsubstantiated in the submission);
- the suggestion that *“the removal of the letting fee sharing arrangement between tenants and owners would inevitably lead to a reduction in the levels of agency services”*; <sup>110</sup>
- *“A survey of REIWA members found that most agents would consider selling the rental businesses or reduce their property management staff, if profits decline after a change to the letting fee arrangements”*; <sup>111</sup> and
- the claim that removing the tenant letting fee would decrease the supply of affordable housing because it would be a disincentive to investors. <sup>112</sup>

### **Further Discussion**

In Western Australia, residential and commercial property sales and commercial leasing and management are all carried out at the cost of the vendor/lessor. This does not appear to have had a detrimental effect on investment in this sector.

The economic impact assessment (EIA) carried out by Murdoch University found that the likely outcome of prohibiting real estate agents from charging a tenant a letting fee would be an increase in rents, as owners passed this charge on. The forecasted increases ranged from an increase of 7.7% in weekly rent under a three month fixed term lease, to a 1.9% increase under a twelve month lease, to a 1% increase under a twenty-four month fixed term lease. <sup>113</sup> The EIA predicted that the longer the term of the lease, the smaller the increase in rent would be.

The EIA also found that in a survey of real estate agent businesses undertaken for the assessment, 60.5% of the businesses indicated that if the ability to charge tenants a letting fee was removed, the tendency would be for real estate agents to pass this charge on to the owner. <sup>114</sup> Were this to prove an accurate prediction, there would be no loss of income to agents and subsequently, no reason to reduce agency services to clients.

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<sup>110</sup> REIWA, *Report on the 2002 statutory review of the Residential Tenancies Act and regulations covering the charging of letting fees on residential rental property by licensed real estate agents (by the WA Department of Consumer and Employment Protection)*, Nov 2004, p. 7.

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*, p. 8.

<sup>113</sup> Flatau, et.al., *Economic Impact Assessment: Letting and Re-Letting Fees in the Western Australia Residential Tenancy Market*, Murdoch University, Nov 1997, pp. xvii-xviii.

<sup>114</sup> *ibid.*, p. xii-xiv.

## **Policy Position**

The Review recognises that the ability to charge letting fees to both owners and tenants creates a substantial income stream for real estate agents. Limiting the ability of agents to charge letting fees only to owners, on whose behalf agents are acting, does not prohibit agents from requesting that owners pay the maximum letting fee (i.e. 2 weeks' rent) allowed under the RT Act. Owners would then exercise their ability to negotiate the level of letting fees with agents. Tenants, on the other hand, have no bargaining power in this respect, and are currently obliged to pay a fee for services which are ultimately rendered for the benefit of owners.

Having regard to the *Report to the Hon. Minister for Consumer Affairs on the Operations of the Residential Tenancies Act*, the economic impact assessment carried out by Murdoch University, the submissions by stakeholders, the recommendation by Stamfords, and the State Homelessness Strategy, the Review recommended an amendment to the RT Act to prohibit real estate agents from charging a letting fee to tenants.

It is noted that on 4 March 2007, the Government formally announced the prohibition of tenant letting fees and its intention to re-proclaim the relevant sections of the *Real Estate Legislation Amendment Act 1995* (WA).

### **Proposal 42**

No further action is required given that on 5 April 2007 the Government formally re-proclaimed the relevant sections of the *Real Estate Legislation Amendment Act 1995* to prohibit the charging of letting fees to tenants.

## **3.6 Re-letting Fees**

### **Stamfords' Recommendation 49**

*That the prohibition on an agent charging a fee in connection with the renewal, extension or continuation of a tenancy where, upon the expiry of the term, a further right of occupancy is granted to the same tenant, be retained.*

## **Background Discussion**

Section 27(1) of the RT Act prohibits a person from requiring or receiving from a tenant, any money for renewing, extending or continuing a tenancy agreement.

## **Summary of Responses**

All major stakeholders supported the recommendation to maintain the prohibition on the charging of re-letting fees. A private property owner and a real estate agent opposed the recommendation stating that tenants would place more value on a tenancy if they had to pay a re-letting fee,<sup>115</sup> and that if tenants (rather than the owner) paid the cost of drawing up a new tenancy agreement they would benefit as owners' costs would be kept down thereby keeping rents down.<sup>116</sup>

## **Policy Position**

The Review believes that tenants should not be required to pay a fee to renew, extend or continue a tenancy. In keeping with the proposal to abolish the tenant letting fee, the prohibition on agents charging a tenant a renewal, extension or continuation fee for an ongoing tenancy agreement, will be maintained.

### **3.7 Compensation**

#### **3.7.1 Compensation due to Termination as a Fee**

##### ***Stamfords' Recommendation 50***

*That the Act not be amended to allow an owner to charge a fee to cover costs they incur as a result of a tenant terminating a fixed term agreement without grounds prior to the end of the fixed term.*

## **Background Discussion**

In order to claim compensation for costs incurred due to the early termination of a tenancy agreement by a tenant, an owner must apply to the Magistrates Court for an order for compensation.<sup>117</sup> There is no standard amount awarded to an owner to cover the costs of advertising for a new tenant, real estate agent fees, lost rent or any other costs incurred to establish a new tenancy. This amount is determined by the magistrate hearing the case, with regard to section 20 of the RT Act (General Powers in Proceedings).

In most other Australian jurisdictions, tribunals with the authority to determine residential tenancy matters deal with applications for compensation.<sup>118</sup> The tribunal determines the level of compensation paid to the applicant.

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<sup>115</sup> Private submission No. 47 to the Review of the RT Act, Dec 2002.

<sup>116</sup> Private submission No. 24 to the Review of the RT Act, Dec 2002, pp. 4-5.

<sup>117</sup> Section 15, RT Act (WA).

<sup>118</sup> Such is the case in Victoria, New South Wales, Queensland, South Australia and the Australian Capital Territory.

## **Summary of Responses**

Most of the respondents supported this recommendation aside from the POA, one real estate agent and one property owner, who objected to the need to undertake legal action to recover costs.

Those respondents supporting this recommendation expressed concern that enabling compensation to be recouped in the form of a fee may result in cases where the tenant is charged a standard fee that may not equate with the actual costs incurred by the owner.

## **Policy Position**

The Review believes that the current practice provided for by section 15 of the RT Act, that of determination by the Magistrates Court of levels of suitable compensation to be paid, is appropriate.

### **3.7.2 Evidence for Compensation of Loss**

#### ***Stamfords' Recommendation 51***

*That the Act not be amended to specifically require evidence of actual loss in a claim for compensation for loss or injury caused by breach of the agreement.*

## **Background Discussion**

Currently the RT Act does not require a magistrate to be bound by the rules of evidence but allows the magistrate to “*inform itself upon any matter relating to the proceedings in such manner as it thinks fit*”.<sup>119</sup> Thus, in applications for compensation there is an implication that decisions will be made taking into account evidence supporting the claims of loss.

Residential tenancies legislation in other Australian States makes no mention of evidentiary requirements in the settling of disputes or claims for compensation.

Consultation with the Building and Tenancy Industries Branch of DOCEP indicates that on occasions, judgements are made without presentation of any supporting documentary evidence. Due to the low level of attendance by respondents (see chapter 9.3 for further discussion) judgements are frequently handed down in favour of owner applicants, based on the information in the application alone.

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<sup>119</sup> Section 21, RT Act (WA).

## **Summary of Responses**

The tenant advocacy groups strongly opposed this recommendation, arguing that it is reasonable to require any party to a proceeding to justify a claim for loss by, where possible, providing documentary evidence supporting their claim. TAS maintains that the interests of both parties involved in a dispute would be better protected through the RT Act clearly specifying the requirement for justification of any claim for loss through the provision of documentary evidence.<sup>120</sup>

Both REIWA and the POA were supportive of the recommendation that the RT Act *not* be amended to require documentary evidence as a matter of course.

## **Policy Position**

The Review is aware that the RT Act is unclear on the need for applicants to provide documentary evidence in claims for compensation for loss, and of the potential (for reasons of expediency in the absence of a challenge to an application) for judgements to be made without scrutiny of supporting documentary evidence.

On the other hand, the Review is also mindful that supporting documentary evidence may not always be available. For example, if an owner carries out repairs to a property required as a result of damage done by a tenant, it would be nonsensical for the owner to issue themselves with a receipt for the work done.

If supporting documentary evidence were to be made mandatory in all compensation claims, the Magistrates Court would no longer have full discretion to determine disputes “as it thinks fit”. This may be problematic in disputes where parties are unable to produce documentary evidence (and evidence is provided by way of testimony). Therefore, rather than make supporting documentary evidence mandatory, the Review proposes to amend the Magistrates Court application forms for residential tenancy disputes (forms 6 and 12) to encourage applicants to attach documentary evidence, where practicable.

### **Proposal 43**

That the Magistrates Court application forms for residential tenancy disputes (Forms 6 and 12) be amended to encourage applicants to, where practicable, attach documentary evidence to substantiate claims for compensation associated with loss.

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<sup>120</sup> See TAS, *Submission to the Review of the RT Act*, Dec 2002, pp. 28-29; Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 11.

## 4. BONDS

### 4.1 A Centralised Bond Administrator

#### ***Stamfords' Recommendation 52***

*That the Act be amended to require all bond monies to be lodged with a centralised bond administrator (including bond monies collected from Homeswest tenants).*

#### **Background Discussion**

Currently under the RT Act, bond monies received by a person for the rental of a private property must be deposited with either the Bond Administrator (DOCEP) or an authorised financial institution (AFI).<sup>121</sup> Unlike lodging money in a trust account with most AFIs, lodgement of bond monies with DOCEP does not incur any associated fees or charges.

Homeswest is exempt from this requirement of the RT Act.<sup>122</sup> Bonds collected by Homeswest for the rental of public housing are held by Homeswest, and the interest earned is used to service the public housing system.

In contrast to Western Australia, all other Australian jurisdictions except Tasmania, have centralised bond administrators to hold bond monies. In a centralised system, the Bond Administrator acts as an independent repository for bond monies and both tenants and owners are aware of where the bond is being held. Centralising the receipt of bonds also makes it easier to collect data on the rental market for policy-making purposes.

Under the current system both DOCEP and DHW essentially act as Bond Administrators. DOCEP holds the bond monies of private tenants in the Rental Accommodation Fund (RAF), the interest from which is used to fund tenant educational and advisory services, the residential tenancy dispute resolution mechanism, administration of the RT Act, the bond administration system, and at times, public housing.

As mentioned previously, the RT Act allows bond monies to be held in a trust account in an AFI (bank, credit society, etc). Real estate agents can deposit tenants' bond monies in AFIs or with DOCEP. The interest accrued from bond monies held in real estate agents' tenancy bond trust accounts is credited to the RAF. Under the REBA Act, real estate agents are required to have their trust accounts audited annually and to lodge a copy of the audit report with the Real Estate and Business Agents Supervisory Board of WA.

Private owners also have the option to place bond monies in trust accounts with AFIs or with DOCEP. However, it is apparent that some owners retain bond money or lodge it in their own bank account in error thereby denying the RAF of interest accrued.

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<sup>121</sup> Section 29(4)(b), RT Act (WA) and clause 2(1), Schedule 1, RT Act (WA).

<sup>122</sup> Section 6(c), RT Act (WA) and clause 5A, RT Regulations (WA).

## **Summary of Responses**

In general, support for a centralised bond administrator came mainly from the tenant advocacy groups and community legal centres. It was argued that problems arise when bonds are held by real estate agents in tenancy bond trust accounts, as real estate agents are not independent neutral third parties (unlike DOCEP acting as the Bond Administrator). In the event that there is a bond disposal dispute between an owner and a tenant, the real estate agent, who is obliged to act in the owner's best interests, has full control over whether or not to release the bond money.<sup>123</sup>

Opposition came from owner advocates and REIWA. In particular, REIWA reported that a member-survey revealed that the majority of member-agents wished to continue with the present system because it provided quicker access to bond monies. Their survey also indicated that regional members had expressed concerns over delays in having bonds processed by DOCEP.<sup>124</sup>

DHW gave conditional support for a centralised bond administrator, subject to being able to access, on application to DOCEP, a proportion of interest of bond monies for appropriate public housing programs.

## **Policy Position**

The current bond lodgement system allows flexibility for Homeswest, real estate agents, and private owners in lodging and accessing bond monies, however, it does not protect tenants from the possibility of incorrect, biased, or fraudulent handling of bond monies. Therefore, in the interests of simplicity and consumer protection, the Review believes that all bond monies should be lodged with the Bond Administrator, which can act as an impartial neutral third party.

Requiring real estate agents and private property owners to deposit bond monies with DOCEP will ensure that the Bond Administrator can safeguard all funds held in trust, owners and tenants will know where their money is held, and the RAF will receive the interest earned on those funds. The amount of interest monies in the RAF determines the level of funding that can be expended on educational resources for owners and tenants, on tenant advisory services, and for the purpose of public housing as specified by the State Treasurer.<sup>125</sup>

Requiring Homeswest to lodge the bond monies it receives from its public housing tenants with DOCEP will increase the interest accumulating in the RAF. As Homeswest accesses the dispute resolution services of the Magistrates Court extensively, the contribution of the interest earned from public housing bond monies to the RAF is appropriate (the RAF funds the residential tenancies dispute resolution services of the Magistrates Court, tenant advisory services used by public housing tenants, and liability payments to tenants who have had their property disposed of by Homeswest in the belief that a property had been abandoned).<sup>126</sup> The interest from public housing tenants' bond monies will help off-set the cost of those services used by Homeswest and public housing tenants which are currently funded only by the interest from the bond monies of private housing tenants.

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<sup>123</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 30.

<sup>124</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 16.

<sup>125</sup> Clause 3(5), Schedule 1, RT Act (WA).

<sup>126</sup> Section 79, RT Act (WA).

In addition to the consolidation of interest earned on bond monies, the centralisation of data on owners, tenants and residential tenancy agreements will provide an invaluable tool for future research to assist policy development on the rental sector.

**Proposal 44**

That the RT Act be amended to require that all persons/organisations that receive bond monies from tenants lodge those monies with the Bond Administrator (DOCEP).

**Proposal 45**

That the RT Act be amended to remove Homeswest's exemption from the requirement to lodge bond monies with the Bond Administrator (DOCEP).

**Proposal 46**

That DOCEP and DHW work together to ensure an efficient transition of all public housing tenants' bond monies from Homeswest to the proposed Central Bond Administrator, and agree on guidelines under which Homeswest could apply for a proportion of interest on bond monies for suitable public housing programs.

## 4.2 The Bond Administration Process

***Stamfords' Recommendation 53***

*That, prior to the introduction of a centralised bond administrator model, DOCEP should conduct a complete review of its bond administration process, including a gap analysis of the current and proposed services in order to:*

- *ensure that DOCEP is able to meet the objectives of a centralised bond administrator without any reduction in the quality of service currently provided;*
- *investigate consumer concerns regarding the current bonds administration process, and develop and implement strategies for change and/or education of stakeholders and the public regarding the process; and*
- *ensure that the process of bonds administration process (sic) is efficient and effective, and utilises best practice (incorporating the entire bond lodgement and disposal process, and the roles of owners, agents, and tenants in the process), particularly in relation to methods for ensuring faster lodgement.*

## **Background Discussion**

It has been reported by some stakeholders that the processing of applications and the retrieval of bond monies from the DOCEP Bond Administrator can be slow and inconvenient. DOCEP acknowledges that limited resources and increases in the number of bonds requiring processing may have impacted on processing times. However, DOCEP reports that delays are often caused by real estate agents and owners failing to lodge complete bond documentation. DOCEP has recently reviewed its bond administration processes and has increased staffing resources in this area.

## **Summary of Responses**

This recommendation was supported by all of the respondents to the Review.

## **Policy Position**

The Review proposes that DOCEP continue to monitor the bond administration process and address any inefficiencies in a timely manner. In addition, the Review proposes that DOCEP develop and implement a community education program to promote the expanded role of the Bond Administrator.

### **Proposal 47**

That DOCEP continue to monitor the bond administration process and address any inefficiency in a timely manner.

### **Proposal 48**

That DOCEP develop and implement a community education program to promote the expanded role of the Bond Administrator.

## **4.3. Bond Amount**

### **Stamfords' Recommendation 54**

*That the current bond amount of four weeks' rent be retained.*

### **Stamfords' Recommendation 55**

*That DOCEP conduct community education to raise the awareness among owners of the ability (in certain circumstances) to obtain insurance coverage for damage to, and loss of income from, their rental property.*

## **Background Discussion**

In most instances, the maximum amount that an owner can request as bond is an amount equal to 4 weeks' rent.<sup>127</sup> There is no limit to what may be charged where the weekly rent is greater than \$500<sup>128</sup> or where the owner has occupied the premises for the previous three months.<sup>129</sup>

According to the report on the *“Minimum Legislative Standards For Residential Tenancies In Australia”*, 4 weeks' rent is considered to be a satisfactory amount for a bond.<sup>130</sup>

Landlord protection insurance is available to owners wanting to take precautions against risk to property or income from tenants. The cost and circumstances under which claims may be made vary, and such insurance may not be available in certain circumstances.

## **Summary of Responses**

Few stakeholders directly opposed the recommendation concerning the bond amount, with most acknowledging that a bond amount exceeding 4 weeks' rent was a substantial upfront cost to tenants. However, there remained the concern that a bond of 4 weeks' rent was often not enough to cover the losses of the owner in cases where a tenant defaults on rent payments. It is believed that reforms to the lower courts system will help to address the issue of loss of rental income by owners through a reduction in times for court hearings and the ability to seek earnings appropriation orders against tenants (see chapter 9 of this Paper for further details on lower court reforms).

TAS expressed concern about landlord protection insurance, worried that insurance companies may pursue tenants for compensation if an owner makes a claim. REIWA also expressed concern that insurance companies may charge high premiums for this type of insurance.

## **Policy Position**

The Review believes that the current requirement limiting bonds on rental properties to the equivalent of 4 weeks' rent is appropriate.

Whether or not to obtain insurance coverage for lost rent or tenant damage is a private matter for owners to decide upon. The Review does recommend that DOCEP note the availability of such insurance in its publications on tenancy issues.

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<sup>127</sup> Section 29(1)(b)(i), RT Act (WA).

<sup>128</sup> Section 29(2)(a), RT Act (WA) and clause 11, RT Regulations (WA).

<sup>129</sup> Section 29(2)(b), RT Act (WA).

<sup>130</sup> Kennedy, Robyn, See, Peter & Sutherland, Peter 1995, *Minimum Legislative Standards for Residential Tenancies in Australia*, Report Prepared for the Commonwealth Department of Housing and Regional Development, Canberra, Australian Capital Territory p. 60.

**Proposal 49**

That DOCEP document the availability of landlord protection insurance in its publications on tenancy issues.

**4.4 Furnished Properties**

***Stamfords' Recommendation 56***

*That the Act not be amended to allow an owner to require a larger bond from a tenant for furnished premises than for unfurnished premises.*

**Background Discussion**

Residential tenancy legislation in New South Wales allows an owner to ask for a bond equivalent to 6 weeks' rent for a furnished property where the weekly rent is \$250 or less, and an unlimited bond amount for furnished premises where the weekly rent is more than \$250.<sup>131</sup>

While there is a greater possibility that a furnished property will be damaged by a tenant, the higher level of rent payable automatically results in a higher bond being paid to 'secure' the condition of the furnishings.

**Summary of Responses**

REIWA and a number of property owners opposed this recommendation generally arguing that extra funds are required to cover potential damage to furniture.

**Policy Position**

As higher rent levels generally required for furnished properties automatically permit commensurately higher bonds to be charged for those properties, the Review believes that the equivalent of 4 weeks' rent is adequate security and that the RT Act should remain unchanged.

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<sup>131</sup> Section 9, *Landlord and Tenant (Rental Bonds) Act 1997* (NSW), and clause 6, *Landlord and Tenant (Rental Bonds) Regulations 1993* (NSW).

## 4.5 Pet Bonds

### ***Stamfords' Recommendation 57***

*That section 29(1)(b)(ii) of the Act be amended to permit an owner to require the payment of a bond of a prescribed amount where the tenant is permitted to keep any animal, with certain limited exceptions, on the premises.*

### ***Stamfords' Recommendation 58***

*That section 29(1)(b)(ii) of the Act be amended to remove the requirement that the pet bond be used only to meet the cost of any fumigation of the premises that may be required on the termination of the tenancy.*

### **Background Discussion**

Currently under the RT Act an owner can request a 'pet bond' of \$100 from a tenant when a dog or a cat is kept on the rental property.<sup>132</sup> This bond is to meet the cost of any fumigation that may be required after the tenant has vacated the property. Currently, compensation for damage caused to a property by a pet can be deducted from the standard security bond, as damage to the property is a breach of the tenant's responsibility for cleanliness and damage.<sup>133</sup>

As fleas can have a gestation period of up to five weeks, the ability for an owner to retain a pet bond during this period provides them with security in case fumigation is required. Retaining the entire security bond until it has been determined whether fumigation is necessary or not, would be inconvenient and unfair to the tenant, as the cost of fumigation is unlikely to equal the full amount of the security bond. The ability of owners to hold a pet bond enables the tenant to receive their security bond back earlier.

The term 'pet' encompasses a wider range of animals than cats and dogs. However, as the purpose of a pet bond is to meet fumigation costs, only pets that carry parasites prone to infesting carpets and soft furnishings need be included in this category for the purpose of the RT Act.

People with disabilities involving impaired sight or hearing often use assist dogs to help them. Dogs can also be trained to assist people with other impairments. For example, service dogs assist the mobility impaired, seizure response dogs assist people prone to seizures, and therapy dogs assist people with various physical and mental disabilities.<sup>134</sup> Dogs trained specifically to provide assistance to an individual with a disability are, arguably, not pets.

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<sup>132</sup> Section 29(1)(b)(ii), RT Act (WA) and Regulation 10A, RT Regulations (WA).

<sup>133</sup> Section 38, RT Act (WA).

<sup>134</sup> National Service Dogs Training Centre Incorporated - <http://www.nsd.on.ca>

Section 25(1)(b) of the *Disability Discrimination Act 1992 (Cwth)* (DD Act) makes it unlawful for a person to discriminate against another person on the ground of that person's disability, in the terms and conditions on which the accommodation is offered to the other person. As an assist dog is, arguably, not a pet, it may be that to require a pet bond from a tenant with an assist dog would breach the DD Act.<sup>135</sup> It should be noted that the DD Act makes it clear that the liability of a person with a disability for damage caused to property by an assist dog is not negated because the dog is an assist dog.<sup>136</sup>

### **Summary of Responses**

There was general support from stakeholders for both of the Stamfords' recommendations, though concern was expressed that the phrase "*with certain limited exceptions*" would need clarifying. It was also claimed that the current prescribed amount for the pet bond was no longer sufficient to meet the cost of fumigation and should be increased.

### **Policy Position**

The Review proposes to remove the restriction on the type of animals for which owners may require a bond. The RT Act will be amended so that an owner can require another bond (the 'pet bond', separate from the standard security bond) for an animal kept as a pet. Section 5(1) of the *Animal Welfare Act 2002 (WA)* defines the term 'animal' as a live vertebrate or a live invertebrate, "*other than a human or a fish (as defined in the Fish Resources Management Act 1994)*".<sup>137</sup> It is proposed that this definition be used for the purposes of this section, in order to prohibit owners from requiring a pet bond for such creatures as fish and hermit crabs, as the cost of rectifying any damage caused by such creatures would more appropriately be claimed from the security bond.

The RT Act will also be amended to prohibit an owner from requiring a pet bond for an assist animal.

The prescribed level of the pet bond was last amended in 1995. It is recognised that the cost of fumigation is likely to have increased in the intervening period and so the Review proposes to amend the appropriate regulation to account for any increase.

#### **Proposal 50**

That the RT Act be amended to appropriately define the term 'animal'.

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<sup>135</sup> See sections 9 and 25 of the *Disability Discrimination Act 1992 (Cwth)*.

<sup>136</sup> Section 9(2), DD Act (Cwth).

<sup>137</sup> Section 4 of the *Fish Resources Management Act 1994 (WA)* defines fish as an aquatic organism of any species excluding aquatic mammals, reptiles, birds, amphibians and pearl oysters, thus hermit crabs are classified as fish and excluded from the definition of 'animal'.

**Proposal 51**

That the RT Act be amended so that an owner may require a bond for any animal kept by a tenant as a pet.

**Proposal 52**

That the RT Act be amended to prohibit an owner requiring a pet bond for an assist animal.

**Proposal 53**

That DOCEP research the cost of residential fumigation and the RT Regulations be amended accordingly.

#### 4.6 Higher Bonds for Higher Rents

***Stamfords' Recommendation 59***

*That section 29(2)(a) of the Act, allowing an owner to require a bond of any amount where the weekly rent exceeds a prescribed amount (e.g. \$500), be retained.*

#### **Background Discussion**

Section 29(2)(a) of the RT Act removes the restriction on the amount of bond that an owner may require from a tenant if the weekly rent is greater than a prescribed amount. Currently that amount is \$500.<sup>138</sup> This threshold level was set in 1987 at which time a weekly rent of \$500 was considered a high or 'luxury' rent level.

#### **Summary of Responses**

A few respondents argued that allowing owners to set the bond amount if rent exceeded a certain level discouraged investment in lower weekly rent properties. TAS suggested that the prescribed amount be reviewed.<sup>139</sup>

#### **Policy Position**

Given the increases in market rents since the \$500 threshold was set, the Review proposes that the amount prescribed for section 29(2)(a) be reviewed.

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<sup>138</sup> Clause 11, RT Regulations (WA).

<sup>139</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 33.

### **Proposal 54**

That the amount prescribed for section 29(2)(a) of the RT Act, which allows owners of properties where the weekly rent is \$500 or more to charge any level of bond, be reviewed to take into consideration the changes in market rents since 1987.

## **4.7 Unlimited Bond Amount for Owner's Previous Residence**

### ***Stamfords' Recommendation 60***

*That section 29(2)(b) of the Act, which allows an owner to charge a bond of any amount if the premises were the owner's principal place of residence for three months prior, be removed.*

### **Background Discussion**

It is believed that section 29(2)(b) was included in the RT Act to cover situations where an owner is transferred elsewhere for work purposes and decides to rent out their 'family' home for a relatively short time before returning to live in it. In such circumstances it was considered appropriate that the family home attract a greater security bond.

### **Summary of Responses**

The Goldfields Community Legal Centre commented that:

"It does not follow that because an owner was living in the premises as their residence prior to the agreement, they intend to return to it after the term has expired, or for that matter, at all".<sup>140</sup>

There was no objection from any of the respondents to the Review to removing this provision from the RT Act.

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<sup>140</sup> Goldfields Community Legal Centre, *Submission to the Review of the RT Act*, Dec 2002, p. 13.

## **Policy Position**

The Review proposes to repeal section 29(2)(b) of the RT Act.

### **Proposal 55**

That section 29(2)(b) of the RT Act be repealed, thereby removing the exemption that enables owners who have lived in a property for the three months prior to it becoming a rental property to charge any amount as a bond.

## **4.8 Bond Instalments**

### ***Stamfords' Recommendation 61***

*That the Act be amended to allow payment of the bond amount in instalments, where the owner is an organisation/individual that receives financial or other assistance from the State to supply rented accommodation.*

### ***Stamfords' Recommendation 62***

*That the Department of Housing and Works investigate its granting of loans to tenants for payment of bonds to ensure that all persons who are required to pay their bond amount upfront, but would experience hardship in doing so, are adequately covered by this loan scheme.*

## **Background Discussion**

Currently the RT Act requires that a person receiving a bond must pay that money to the Bond Administrator or an authorised financial institution within 14 days of receipt of the money, or, in the case of a real estate agent, as soon as is practicable.<sup>141</sup> The RT Act is silent on the matter of bonds being paid in instalments.

DHW offers bond assistance as an interest free loan to assist people obtain rental accommodation in the private rental sector. Applicants must meet specific criteria and must pay the loan back in fortnightly instalments of at least \$ 15.<sup>142</sup>

In cases where community housing tenants are ineligible for bond assistance from DHW, DOCEP, as the Bond Administrator, allows certain community housing providers to lodge their tenants' bonds in instalments.

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<sup>141</sup> Section 29(4)(b) and Schedule 1, clause 2, RT Act (WA).

<sup>142</sup> For further information on DHW's Bond Assistance scheme see their internet website at [www.dhw.wa.gov.au/404\\_446.asp](http://www.dhw.wa.gov.au/404_446.asp)

## **Summary of Responses**

All respondents to the Review supported these two recommendations. DOCEP noted that accepting bond money in instalments increases the level of its administrative work.

In response to the recommendation concerning its bond loan scheme, DHW advised that it regularly reviews its bond assistance scheme and welcomes input by DOCEP into future reviews.

## **Policy Position**

The RT Act is not entirely clear on whether bonds can be paid in instalments. Section 29 of the RT Act states:

- “(1) A person shall not –
- (a) require the payment of, or receive, more than one security bond in relation to any residential tenancy agreement...”.

One interpretation is that the lodgement of a security bond can occur over a period of time with the total amount of the bond split into multiple instalments. Another interpretation is that the lodgement of each instalment of a bond constitutes multiple separate bonds. Although it may be impractical for owners to lodge several separate amounts of money with the Bond Administrator, the Review recognises the benefit to low-income tenants in being able to pay bonds in instalments. Feedback from DOCEP’s Bond Administrator indicates that it is predominantly community housing providers which allow tenants to pay bonds by instalments.

It is therefore proposed that the RT Act be amended to allow community housing providers and Homeswest to receive and lodge bonds with the Bond Administrator in instalments.

It is noted that the Stamfords Report recommended adopting section 59A of the Queensland RT Act, which allows owners to retain all instalments and pay the entire bond to the Bond Administrator after receiving the final instalment.<sup>143</sup> Contrary to this model, the Review believes that it is preferable all bond instalments are paid to the Bond Administrator as soon as practical, and within a maximum period of 14 days of receipt from the tenant.

The Review also proposes that DOCEP have input into the next review of the bond assistance scheme undertaken by DHW.

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<sup>143</sup> Stamfords’ Report, pp. 112-113.

**Proposal 56**

That the RT Act be amended to allow community housing providers and Homeswest to receive and lodge bonds in instalments with the Bond Administrator as soon as practical, and within a maximum period of 14 days after receipt from the tenant.

**Proposal 57**

That DOCEP participate in the next bond assistance scheme review conducted by DHW.

**4.9 Bond Increases**

***Stamfords' Recommendation 63***

*That the current provisions in the Act relating to the frequency of bond increases and the notice period prior to a bond increase be retained.*

**Background Discussion**

Currently the RT Act allows an owner to increase the level of bond once every 12 months if the rent has been increased.<sup>144</sup>

**Summary of Responses**

REIWA submitted that an owner should be permitted to increase the bond any time the rent is increased (i.e. a maximum of once every six months<sup>145</sup>), claiming that otherwise an owner is put at risk.<sup>146</sup> This view was supported by another stakeholder, the owner of a real estate agency. All other respondents supported the recommendation not to change the current provision.

**Policy Position**

Although the level of rent is used to initially calculate the amount of bond, an increase in rent does not necessarily mean that there is a need for greater protection through an increased bond. Accordingly, the Review believes that the current provision in the RT Act is appropriate and should be retained.

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<sup>144</sup> Section 31, RT Act (WA).

<sup>145</sup> Section 30, RT Act (WA).

<sup>146</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 18.

## 4.10 Alternatives to Bonds

### ***Stamfords' Recommendation 64***

*That the current bonds system be retained, and the Act not be amended to make provision for any alternatives to bonds, such as insurance policies or sureties (with the possible exception of the bond guarantee scheme discussed in Recommendation 65).*

### ***Stamfords' Recommendation 65***

*That the Department of Housing and Works investigate the introduction of a bond guarantee scheme, provided that:*

- the scheme results in an expansion of the bond assistance provided by the Department of Housing and Works (without simply replacing the Department's current bond loans scheme with bond guarantees);*
- the Department of Housing and Works investigates possible payment of a levy to the Rental Accommodation Fund, in compensation for the loss in income that would have been earned on bond loan interest;*
- the Department of Housing and Works investigates methods for providing a guarantee scheme without having to inform the owner that the tenant is part of such a scheme; and*
- upon completion of the investigation, if DOCEP is satisfied that such a scheme should be introduced, DOCEP undertake any amendment of the Act that maybe required to introduce such a scheme.*

### **Background Discussion**

As was reported in the Stamfords Report, alternatives to monetary bonds such as insurance policies and guarantees are problematic, in terms of the cost of insurance premiums (and who should bear that cost) and the potential complexity of pursuing a third party guarantor for compensation if the tenant breaches the tenancy agreement and therefore forfeits the 'bond'.<sup>147</sup>

Further, the use of a guarantee scheme could bring about a reduction in tenant responsibility for damage to the property, in which case the owner would be required to approach DHW to recover the bond funds in the event of a breach by the tenant.

In providing bond assistance, DHW is required to confirm that a tenancy agreement has been entered into. The surest way of doing this is to confirm the existence of the agreement with the owner. Thus, as contemplated by Stamfords' Recommendation 65 (in the third point), keeping the bond assistance a 'secret' from the owner is not feasible.

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<sup>147</sup> See Stamfords' Report, pp. 114 - 116.

## **Summary of Responses**

All respondents to the Review supported the recommendation to retain the current bond scheme, stating that the introduction of a surety scheme would impact negatively upon youth, indigenous people and low-income earners as these groups may have difficulty in obtaining guarantors.<sup>148</sup> Further, it was noted that it would be difficult to administer a bond that was part guarantee and part funds kept in a financial institution.<sup>149</sup>

DHW were opposed to recommendation 65 advising that the conditions in the recommendation would make it difficult to pursue a bond guarantee system at a later stage. DHW stated that owners were a key stakeholder in approving a bond and “their approval of the tenancy and sourcing of the bond from DHW is a requirement of any bond loan scheme”.<sup>150</sup> Furthermore, DHW advised that under their legislation they could not make administrative payments to the RAF.<sup>151</sup>

REIWA agreed that tenants should not be discriminated against because they were part of a bond assistance scheme, but were not supportive of a bond guarantee scheme. A private submission to the Review commented that an investigation would be costly, the scheme cumbersome, unfair to some parties while not acceptable to at least one group of stakeholders, and that “change for the sake of change is usually a burden”.<sup>152</sup>

## **Policy Position**

The Review supports the recommendation by Stamfords not to amend the current bond system to make provisions for alternatives to monetary bonds.

The Review considers the provision of bond assistance to be a matter of public policy more appropriately dealt with by DHW and interested stakeholders, rather than enshrined in the RT Act. The Review proposes that DOCEP accept DHW’s offer to participate in the next review of the bond assistance scheme.

### **4.11 Deposit of Bonds**

#### ***Stamfords’ Recommendation 66***

*That the Act be amended to require both owners and agents to lodge a bond with the bond administrator as soon as practicable, and within a maximum of 14 days of receiving bond payment and relevant documentation.*

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<sup>148</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 34.

<sup>149</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 19.

<sup>150</sup> DHW, *Submission to the Review of the RT Act*, Dec 2002, p. 9.

<sup>151</sup> *ibid.*

<sup>152</sup> Private submission No. 24 to the Review of the RT Act, December 2002, p. 8.

## **Background Discussion**

The RT Act requires an owner to deposit bond monies within 14 days of receipt, with the Bond Administrator or an authorised financial institution.<sup>153</sup> Real estate agents are to deposit bond monies into trust accounts or with the Bond Administrator “as soon as practicable after the agent’s receipt of the bond”.<sup>154</sup> A publication produced by the Real Estate and Business Agents Supervisory Board recommends that money to be kept in trust accounts should be banked by the agent before the close of business the next business day.<sup>155</sup>

It has been noted that often the delay by a real estate agent in depositing the bond money is a result of a delay by the tenant in completing a bond lodgement form.<sup>156</sup>

## **Summary of Responses**

All respondents to the Review supported the recommendation that both owners and real estate agents be required to lodge bond monies as soon as practicable, and within 14 days of receipt of the money and associated documentation.

## **Policy Position**

The Review agrees with the recommendation to standardise the timeframe within which owners and real estate agents are to deposit bonds. The Review does not, however, propose to adopt the requirement that bonds only be deposited after receipt of relevant documentation. Although some owners/agents may experience delays in the return of relevant documentation from tenants, it is believed that 14 days is a reasonable timeframe for pursuing this documentation. The Review believes that in order to avoid owners/agents unduly delaying deposit of bond monies, the RT Act should not be amended to make deposit of bonds contingent upon the receipt of relevant documentation.

As discussed earlier in this Paper (in Proposal 4.1), it is recommended that Homeswest deposit public housing tenants’ bond monies with a Central Bond Administrator. For reasons of consistency, it is also recommended that Homeswest comply with the same timeframes as owners and real estate agents.

### **Proposal 58**

That the RT Act be amended to require all persons/organisations that receive bond monies from tenants to deposit bonds with the Central Bond Administrator as soon as practicable, and within a maximum of 14 days of receiving the money.

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<sup>153</sup> Schedule 1, clauses 2(1), (2) & (3), RT Act (WA).

<sup>154</sup> Ibid.

<sup>155</sup> REBA 2003, *Real Estate Trust Accounting: A Reference Manual*, Perth, Western Australia, p. 13.

<sup>156</sup> Stamfords’ Report, p. 118.

#### 4.12 Interest on Bonds

***Stamfords' Recommendation 67***

*That alternative funding models be examined that would remove the reliance on the interest on Rental Accommodation Fund monies to support the administration of the Act and the dispute resolution process.*

#### **Background Discussion**

Currently, the interest earned on bond monies in the RAF contributes to funding the administration of the RT Act, education and conciliation carried out by DOCEP, and the dispute resolution process.<sup>157</sup> Both tenants and owners benefit from education initiatives and from conciliation services.

#### **Summary of Responses**

Tenant advocates strongly object to the use of funds from the RAF in this way, arguing that the interest accumulated from private tenants' bond money should not be used to finance a dispute resolution system used by owners and Homeswest.

While TAS accepts that DOCEP's administration of the RT Act requires funding from the RAF, they argue that owners should be required to contribute to the funding of the dispute resolution mechanism, particularly as the majority of tenancy disputes resolved by the dispute resolution mechanism are instigated by owners.<sup>158</sup>

#### **Policy Position**

Funding for Government activities including the dispute resolution system comes from a combination of user-pays and the Consolidated Fund. The only other way of funding the dispute resolution mechanism would be to bid for additional and ongoing funding from the Consolidated Fund, which is difficult to obtain on a recurrent basis. The result of obtaining funding this way would be to take funding from another area of government spending, which always runs the risk of reducing government spending in the area of social services.

As discussed in chapter 9, it is proposed to amend the RT Act to allow funding to be allocated to tenant advocacy services from any surplus in the RAF. This may go some way towards addressing the perceived imbalance in the use of interest monies accumulated by tenants' bonds.

The Review is opposed to Stamfords' recommendation.

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<sup>157</sup> Schedule 1, clause 3(3), RT Act.

<sup>158</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, pp. 35-36.

## 4.13 Surplus Interest in the RAF

### ***Stamfords' Recommendation 68***

*That the Act be amended to remove the ability of the Treasurer to direct surplus income from the Rental Accommodation Fund to public housing.*

### **Background Discussion**

Schedule 1, clause 3(5) of the RT Act enables the Treasurer to direct surplus income in the RAF toward expenditure on public housing. In 2002, the Treasurer directed in excess of \$5 million from the RAF towards spending on public housing. This had a significant impact on the RAF and curtailed spending on educational and advisory services to tenants, as provided for in clause 3(3a) of Schedule 1 of the RT Act.

### **Summary of Responses**

Most tenant advocates supported this recommendation, objecting to the use of the interest from private tenants' bonds for funding public housing.<sup>159</sup> REIWA also supported removing this ability from the Treasurer.<sup>160</sup>

DHW strongly objected to the recommendation,<sup>161</sup> while MIDLAS supported the use of RAF monies for fund public housing.<sup>162</sup>

### **Policy Position**

As discussed in chapter 4.1, the Review proposes that bonds of tenants in public housing be deposited in the RAF. Accordingly, DHW will have a legitimate claim on the use of some of the interest earned on those monies for public housing.

In addition, the Review believes that the Treasurer should retain the ability to direct surplus income available from the RAF to public housing, as the Treasurer's Office, being advised by the Department of Treasury and Finance, is the more appropriately equipped agency to determine any funding applications from DHW.

In order to ensure that the RAF is not significantly depleted in the future, the Review proposes to amend the RT Act to require the Treasurer to consult with the Minister responsible for the administration of the RT Act prior to allocating any surplus income to public housing.

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<sup>159</sup> See for example, TAS, *Submission to the Review of the RT Act*, December 2002, p. 37; Gosnells Community Legal Centre, *Submission to the Review of the RT Act*, December 2002, p.3; Giz Watson MLA, *Submission to the Review of the RT Act*, December 2002, p. 4.

<sup>160</sup> REIWA, *Submission to the Review of the RT Act*, December 2002, p. 20.

<sup>161</sup> DHW, *Submission to the Review of the RT Act*, December 2002, p. 10.

<sup>162</sup> MIDLAS, *Submission to the Review of the RT Act*, December 2002, p. 7.

**Proposal 59**

That the RT Act be amended to require the Treasurer to consult with the Minister responsible for the administration of the RT Act prior to allocating any surplus income from the Rental Accommodation Fund to public housing.

**4.14 Bonds and Sub-tenancies**

***Stamfords' Recommendation 69***

*That the Act be amended to clarify that a head-tenant is able to require a bond of a sub-tenant, and that, if such a bond is required, the Act should regulate this process as if it were a bond between an owner and tenant.*

**Background Discussion**

The RT Act does not currently contain any provisions relating to the management of bonds in sub-tenancies. The Stamfords Report noted that the relationship between a head-tenant and a sub-tenant may not necessarily be formalised through a written tenancy agreement. In addition, if there is no written receipt recording the payment of a bond by the sub-tenant to the head-tenant, difficulties may arise for the sub-tenant in recovering their bond upon termination of their rental arrangement.<sup>163</sup>

Laws governing residential tenancies in other Australian jurisdictions provide very little information about how bonds are to be dealt with in sub-tenancies. The New South Wales RT Act states, in section 3 (Definitions):

“(3) In this Act:

- (a) a reference to a landlord includes a reference to a tenant who has granted the right to occupy residential premises to a sub-tenant; and
- (b) a reference to a tenant includes a reference to the sub-tenant of a tenant”.

Presumably, a tenant who has sub-let a property is subject to the same rights and obligations as an owner under this legislation.

**Summary of Responses**

There was widespread support for this recommendation, with no direct opposition from any of the respondents to the Review.

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<sup>163</sup> Stamfords' Report, p. 121.

## **Policy Position**

The Review agrees that in circumstances where a tenant has sub-let a property to a sub-tenant, the RT Act is not clear about the rights and obligations of those parties in respect of the bond. Sub-tenants are particularly vulnerable where head-tenants have failed to issue receipts for bonds, and parties have neglected to note the condition of a property at the commencement of the sub-tenancy. It is therefore proposed that, for the purposes of bond collection, lodgement, and disposal, the RT Act be amended to treat head-tenants and sub-tenants in the same way as owners and tenants are treated.

### **Proposal 60**

That the RT Act be amended to clarify that bond collection, lodgement, and disposal between head-tenants and sub-tenants is to be regulated in the same way as the process applicable to owners and tenants.

## **4.15 Bond Recovery**

### **4.15.1 Contacting Tenants Regarding Bond Disposal**

#### ***Stamfords' Recommendation 70***

*That the Act be amended to:*

- *improve the ability of the owner to contact the tenant after the tenant has vacated the premises, by reforming the requirements of the tenant to disclose alternative details; and*
- *require an applicant to a bond disposal application to ensure that they have endeavoured to obtain and provide on the application form an appropriate address for service of notice to the respondent.*

## **Background Discussion**

Section 53(3) of the RT Act places an obligation upon a tenant to notify the owner of a forwarding address when the tenant vacates a property. There is a penalty of \$1000 attached to this requirement.

DOCEP receives numerous complaints from owners about the inability to contact tenants after they have vacated the rental property. In situations where an owner is attempting to contact the former tenant in relation to the disposal of the bond or the tenant's possessions that have been left behind, the inability to contact the tenant can be detrimental to the interests of both parties.

## **Summary of Responses**

All respondents to the Review of the RT Act were supportive of this recommendation however, REIWA was sceptical as to how it would be enforced.

## **Policy Position**

The Review agrees that the inability to contact a tenant after they have vacated a property is problematic. However, requiring a tenant to provide alternative contact details also has problems. For example, should a tenant not wish to be located following termination of a tenancy agreement they could simply provide the owner with false 'alternative contact details'. Thus, making it a requirement to provide alternative contact details could prove no more effective than the current requirement to provide a forwarding address. The provision of someone else's contact details to a third party (the owner or real estate agent) may also infringe upon that person's privacy.

In regard to requiring an applicant to a bond disposal application to ensure that they had endeavoured to provide on the application form an appropriate address for service, it would be difficult to prove that the applicant had not fulfilled this requirement. Therefore the Review opposes Stamford's recommendation.

### **4.15.2 Default Court Orders**

#### ***Stamford's Recommendation 71***

*That, following the implementation of Recommendation 70, the Act be amended to allow a Magistrate (or Clerk) to make an order on any liquidated amount as well as on any pecuniary damages up to the amount of \$500.*

## **Background Discussion**

Currently under the RT Act a magistrate may order payment in accordance with an undisputed Application for Disposal of Bond Money (Form 6) without conducting a formal hearing (following appropriate notification to the respondent).<sup>164</sup> The Magistrates Court must take into consideration all invoices etc. supporting any unliquidated claims made by the owner against the security bond.

In his submission to the Review, the Chief Stipendiary Magistrate advised that the requirement of the Magistrates Court to sight supporting documentation for unliquidated claims is:

“time consuming for the applicants/agents producing these documents but has also consumed a considerable amount of court resources in pursuing applications where the required documentation has not been filed”.<sup>165</sup>

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<sup>164</sup> Clause 8, Schedule 1, RT Act (WA).

<sup>165</sup> Chief Stipendiary Magistrate, Chief Magistrates Chambers, *Submission to the Review of the RT Act*, Apr 2002, p. 2.

It appears that Stamfords' recommendation 71 attempts to directly address this by removing the need for applicants to prove losses of up to \$500 by providing the Magistrates Court with documentary evidence.

The Chief Stipendiary Magistrate further suggested that the RT Act be amended to enable:

- the lodging of a Notice of Intention to Dispute (similar to the Form 5 Notice of Intention to Dispute Application for Disposal of Security Bond) in response to an applicant lodging a Form 12 Application (often used to claim damages or outstanding rent monies from a tenant); and
- procedural judgement in default of a Notice of Intention to Dispute or non-attendance at the hearing in regard to liquidated demands in money owing up to the jurisdictional monetary limit under the Act, as well as procedural default judgement on unliquidated pecuniary damages up to the amount of \$500.<sup>166</sup>

The introduction of a Notice of Intention to Dispute in response to a Form 12 Application would enable the Magistrates Court to better determine which matters require listing for (extended) hearing.

### **Summary of Responses**

There was limited support for the recommendation to enable the Magistrates Court to make procedural default orders, and quite strong opposition from the tenant advocacy groups. TAS proposed that this recommendation conflicted with the spirit of section 57 of the RT Act, which prohibits the imposition of penalties and liquidated damages upon a tenant.<sup>167</sup>

### **Policy Position**

The Review recognises that enabling the Magistrates Court to make procedural default orders on what it considers relatively small amounts of money (up to \$500) would increase efficiency in scheduling and progressing hearings.

Although \$500 may be considered a small amount of money by Magistrates Court standards, it is a significant amount to many low-income earners. There is a risk that enabling default judgment without documentary evidence may encourage unscrupulous owners to gain default judgment in their favour by being lax about attempting to notify tenants of their application to the Magistrates Court.

The Review does not support Stamfords' recommendation to enable default orders as suggested. However, the Review does propose to introduce the use of a Notice of Intention to Dispute form, similar to Form 5, to be used in conjunction with the Form 12 Application.

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<sup>166</sup> *ibid.*

<sup>167</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 38.

### **Proposal 61**

That the RT Act be amended to require that upon any application to the Magistrates Court under the Act, the respondent be served with notice of the application, advising them to indicate to the Magistrates Court by notice in the prescribed form, whether they intend to dispute the application.

## **4.16 Fair Wear and Tear**

### ***Stamfords' Recommendation 72***

*That the Act be amended to provide greater clarity of the definition of "fair wear and tear".*

### **Background Discussion**

Under section 38(1)(c) of the RT Act, a tenant is not to intentionally or negligently cause or allow damage to occur to a property. It is generally accepted that a tenant is not liable for "fair wear and tear" which is the normal deterioration that occurs to a property over time.

No other Australian jurisdiction defines "fair wear and tear" in residential tenancies legislation, quite possibly because it is a difficult term to define. It is perhaps easier to define the terms 'intentionally' (with forethought) and 'negligently' (guilty of a lack of due care or concern).

It has been suggested that there is widespread confusion amongst both tenants and owners regarding the notion of fair wear and tear.<sup>168</sup> As a result it is often a matter of dispute at the end of a tenancy agreement. Feedback from DOCEP's Building and Tenancy Industries Branch indicates that some owners have attempted to claim the entire replacement cost of an item (e.g. carpet) from a tenant's bond, when in fact a tenant has been residing in a rental property for a much shorter period (e.g. 1 year) than the estimated lifespan of the item (e.g. 10 years). In these cases, a tenant should not be deemed liable for the full replacement cost, as they are not liable for "fair wear and tear".

### **Summary of Responses**

There was significant support for a clarification of the definition of "fair wear and tear" with the only opposition coming from the POA and a private respondent.<sup>169</sup> DHW requested that they be consulted during the development of a definition.

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<sup>168</sup> Stamfords' Report, pp. 125-126.

<sup>169</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p. 3; Private submission number 24, Dec 2002, p. 8.

## **Policy Position**

The Review acknowledges that owners and tenants may benefit from greater clarification of the definition of “fair wear and tear”, however, believes that it is not realistic to expect that “fair wear and tear” can be adequately defined in the RT Act. Things which constitute “fair wear and tear” will vary considerably depending upon the age and condition of each individual property, the state of a property’s fixtures and fittings, and the physical environment surrounding each property.

It is believed that it is already clear in the RT Act that a tenant is not liable for “fair wear and tear” due to a tenant’s liability extending only to intentional or negligent damage to a property. Rather than amend the RT Act as recommended by Stamfords, the Review proposes that DOCEP conduct further community education to provide practical, although not exhaustive, examples of what constitutes “fair wear and tear”. Community education would also serve to highlight to owners that they should not attempt to claim full replacement costs of items from tenants, and enable tenants to confidently challenge owners in these attempts.

### **Proposal 62**

That DOCEP conduct further community education to provide practical examples of what constitutes “fair wear and tear”, to highlight items which owners cannot lawfully claim reimbursement from tenants, and to inform tenants of their rights when such reimbursements are claimed.

## **4.17 Bond Retrieval**

### ***Stamfords’ Recommendation 73***

*That the Department of Housing and Works and DOCEP investigate the development of a system to address issues of bond disposal where a Homeswest bond loan has not been fully repaid, without reducing the efficiency of the bond disposal process.*

### ***Stamfords’ Recommendation 74***

*That, if an amendment to the Act is required to develop and implement a system that adequately addresses issues of bond disposal where a Homeswest bond loan has not been fully repaid, the Act be amended to enable the bond administrator to dispose of part (or all) of the bond to Homeswest in instances where the tenant has not fully repaid their bond loan.*

## **Background Discussion**

Currently, the Joint Application for Disposal of Security Bond (form 4) makes provision for the applicant to detail how much of the bond is to be paid, and to whom, by the Bond Administrator. Homeswest is listed as a possible recipient for instances where a tenant has not fully repaid a bond assistance loan received from DHW.

## **Summary of Responses**

There was general support for Stamfords' recommendations 73 and 74, the only opposition coming from a private respondent commenting that they believed the reviewers were "*seeing problems here where none exist*".<sup>170</sup>

## **Policy Position**

The Review considers the matter of bond disposal in instances where bond assistance has been provided to be a procedural matter more appropriately dealt with by DHW and the Bond Administrator, rather than in legislation. The purpose of the RT Act is to regulate the relationship between tenants and owners. The relationship between DHW as finance provider and a tenant as loan recipient does not fall within the jurisdiction of the RT Act. The Review proposes that DOCEP accept DHW's offer to participate in the next review of the bond assistance scheme, during which procedural matters such as the disposal of bond assistance funds will be discussed.

### **4.18 An Owner's Bond**

#### ***Stamfords' Recommendation 75***

*That the Act not be amended to include provision for an owner's bond.*

#### ***Stamfords' Recommendation 76***

*That DOCEP investigate methods of ensuring that an owner's financial obligations under the Act (such as payment of utilities and the conduct of necessary repairs) are met.*

## **Background Discussion**

Under section 42 of the RT Act an owner is required to maintain the rental property in a reasonable state of repair. Furthermore, section 43 of the RT Act requires that a tenant be compensated by an owner for expenses incurred when making an urgent repair to the property. Section 15 of the RT Act enables a tenant to make an application to the Magistrates Court to compel an owner to meet their obligations under sections 42 and 43. Thus the RT Act compels the owner to maintain their property and provides an avenue for a tenant to claim compensation or compel an owner to meet their obligations under the RT Act.

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<sup>170</sup> Private submission No. 24, Review of the RT Act, Dec 2002, p. 8.

## **Summary of Responses**

REIWA and the POA supported the recommendation not to introduce an owner's bond. Both TAS and Shelter WA expressed disappointment that Stamfords made this recommendation, as they see the establishment of a fund of owners' bonds as solving two problems – that of equal funding of the dispute resolution mechanism, and as surety against owners failing to meet their maintenance obligations.

DOCEP records indicate that the complaints received by the Department relate more to the length of time it takes for owners to carry out maintenance and compensate tenants for urgent repairs.

## **Policy Position**

The Review does not support the recommendation to introduce a mandatory owners' bond, as this would penalise those owners that do attend to maintenance matters promptly. However, the Review recognises that tenants can have problems compelling owners to meet their maintenance obligations and proposes:

- increased education for tenants explaining their right to seek court orders to enforce compliance by owners; and
- conferral upon the Commissioner for Consumer Protection the power to require owners who habitually fail to meet their maintenance obligations to lodge a security bond with the Bond Administrator. Tenants could then make application to DOCEP seeking compensation from the owners' bond for any expenses they had incurred in addressing maintenance issues that are the responsibility of the owner.

### **Proposal 63**

That DOCEP instigate a community education program to advise tenants about their ability to access the dispute resolution system to compel owners to meet their obligations under the RT Act.

### **Proposal 64**

That the RT Act be amended to confer upon the Commissioner for Consumer Protection the power to require owners who habitually fail to meet their maintenance obligations under the RT Act to lodge a security bond with the Bond Administrator, that can be accessed by tenants for compensation.

## 5. ISSUES RELATING TO RENT

### 5.1 Setting Rent Levels

**Stamfords' Recommendation 77**

*That there be no introduction of rent level setting or capping in the Act.*

**Stamfords' Recommendation 78**

*That relevant government agencies examine alternative approaches for addressing issues relating to rent levels in certain regional areas that are experiencing substantial economic expansion.*

### **Background Discussion**

The RT Act does not provide any mechanism for determining what constitutes an appropriate level of rent for rental properties. In all Australian jurisdictions, rent is market driven and subject to negotiation in all cases. In Western Australia, tenants do, however, have a general right to challenge excessive rent in the course of any tenancy.<sup>171</sup>

In Phase 1 of the Review, respondents from tenant advocacy groups, in particular TAS and Shelter WA, as well as a number of attendees at a public meeting, suggested that the RT Act should make provision for setting appropriate levels of rent for properties. This was of particular concern in relation to some regional areas of the state where a limited amount of appropriate rental accommodation was exacerbated by a high demand for employee accommodation. It was noted that this can result in grossly inflated rental prices and that alternative accommodation options are often limited, particularly at the lower-income end of the market.

With development booms in recent years, and in response to concerns about escalating rent levels in North West areas of the State, the Government established a special taskforce under the Pilbara Development Commission (PDC) to monitor rents and rental activity, in an effort to try to keep the rent levels down.

The taskforce liaised with mining companies and other large organisations that own or require rental properties for employee accommodation, so that it could inform communities about anticipated demand and about strategies to meet that demand. Although rent levels in some regional areas remain significantly higher than those in the Perth metropolitan area, the taskforce believes that it would be unrealistic to expect similar rent levels to those in Perth due, in part, to the boom/bust cycle and the scarcity of privately owned real estate and quality accommodation.<sup>172</sup>

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<sup>171</sup> Section 32, RT Act (WA).

<sup>172</sup> Discussion with Robyn Crane, Chief Executive Officer, Pilbara Development Commission on 8 Dec 2004.

It was suggested by some respondents that the RT Act should not attempt to regulate rents as this would not only be detrimental to owners but costly to administer, without any evidence that it would achieve its intended outcome.

It was further suggested that attempts to restrict rents would reduce the investment value of rental properties and investment in the rental property market and would adversely affect the options for suitable rental accommodation available to tenants.

The Stamfords Report noted the considerable opposition from a large number of respondents to any form of rent setting. Given the arguments put forward, Stamfords concluded that legislative restriction on rent levels across the State was not viable, but recommended that the Government investigate alternatives such as the provision of housing subsidies and/or increased public housing capacity in certain regional areas.<sup>173</sup>

### **Summary of Responses**

TAS, DHW, REIWA, POA, and the then Department of Land Administration (DOLA), Regulation and Valuation Branch supported recommendation 77. MIDLAS opposed this recommendation.

In relation to recommendation 78: TAS and MIDLAS were in support; POA was in opposition; and the DOLA Regulation and Valuation Branch was in support on the condition that strategies be developed for short-term economic expansion only.<sup>174</sup>

### **Policy Position**

The Review acknowledges the initial appeal to tenants of setting or capping of rents, particularly in regional areas undergoing an economic boom, but believes that such regulation would act as a disincentive to investment and have a detrimental impact on both property owners and tenants in terms of property values and availability of housing stock for rent.

The Review recognises the problem in maintaining affordable rental accommodation in remote regional areas, however, the opportunities and options for intervention are extremely limited. The Review believes that existing measures (such as monitoring by the special taskforce within the PDC) should continue and that further measures should be explored.

#### **Proposal 65**

That there be no introduction of rent level setting or capping in the RT Act.

#### **Proposal 66**

That the Government continue to explore ways of addressing excessive rent levels in regional areas undergoing substantial economic growth.

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<sup>173</sup> Pages 129 – 130.

<sup>174</sup> DOLA, Regulation and Valuation Branch, *Submission to the Review of the RT Act*, Nov 2002, p. 2.

## 5.2 Amount and Frequency of Rent increases

### **Stamfords' Recommendation 79**

*That the Act not be amended to prescribe a maximum allowable rent increase, either directly (by way of a stated maximum percentage increase) or indirectly (by link to the CPI or other index).*

### **Stamfords' Recommendation 82**

*That the current restriction on the frequency of rent increases of not more than once every six months be retained.*

### **Background Discussion**

The RT Act regulates the notice period required before rent may be increased, and the frequency of any increase, for all tenancies.<sup>175</sup>

The RT Act does not permit rent to be increased after a tenancy commences until at least six months has passed. The Act also precludes increases more frequently than every six months thereafter.<sup>176</sup>

Rent may not be increased during a fixed term tenancy unless the tenancy agreement expressly provides for this.<sup>177</sup>

The Act does not expressly limit the size of any rent increase but provides grounds for making an application to the Magistrates Court for an order declaring a rent increase to be “excessive” and that the owner is motivated “by a desire that the tenancy be terminated”.<sup>178</sup>

In most other Australian jurisdictions, legislation does not prescribe a maximum allowable rent increase. In the ACT, the Residential Tenancy Tribunal has the power to review any proposed rental increases which are considered excessive. An increase is considered not excessive if it is less than 20% greater than any CPI increase since the beginning of the tenancy or since the last rent increase.<sup>179</sup>

In Victoria, rent may be increased at intervals of not less than 6 months.<sup>180</sup> In the ACT, rent may only be increased once every 12 months unless the Residential Tenancy Tribunal has endorsed a term in a tenancy agreement that provides otherwise.<sup>181</sup>

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<sup>175</sup> Section 30, RT Act (WA).

<sup>176</sup> Section 30(1), RT Act (WA).

<sup>177</sup> Section 30(2), RT Act (WA).

<sup>178</sup> Section 32(2)(b), RT Act (WA).

<sup>179</sup> Section 68, RT Act (ACT).

<sup>180</sup> Section 44(4A), RT Act (Vic).

<sup>181</sup> Schedule 1, clause 35, RT Act (ACT).

In Phase 1 of the Review, a number of respondents favoured the inclusion of a provision in the RT Act that more explicitly regulates the level of rent increases.

Some respondents believed that the current provisions for rent increases in the RT Act were inadequate but accepted that there may be practical difficulties restricting rent increases in all instances. It was suggested, however, that restrictions may be appropriate where a lack of appropriate rental accommodation may result in opportunistic and exploitative increases.

The Stamfords recommendation not to prescribe a maximum allowable percentage for rent increases was based on the view that the appropriateness of any rent increase depended on a number of factors, including the current level of rent, prevailing market rents and improvements that may have been made to a property. Accordingly, it was believed that the imposition of a prescribed allowable increase would not take into account such factors. Stamfords did, however, suggest that an increased ability for tenants to make application to a court for an order that rent or a rent increase is excessive, would provide a more flexible solution.<sup>182</sup>

DOCEP's Building and Tenancy Industries Branch reported that very few complaints are received regarding the amount or frequency of rent increases and believes that this is most likely due to property owners being sufficiently aware of the possible economic consequences of unreasonable rent increases.

### **Summary of Responses**

Shelter WA argued that the absence of protection against excessive rent increases is particularly relevant to regional tenancies and vulnerable low-income tenants.<sup>183</sup> It was suggested that the Act should link rent increases to increases in official government indices, such as the Consumer Price Index (CPI) similar to the practice in the ACT.<sup>184</sup>

REIWA agreed that the RT Act should not be amended to prescribe maximum allowable rent increases, arguing that the amount and frequency of rent increases should be negotiable.<sup>185</sup> Similar views were expressed by owners and owners' groups such as POA.<sup>186</sup>

TAS, Shelter WA, REIWA, POA, MIDLAS and other community groups, supported recommendation 82 that the current restriction on the frequency of rent increases be retained. There was no support from respondents for reducing the allowable frequency of rent increases.

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<sup>182</sup> Page 131.

<sup>183</sup> Shelter WA, 2002 *Submission to the Review of the RT Act*, p.3.

<sup>184</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 42.

Shelter WA, 2002 *Submission to the Review of the RT Act*, p.15.

<sup>185</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 22.

<sup>186</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p. 3.

## **Policy Position**

The Review agrees with Stamford's reasoning that rent increases are influenced by a complex combination of factors which differ across Western Australia and cannot be predicted with absolute certainty from month to month. To impose a statutory limit may have unintended consequences such as serving as a strong disincentive to investment in rental properties, which may in turn cause a reduction in affordable rental housing stock.

The Review, therefore, believes that rent increases should be determined principally by the market rather than statutory limits, and that the current restriction in the RT Act that limits the frequency of rent increases to once every six months, is appropriate (for a discussion on excessive rent increases see chapter 5.5).

### **Proposal 67**

That the RT Act not be amended to prescribe maximum allowable rent increases either directly or indirectly.

### **Proposal 68**

That the current restriction on the frequency of rent increases of not more than once every six months be retained.

## **5.3 Notice Period for Rent Increases**

### **Stamford's Recommendation 83**

*That the current period of notice required to be given before a rent increase (60 days) be retained.*

## **Background Discussion**

In Western Australia, the period of notice required to be given before a rent increase is 60 days.<sup>187</sup> The position in some other Australian jurisdictions is detailed in the table below.

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<sup>187</sup> Section 30(1)(a), RT Act (WA).

**Table 3: Notice periods for rent increase**

<i>Australian jurisdictions</i>	<i>Notice Period (as set out in each jurisdiction's RT Act)</i>
ACT	8 weeks (Schedule 1, clause 38)
NSW	60 days (section 45(2))
QLD	2 months for periodic tenancy or 1 month for fixed term (section 53)
SA	60 days (section 55(2))
VIC	60 days (section 44)

### **Summary of Responses**

Most respondents to the Review believed that the current 60-day notice period was appropriate.

Some respondents, including REIWA,<sup>188</sup> suggested that the notice period should be reduced from 60 days to 30 days. REIWA submitted that 30 days notice was sufficient for tenants to decide whether or not to remain in a property, but provided no further rationale in support of the suggested amendment.

### **Policy Position**

The Review believes that the current period of notice required to be given before a rent increase is appropriate.

#### **Proposal 69**

That the current 60-day period of notice required to be given before a rent increase be retained.

<sup>188</sup> REIWA, *Submission to the Review of the RT Act*, Dec. 2002, p.22

## 5.4 Tenancies Where Rent is Calculated as a Percentage of Income

### **Stamfords' Recommendation 84**

*That the exemptions for employment-linked tenancy agreements provided in the Regulations be retained.*

### **Stamfords' Recommendation 85**

*That the Act be amended to exempt tenancy agreements where rent is calculated as a percentage of a tenant's income from the restriction on the frequency of rent increases, and the requirement to give 30 days (sic) notice prior to such an increase. [Note: Reference to '30 days should be read as 60 days'.]*

### **Stamfords' Recommendation 12**

*That the Regulations be amended to remove Homeswest's exemption from the restrictions on varying rent.*

### **Stamfords' Recommendation 13**

*That the Act be amended to provide an appropriate definition of "rental subsidy".*

### **Stamfords' Recommendation 14**

*That the Act be amended to state that an increase in the amount payable by a tenant as a result of the cancellation or reduction of a rental subsidy does not constitute a rent increase, and is therefore not restricted by section 30 of the Act.*

## **Background Discussion**

Employment-linked tenancy agreements frequently express the amount of rent payable by an employee tenant as a percentage of the employee's income.

The RT Act limits the frequency of rent increases to once every six months and requires tenants to be provided with 60 days notice before a rent increase. These requirements impact upon the effective operation of employment-linked tenancy agreements. Accordingly, such agreements are exempted from these requirements by regulation 5C of the RT Regulations.

Stamfords expressed the view that tenants, who are party to agreements where the amount of rent payable is calculated as a percentage of the tenant's income, are effectively on perpetual notice that any increase in pay will result in a corresponding increase in rent. It was suggested that because the tenant's rental cost as a proportion of their income does not increase, there was no hardship to the tenant nor any threat to the tenant maintaining their tenancy.

Stamfords concluded that the current exemption for employment-linked tenancy agreements should be retained. In addition, they argued that agreements where rent is calculated as a percentage of a tenant's income should be exempt from the restriction on the frequency of rent increases, and the requirement to give 60 days notice.<sup>189</sup>

Similar issues to those arising in employment-linked tenancy arrangements also arise in Homeswest tenancies and tenancy arrangements with community housing providers where rental subsidies are provided and the subsidy varies according to fluctuations in income.

A 'rental subsidy' is the difference between a set percentage of gross weekly income (as calculated by the housing provider) paid towards rent, and the base rent. For example, if a tenant is required to pay 25% of their \$300 gross weekly income and the base rent is \$125 per week, the actual rent payable would be \$75 with a rental subsidy of \$50 covering the balance. In this case, the subsidy would be funded under the Commonwealth State Housing Agreement. If a tenant's income varies, or the housing provider varies the percentage of income payable or the base rent, the amount of rent payable (and therefore the rental subsidy) will also vary.

Homeswest is exempt from the requirement to provide notice of rent increases and is not precluded from increasing rent more frequently than once every six months. However, where an increase in the base rent of a property is proposed, it is the practice of Homeswest to provide tenants with advance notice of the change.

In some cases, subsidy arrangements may effectively result in no change to the actual rent payable by the tenant until their income changes, even where there is a change in the base rent. Notification of a base rent increase in some cases merely serves to place tenants on notice of a *potential* increase in rent payable. In contrast, any increase in the percentage of income payable as rent will result in an increase in rent payable even where the base rent remains the same.

Residential tenancy legislation in other Australian jurisdictions is largely silent on these types of tenancy arrangements. The South Australian RT Act, however, contains provisions relating to tenancies where rent is linked to income (in the context of registered housing co-operatives). Section 55 relevantly states:

“(2)(ii) if the landlord is a registered housing co-operative, and the residential tenancy agreement provides for variation of rent in accordance with the tenant's income, the landlord may increase the rent on the ground of a variation in the tenant's income from a date falling at least 14 days after the notice of the increased rent is given; and

(2)(iii) if the landlord is a registered housing co-operative under a residential tenancy agreement that allows the landlord to change the basis of calculating the rent payable under the agreement, and the landlord gives the tenant written notice that there is to be a change in the basis of calculating rent as from a specified date (which must be at least 60 days after the notice is given and at least six months from the date of the agreement, or if there has been a previous change in the basis of rent calculation, at least six months from the date of the last such change), the rent may be increased to accord with the new basis of rent calculation as from the specified date without further notice under this section”.

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<sup>189</sup> Page 136.

## **Summary of Responses**

### ***Employment-linked tenancy arrangements***

The Australian Hotels Association (WA Branch), REIWA and POA supported recommendation 84. TAS submitted that in all cases, tenants should be provided with prior notice of a rent increase.<sup>190</sup>

DHW and POA supported recommendation 85. TAS and Shelter WA strongly opposed this recommendation, stating that tenants should receive 30 days notice of a rent increase where rent is linked to income.<sup>191</sup> REIWA also opposed this recommendation. CHCWA held the view that recommendation 85 conflicted with recommendation 14, and that the former recommendation ought to apply to accommodation leased to employees only.<sup>192</sup>

### ***Public and community housing arrangements***

Almost all respondents supported recommendations 12 and 13. Some respondents suggested that public housing tenants were disadvantaged by the Homeswest exemption and argued that equal protection should be given to both private and public tenants.

Shelter WA suggested that the definition for 'rental subsidy' or 'rent rebate' equate with 'an amount waived or remitted by a social housing provider'. Shelter WA also provided a definition of 'social housing provider' including: the State Housing Commission; or a not-for-profit corporate body that provides affordable rental accommodation, where rents charged are tied to the tenant's capacity to pay.<sup>193</sup>

Homeswest reported that the exemption from the restriction from varying rent is only relied upon in cases where tenants receive a rental subsidy so that rents may be varied according to income. For full rent paying tenants, Homeswest complies with the requirements of the RT Act notwithstanding the statutory exemption.<sup>194</sup>

DHW supported recommendation 12 and accepted that the rent increase-related exemption for Homeswest could be removed subject to the concurrent implementation of recommendations 13 and 14.<sup>195</sup> REIWA and POA also supported recommendation 14. CHCWA recommended that where an individual is receiving subsidised housing as a result of a rent to income policy, rental increases should apply from the time the person's income changes.<sup>196</sup>

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<sup>190</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 44.

<sup>191</sup> *ibid* (TAS); Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 16.

<sup>192</sup> CHCWA, *Submission to the Review of the RT Act*, Dec 2002, p. 5.

<sup>193</sup> Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 5.

<sup>194</sup> Dialogue session between DOCEP and DHW, 12 Apr 2005.

<sup>195</sup> DHW, *Submission to the Review of the RT Act*, Dec 2002, p. 4.

<sup>196</sup> CHCWA, *Submission to the Review of the RT Act*, Dec 2002, p. 3.

TAS and Shelter WA strongly opposed recommendation 14, arguing that tenants should receive 30 days notice of any variation in rental subsidy, and therefore any corresponding variation in rent payable.<sup>197</sup> TAS explained that the cancellation or reduction of a rent rebate, effectively increasing the rent payable, can take effect immediately that DHW determines that household income has increased. It was pointed out that often, a tenant's income has remained the same, and DHW has included income which it deems other household members to receive, in calculating the rent increase. It was submitted that rent might increase substantially, without a tenant's knowledge, as DHW tenants are required to sign authorities allowing DHW to automatically vary their rent deductions from Centrelink.<sup>198</sup>

### **Policy Position**

The Review accepts the view expressed by Stamfords that employee tenants, who are party to agreements where the amount of rent payable is calculated as a percentage of their income, are effectively on perpetual notice of a rent increase should their income increase. Accordingly, the Review does not support the need for further notice to be given prior to each increase that occurs following an increase in income.

However, the Review notes that the exemption for employment-linked tenancy agreements provided for in regulation 5C of the RT Regulations does not address changes to the basis of calculating rent payable (e.g. percentage of income) that may occur during the course of employment. As a change in the percentage of income payable could result in an increase in rent greater than an employee might ordinarily contemplate, the Review is of the opinion that notice should be given of such changes and that the frequency of any change should also be limited. The Review proposes, therefore, to require employers to give 60 days notice of any change in the basis of calculating rent (e.g. proportion of income) and to restrict increases of this nature to once every six months.

In relation to public and community housing, where rent is also linked to income, the Review recognises that there are two distinct scenarios relating to potential increases in rent:

- (1) where the base rent and percentage calculation (i.e. basis of calculating rent) remains the same, but the tenant's individual income changes; and
- (2) where the tenant's individual income remains the same, but the base rent and/or the percentage changes.

The Review agrees with the necessity for public and community housing providers to be exempt from the standard restrictions on increases in rent in the first scenario, as the tenant is effectively on perpetual notice that the amount of rent deducted from their income (and the corresponding rental subsidy) will vary according to fluctuations in income. Therefore, it is proposed that public and community housing providers be exempt from the necessity to give 60 days notice of a rent increase, or to limit these increases to once every 6 months.

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<sup>197</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 13; Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 5.

<sup>198</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 13.

The second scenario, however, involves a change in the basis of calculating rent payable, and the Review proposes to adopt the South Australian model whereby the standard restrictions on such increases in rent will apply. In effect, any change in the basis of calculating rent payable is a 'true rent increase', and therefore should occur no more than once every 6 months and tenants should receive at least 60 days notice.

The Review notes the issue raised by TAS that Homeswest may deem a tenant's *household* income to have changed, and therefore the rent may increase in proportion to any increase in household income. It appears that this third scenario may result in tenants being unaware of the new calculation and therefore unprepared for the increased rent payable. It is proposed that DOCEP consult with DHW on this issue with a view to adopting mandatory notification of a recalculation of household income (and therefore an increase in rent payable), similar to section 55(2)(ii) of the South Australian RT Act.

**Proposal 70**

That the exemptions for employment-linked tenancy agreements provided in the RT Regulations be retained.

**Proposal 71**

That regulation 5C of the RT Regulations be amended to require 60 days notice to be given of any change in the basis of calculating rent (e.g. increase in percentage of income payable as rent) and to limit such increases to once every 6 months.

**Proposal 72**

That the RT Act and RT Regulations be amended to exempt public and community housing providers, which charge rent based upon a specified calculation linked to income, from the standard restrictions on rent increases, provided that the specified calculation does not change during the course of a tenancy.

**Proposal 73**

That the RT Act and RT Regulations be amended such that public and community housing providers must give 60 days notice of any change in the specified calculation of rent payable, and to limit such changes to once every 6 months.

**Proposal 74**

That DOCEP consult further with DHW about the issue of rent increasing due to Homeswest's recalculation of a tenant's *household* income (as opposed to individual income), and that DHW consider introducing mandatory notification of any recalculation of household income.

## 5.5 Challenging Excessive Rent

### **Stamfords' Recommendation 80**

*That the grounds, stated in section 32(2) of the Act, for making an application for an order that rent is excessive be expanded, to allow a tenant to make application for an order on the ground that, since the tenancy was entered into, renewed or extended, rent has increased excessively.*

### **Stamfords' Recommendation 81**

*That the current power of a Magistrate to backdate an order that rent is excessive to the date of application be retained, and the Act not be amended to allow a Magistrate to backdate such an order to the date upon which the increase the subject of the application took effect.*

### **Background Discussion**

The Stamfords Report recognised community concern as to a tenant's ability to make application to a court on the grounds that rent or a rent increase is excessive.<sup>199</sup>

At present, a tenant can make application to the Magistrates Court for an order that rent is "excessive".<sup>200</sup> The application may only be made on the grounds that, either:

- the chattels or facilities with a property have been significantly reduced (through no default on the part of the tenant) since the tenancy was entered into, renewed or extended; or
- the owner was motivated in his approach to the level of rent by a wish that the tenancy be terminated.<sup>201</sup>

There is no time restriction for making application for an order declaring that rent is excessive. However, the magistrate must have regard to the rental market, the current value of the property, outgoings for both owner and tenant, facilities provided, and the state of repair and general condition thereof and any other relevant matter.<sup>202</sup>

The NSW model<sup>203</sup> permits a tenant to make application to a tribunal for an order declaring that a rent increase is excessive not later than 30 days:

- after being given notice of the rent increase; or
- after being given notice of a rent increase payable under a proposed residential tenancy agreement for residential premises already occupied by the tenant.<sup>204</sup>

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<sup>199</sup> Pages 131 – 133.

<sup>200</sup> Section 32(2), RT Act (WA).

<sup>201</sup> Section 32(2), RT Act (WA).

<sup>202</sup> Section 32(3), RT Act (WA).

<sup>203</sup> Part 4, Division 2, RT Act (NSW).

<sup>204</sup> Section 46, RT Act (NSW).

In addition, section 47 of the NSW RT Act allows a tenant to, at any time, apply to a tribunal for an excessive rent order in relation to rent payable under a residential tenancy agreement (or proposed residential tenancy agreement where the tenant is already in occupation of the property), having regard to the reduction or withdrawal by the owner of any goods, services or facilities provided with the property.

In Victoria a tenant may make application to a tribunal seeking an order in respect of the level of rent payable where the owner has reduced or withdrawn services or facilities. Application must be made within 30 days. An application may also be made where a tenant receives notice of a rent increase and considers that the proposed rent is excessive.<sup>205</sup> In determining whether an order should be made, the tribunal will consider rents payable for comparable rented properties, the general condition of the property, costs for both parties, and any other relevant factors including the number, amount and timing of rent increases in the past 24 months, and any change in value of the property.

In Queensland a tenant may apply to a tribunal within 30 days of receipt of a notice of rent increase for an order reducing the increase or setting the increase aside. In making any order, the tribunal must consider the range of rents usually charged for comparable properties, the proposed rent compared to the current rent, state of repair of the properties, the term of the tenancy, the period since last increase, and any other relevant matter.<sup>206</sup>

In the ACT tenants have a similar right to challenge rent increases as exists in Victoria and Queensland.

Specific provision to backdate rent increases exists only in New South Wales where the Tribunal may order an effective date from which the increased rent is payable.

In Western Australia, a court order that rent shall not exceed a specified amount can currently only be backdated to the date of the application.<sup>207</sup>

### **Summary of Responses**

Many respondents to the Review were concerned that the current grounds for an excessive rent order in the RT Act were too limited.

Tenant advocacy groups offered conditional support for recommendation 80, arguing that it did not go far enough and that the RT Act failed to address situations where current rent levels are excessive or where the purpose of an increase is to force termination.<sup>208</sup>

REIWA also offered conditional support for recommendation 80 but believed that tenants should be required to provide supporting documentation to substantiate their claims.<sup>209</sup>

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<sup>205</sup> Section 46, RT Act (Vic).

<sup>206</sup> Section 53A, RT Act (Qld).

<sup>207</sup> Section 32(4), RT Act (WA).

<sup>208</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p.42;  
Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p.15.

<sup>209</sup> REIWA *Submission to the Review of the RT Act*, Dec 2002, p.22

POA opposed recommendation 80 maintaining that the current grounds in section 32(2) of the RT Act are sufficient.<sup>210</sup>

Tenant advocacy groups strongly opposed recommendation 81, maintaining that a magistrate should be allowed to backdate an order to any date, including the date on which the increase took effect.<sup>211</sup> They argued that disadvantaged tenants are those most likely to be affected by excessive rent increases but least likely to commence court action quickly, therefore being further adversely affected.

REIWA and POA supported the status quo given that this would mitigate any losses that the owner may face in a court order ruling against the increase. Tenant advocacy groups suggested that it was only reasonable for tenants disadvantaged by excessive rent demands to be repaid rent.

### **Policy Position**

The Review recognises that section 32 of the RT Act provides very limited grounds for challenging excessive rent, and in practice, few situations arise which 'fit' these limited grounds. Tenants are therefore left with little recourse during times when owners decide to excessively increase rent, and the circumstances do not fall under section 32.

The Review agrees with recommendation 80 that the grounds for excessive rent applications be expanded, and proposes to adopt the NSW model for challenging excessive rent. Under this model, tenants will be able to apply, within 30 days of a rent increase notice, for an order that the proposed rent increase is excessive.

The Review also agrees, however, with Stamfords' view that the primary purpose of any provision enabling tenants to challenge excessive rent increases is to prevent unscrupulous increases after a tenancy has commenced. Accordingly, the Review does not support any amendment that would allow a prospective tenant to challenge the rental rate offered with a prospective tenancy, which may have the same effect as a statutory rent restriction.

In relation to recommendation 81, the Review believes that the RT Act should be amended to allow magistrates to backdate orders to the date of a rent increase, or the date when there was a significant reduction in the chattels or facilities provided with the property. To minimise potential hardship for owners the Review supports the imposition of a 30-day time limit on lodging applications in respect of excessive rent (as discussed above). Applications outside the time limit will be heard at the discretion of the Magistrates Court only. The 30-day time limit accords with a number of other Australian jurisdictions. In making any backdated orders, magistrates will be required to consider the relative hardship to both the owner and the tenant.

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<sup>210</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p.3.

<sup>211</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p.43;  
Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p.15.

### **Proposal 75**

That the grounds for an excessive rent application in section 32(2) of the RT Act be expanded, allowing a tenant, within 30 days of receiving a notice of rent increase, to apply to the Magistrates Court for an order that the proposed rent increase is excessive.

### **Proposal 76**

That the RT Act be amended to empower the Magistrates Court to backdate excessive rent orders to the date of a rent increase, or the date when there was a significant reduction in the chattels or facilities provided with the property, subject to consideration of the relative hardship to both the owner and the tenant before making such an order.

### **Proposal 77**

That the current ability to challenge excessive rent under section 32(2) of the RT Act be available to tenants at any time during a tenancy, and that the new ground in proposal 5.11 (with its 30-day application time limit) also allow for “out of time” applications to be heard at the discretion of the Magistrates Court.

## **5.6 Varying Rent at the Commencement of a New Tenancy**

### **Stamfords’ Recommendation 86**

*That the Act be amended to make adequate provision for varying rent at the commencement of a new tenancy that follows the conclusion of a previous tenancy.*

### **Background Discussion**

As indicated in chapter 8.4, under the current RT Act, a party to a fixed-term tenancy is not required to give the other party notice that they wish to continue the tenancy. If the tenant continues to occupy the property beyond the agreement’s expiry date and the owner continues to accept rent and treat the property as being rented to that tenant, the tenancy is deemed to have ‘rolled over’ from a fixed-term into a periodic tenancy.

Currently, the RT Act provides for agreements that continue beyond the day on which they would, upon their terms, have terminated, to be subject to the same terms as last applied before termination.<sup>212</sup> However, the Act is silent in relation to any new agreement that may be signed with an existing tenant to continue residing in the same premises.

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<sup>212</sup> Section 60(2), RT Act (WA).

One issue is whether an owner is permitted to vary rent where an agreement with an existing tenant ends and a new agreement with the same tenant is entered into, where the 60 days notice has not been given and/or the rent has been increased within the previous six months.

In Phase 1 of the Review, though accepting the concerns of TAS and other respondents about owners being able to increase rent when renegotiating a lease without adequate notice, Stamfords believed that restrictions should not be imposed that might discourage owners from signing a new agreement with an existing tenant by preventing owners from negotiating a new level of rent at the commencement of a new tenancy. It was thought that to do so would be to the disadvantage of both the owner and existing tenant.<sup>213</sup>

Stamfords recommended the introduction of a new process for dealing with a continuing tenancy at the expiration of an existing lease. The key features of the suggested model are listed below.

- Provision for existing leases to “roll over” into periodic tenancies in the absence of notice from either party of their intention not to continue the tenancy.
- Requiring owners and tenants to provide 30 days and 21 days notice respectively, of their intention not to continue a fixed term tenancy.
- Amending the RT Act to allow rent to be increased when renegotiating a further tenancy agreement (fixed or periodic).
- Requiring owners wishing to enter into a new agreement with an existing tenant, to give 30 days notice prior to the expiration of a fixed term tenancy of any increase in rent at the commencement of a new tenancy.
- Provision for existing leases that “roll over” into periodic tenancies where less than 30 days notice has been given, to be subject to the same terms until exactly 30 days after the notice is actually given.<sup>214</sup>

In most other Australian jurisdictions, residential tenancy legislation is silent on varying rent (and other conditions) at the commencement of a new tenancy agreement.

In South Australia, however, a series of residential tenancy agreements between the same parties and relating to the same property is treated as a single residential tenancy agreement unless a minimum of six months has elapsed since rent for the property was fixed or last increased. In addition, the date fixed for an increase in rent must be at least six months after the date of the agreement (or the last rent increase) with at least 60 days notice.<sup>215</sup>

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<sup>213</sup> Pages 137 – 138.

<sup>214</sup> Page 138.

<sup>215</sup> Section 55, RT Act (SA).

## **Summary of Responses**

Stamfords' recommendation was supported by both tenant advocacy groups and property owners.

It was suggested by tenant advocacy groups that under the current RT Act, owners were able to increase rent when renegotiating an agreement without giving adequate notice to the tenant. Shelter WA strongly supported the recommendation as it was seen to close a potential loophole that allowed unscrupulous owners to terminate a tenancy and start a new one in order to increase the frequency of rent increases.<sup>216</sup> TAS also supported the recommendation arguing that currently tenants continuing in a tenancy may be required by owners to pay increased rent without notice. TAS felt that in such circumstances, 30 days notice would be appropriate and consistent with recommendations related to income-linked rent increases.<sup>217</sup>

While supporting the recommendation, REIWA suggested that the RT Act be amended to require owners to notify tenants 30 days prior to the expiration of a fixed term tenancy of the ability to renew their lease at a reviewed rent. REIWA also suggested that tenants should be required to confirm 21 days prior to the expiration of a lease, their intention not to continue or renew their lease.<sup>218</sup>

## **Policy Position**

The Review recognises that problems can arise with fixed term leases where there is a lack of communication between owners and tenants as to their intentions at the end of the fixed term.

The policy position in relation to this issue is detailed in the response to Stamfords' recommendation 127 (discussed in chapter 8.4).

In summary, the Review proposes to amend the RT Act to require owners to give 30 days, and tenants to give 21 days, notice of intention to terminate a fixed term lease at its natural expiry date. In addition, the Review also proposes to require owners to provide 30 days notice of any proposed rent increase at the commencement of a new tenancy. Such notice is considered appropriate and coincides with the notice period for owners to signal their intention to offer a new tenancy (or refrain from offering a new tenancy).

### **Proposal 78**

That the RT Act be amended to allow rent to be increased at the commencement of a new tenancy that follows a fixed term tenancy, and that owners be required to provide at least 30 days notice of any rent increase to be applied at the commencement of the new tenancy.

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<sup>216</sup> Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p.16.

<sup>217</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p.45.

<sup>218</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p.24.

## 5.7 Electronic Payment of Rent

### **Stamfords' Recommendation 87**

*That the Act be amended to require that, where rent is paid electronically under an agreement between owner and tenant, the owner be required to issue to the tenant on at least a quarterly basis a statement of such payments that contains the same items as required on a standard rent receipt.*

### **Stamfords' Recommendation 88**

*That the Act be amended to require that, unless a term contained in the agreement requires that payment be made in a certain form (or forms), an owner may not restrict a tenant from paying rent in any generally accepted form.*

### **Stamfords' Recommendation 15**

*That the Regulations be amended to remove Homeswest's exemption from section 33 of the Act, which requires owners to issue receipts for rent.*

## **Background Discussion**

The RT Act currently requires any person receiving rent under a residential tenancy agreement to provide a receipt within three days of receiving payment.<sup>219</sup> This requirement does not apply to:

- rent paid into an account at an authorised deposit-taking institution pursuant to an agreement between the owner and the tenant,<sup>220</sup> or
- Homeswest tenancies.<sup>221</sup>

Electronic payments can be convenient for both owners and tenants and are becoming more commonplace. However, problems can and do arise where reliance is placed on the limited information contained in bank statements to determine the record of payment.

Respondents in Phase 1 of the Review reported that it was the current practice of Homeswest to issue quarterly statements (in respect of rent paid) even though they are exempt from the requirement to provide rent receipts. The practice was commended by respondents who suggested that owners should be required to provide similar statements on a quarterly basis where rent is paid electronically. In such cases, the issuing of fortnightly receipts would be unnecessary.

Stamfords expressed their support for the provision of quarterly statements expressing the view that this would not be an overly onerous requirement.<sup>222</sup>

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<sup>219</sup> Section 33(1), RT Act (WA).

<sup>220</sup> Section 33(2), RT Act (WA).

<sup>221</sup> Regulation 5A, RT Regulations (WA).

<sup>222</sup> Page 139.

Stamfords conceded that fees and charges incurred where payment is made electronically can be considerable where insufficient funds are not available on a due date. However, Stamfords believed that fees and charges incurred otherwise would likely be small and that any legislative requirement to regulate this would be difficult to administer. It was suggested that provided the tenant had a clear understanding prior to entering into an agreement that electronic payment would be required, an owner should not be responsible for payment of associated charges.<sup>223</sup>

In Victoria and Queensland, residential tenancy legislation requires persons receiving rent to keep a record for 12 months and provide a copy of the rent record upon request by the tenant within either 5 or 7 days.<sup>224</sup>

With respect to choice of method of making payment, in Queensland parties may agree upon any one of a number of “approved” ways of paying rent including:

- (a) cash;
- (b) cheque;
- (c) deposit to a financial institution account nominated by the owner;
- (d) credit card;
- (e) an EFTPOS system;
- (f) deduction from pay, or a pension or other benefit, payable to the tenant; or
- (g) any other way agreed on by the owner and tenant.

After signing an agreement the parties may agree on changing the manner in which payment is made, however, the tenant must then continue making payment in the manner agreed upon while the agreement remains in force.<sup>225</sup>

### **Summary of Responses**

With respect to method of payment of rent, TAS cited cases where tenants had been required to pay rent electronically to an agent, where the agreement was silent as to the method of payment. In such cases, refusal by the agent to accept certain forms of payment (other than electronic) could lead to a breach by the tenant.

TAS suggested that tenants could be disadvantaged as fees and charges can be incurred where payment is made electronically or where funds are not available for direct debit on a certain date.<sup>226</sup> TAS suggested that where owners or agents sought payment of rent electronically, without agreement, all fees and charges should be borne by the owner.<sup>227</sup>

Apart from these comments, recommendations 87 and 88 were widely supported by all major stakeholders and respondents.

Similarly, all respondents, apart from MIDLAS, supported recommendation 15 to remove Homeswest’s exemption from the requirement to issue receipts for rent.

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<sup>223</sup> Page 140.

<sup>224</sup> Section 43 (5 days), RT Act (Vic); Section 50 & 51 (7 days), RT Act (Qld).

<sup>225</sup> Section 47, RT Act (Qld).

<sup>226</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p.45.

<sup>227</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p.46.

## **Policy Position**

The Review believes that issuing of quarterly rent statements will ensure that tenants are provided with an adequate record of electronic rent payments without placing an undue burden on owners/agents. Given that Homeswest has already adopted this practice, the Review proposes to remove Homeswest's exemption from the requirement to issue receipts for rent.

With respect to method of payment of rent generally, the Review believes that both owners and tenants should agree on the manner of payment when entering into any tenancy agreement. In the absence of any express agreement between parties, the Review believes that there should be no restriction on paying rent in any generally accepted form.

### **Proposal 79**

That the RT Act be amended to require that, where rent is paid electronically under an agreement between an owner and tenant, the owner be required to issue to the tenant, on at least a quarterly basis, a statement of such payments that contains the same information as that required to be given on a standard rent receipt.

### **Proposal 80**

That the RT Act be amended to require that, unless a term contained in the agreement requires that payment be made in a certain form (or forms), an owner may not restrict a tenant from paying rent in any generally accepted form.

### **Proposal 81**

That the RT Regulations be amended to remove Homeswest's exemption from section 33 of the RT Act, which requires owners to issue receipts for rent, as it is Homewest's current practice to issue quarterly statement (thereby negating the need for fortnightly receipts to be issued).

## 6. ACCESS, INSPECTIONS AND QUIET ENJOYMENT

### 6.1 Tenant's Right to Quiet Enjoyment

#### ***Stamfords' Recommendation 89***

*That the Act be amended to impose a penalty for breach of a tenant's right to quiet enjoyment.*

#### **Background Discussion**

Section 44 of the RT Act states:

- “(1) It is a term of every agreement –
- (a) that the tenant shall have quiet enjoyment of the premises without interruption by the owner or any person claiming by, through or under the owner or having superior title to that of the owner;
  - (b) that the owner shall not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises; and
  - (c) that the owner shall take all reasonable steps to enforce the obligation of any other tenant of the owner in occupation of adjacent premises not to cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises”.

Similar clauses in regard to quiet enjoyment are contained in the tenancy legislation of other Australian jurisdictions.<sup>228</sup> The RT Acts of Queensland, South Australia, Tasmania and the Northern Territory all contain penalty provisions for a breach by an owner/landlord of a tenant's quiet enjoyment.<sup>229</sup>

#### **Summary of Responses**

All major stakeholders aside from the POA supported the introduction of a penalty for a breach of quiet enjoyment by an owner. The POA believed that the RT Act is sufficient as it is.<sup>230</sup>

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<sup>228</sup> Section 22, RT Act (NSW); Section 67, RT Act (Vic); Section 101, RT Act (Qld); Section 65, RT Act (SA); Section 55, RT Act (Tas); Section 65 & 66, RT Act (NT).

<sup>229</sup> Section 101, RT Act (Qld); Section 65, RT Act (SA); Section 55, RT Act (Tas); Section 65 & 66, RT Act (NT).

<sup>230</sup> POA, *Submission to the Review of the RT Act, Dec 2002*, p.3.

## **Policy Position**

As discussed in the Stamfords Report, the Review notes that the options available to a tenant in response to an owner's breach of their quiet enjoyment are limited.<sup>231</sup> The most severe option the tenant can take is to apply to the Magistrates Court for termination of the tenancy agreement for breach by the owner, however, this may cause greater hardship for the tenant than the owner.

Another option is for a tenant to apply to the Magistrates Court under section 15 of the RT Act for an order for compensation for loss or injury caused by a breach of the tenancy agreement. It is likely, however, that many tenants would find it very difficult and costly to run such an action.

The Review believes that the breach of a tenant's right to quiet enjoyment warrants the application of a penalty and so proposes to amend the RT Act accordingly. This would allow DOCEP, if it was in the public interest, to prosecute an owner for breaching the RT Act. Furthermore, the Review believes that a magistrate should have the capacity to make a compensation order in favour of the tenant if it is deemed appropriate.

Part 16 of the *Sentencing Act 1995 (WA)* allows a court to order an offender to pay money as compensation to a victim for "*the loss of, or damage to, the victim's property...*" It is unlikely that a tenant's loss of quiet enjoyment would fall within the definition of "property" in the Sentencing Act. It is therefore necessary for the RT Act to be amended to expressly provide for compensation orders in the event of a successful prosecution for breach of a tenant's right to quiet enjoyment. This will enable a tenant to be appropriately compensated, without that tenant needing to commence a separate civil action in the Magistrates Court.

### **Proposal 82**

That the RT Act be amended to impose a penalty for a breach of a tenant's quiet enjoyment.

### **Proposal 83**

That the RT Act be amended to enable a magistrate to make a compensation order in favour of a tenant, if the magistrate deems it appropriate, in addition to sentencing an owner for breach of a tenant's right to quiet enjoyment.

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<sup>231</sup> Stamfords' Report, p. 142.

## 6.2 Tenant Databases

### **Stamfords' Recommendation 90**

*That DOCEP investigates further the effect of the recent amendments to the Privacy Act 1988 (Cth) on the operation of tenant databases. This investigation should determine the adequacy of the recent amendments to the Privacy Act 1988 (Cth) in protecting the privacy of tenants, and make recommendation [sic] regarding any appropriate amendments to the Residential Tenancies Act in order to address any shortcomings identified.*

### **Background Discussion**

Residential tenancy databases (RTD) are tools that provide real estate agents with information about prospective tenants who may have been listed because of past negative tenancy experiences. Tenants may be listed on a database for a number of reasons, including objectionable behaviour, termination of an agreement because of a breach of the agreement, or failure to pay rent. Agents use this information to assess whether a prospective tenant poses a risk to an owner's rental property.<sup>232</sup>

In 2003 the Standing Committee of Officials of Consumer Affairs (SCOCA - a national committee composed of senior officials from government agencies responsible for consumer affairs) established a working party to develop a national approach for regulating the use and operation of residential tenancy databases. DOCEP is a member of the national working party. The working party released a discussion paper in November 2003 seeking public comment on database issues, and submitted a post consultation report to SCOCA in November 2005. The post-consultation report contains provisional recommendations for uniform regulatory measures for the States and Territories to address serious concerns about the use of RTDs, with supporting action by the Commonwealth to clarify the application of the *Privacy Act 1988* (Cth) to RTDs.

Queensland and New South Wales have developed amendments to their residential tenancies legislation to address database issues at the State level. It has yet to be determined whether issues associated with the database service operators can be addressed under State legislation as many of them operate at a national level and thus may fall outside of State-based legislation.

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<sup>232</sup> Residential Tenancies Authority (Queensland) *New rules for tenancy database listing*, Fact Sheet, July 2003; Office of Fair Trading (NSW) *Tenant databases Information for renters*, Information Booklet, Aug 2004.

## **Summary of Responses**

The Goldfields Community Legal Centre (GCLC) submitted a lengthy paper discussing its concerns with tenancy databases.<sup>233</sup> The paper included case studies and discussion in relation to National Privacy Principles and reports prepared for the Queensland Government and the Tasmanian Government,<sup>234</sup> and the practices of database service providers. The GCLC was highly critical of the operations of databases and recommended that the RT Act be amended to regulate particular aspects of tenancy database listings. In their submissions, TAS and Shelter WA were also quite critical of tenancy databases, seeking amendments to the RT Act to, among other things, prohibit database listing without reasonable excuse, and enable applications for compensation by tenants who have suffered a loss as a result of an unjustified database listing.<sup>235</sup>

## **Policy Position**

As stated previously, DOCEP is a member of the SCOCA national working party developing a national approach to tenancy database regulation. As such, the Government will monitor developments and, if necessary, amend the RT Act as required, if a uniform national approach to database regulation is not settled.

### **Proposal 84**

That the Government monitor the work of the national working party on tenancy database regulation and, if necessary, amend the RT Act as required, if a uniform national approach to database regulation is not settled.

## **6.3 Negotiated Entry**

### ***Stamfords' Recommendation 91***

*That the Act be amended to state that, where an owner is required under the Act to give notice to the tenant before entering the premises, the owner is required to make a reasonable attempt to negotiate an appropriate time of entry to the premises, and to take into account the circumstances of the tenant in this regard.*

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<sup>233</sup> Goldfields Community Legal Centre Inc. *Submission to the Review of the RT Act*, Dec 2002.

<sup>234</sup> See *Recommended Queensland Government Strategy Regarding Tenancy Databases*, Jan 2002; *Report of a Special Government Backbench Committee to inquire into the operation of Tenancy Databases*, Linda Lavarch MP (Chair), August 2002; and *Tenant Databases: Responses and Approaches*, Office of Consumer Affairs and Fair Trading Tasmania, Mar 2002.

<sup>235</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, pp. 48 – 49; Shelter WA *Submission to the Review of the RT Act*, Dec 2002, pp. 17 – 18.

## **Background Discussion**

Currently under the RT Act, an owner is simply required to notify a tenant of their intention to enter the property (for one of the purposes listed in the Act) and, should the tenant not advise the owner that the time is inconvenient, the owner/agent may enter the property if the tenant is not there. For example, an owner could arrange for an inspection at a time that inadvertently inconveniences a tenant, when an alternative time may be available that better suits the tenant and would not inconvenience the owner. A requirement to negotiate entry times would be particularly beneficial for shift workers and people who run businesses from home.

Furthermore, if it was incumbent upon the owner and tenant to negotiate the owner's time of entry, it may be possible to negotiate a shorter notification timeframe than required by the RT Act, if preferred.

## **Summary of Responses**

All major stakeholders supported this recommendation, with REIWA noting that tenants should be aware that they should negotiate in a reasonable manner. TAS welcomed the recommendation for security reasons, maintaining that "*tenants may suffer a non-recoverable loss from theft by a 'prospective purchaser' being brought through the house in their absence*" and that "*there may be safety implications, for example if the landlord fails to resecure the house properly*".<sup>236</sup>

## **Policy Position**

The Review believes that increased communication between an owner and a tenant concerning entry of the property by the owner would be beneficial and proposes to amend the RT Act to require owners to make reasonable attempts to negotiate with tenants before any proposed entry into a rental property.

### **Proposal 85**

That the RT Act be amended to state that, where an owner is required under the Act to give notice to the tenant before entering the property, the owner is required to make a reasonable attempt to negotiate an appropriate time of entry onto the property, and to take into account the circumstances of the tenant.

## **6.4 Repairs and Maintenance Entry Notice Period**

### ***Stamfords' Recommendation 92***

*That the current period of notice in the Act for access to the premises to carry out or inspect repairs or maintenance be retained without amendment.*

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<sup>236</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 49.

## **Background Discussion**

Currently, the RT Act requires that 72 hours notice be given to the tenant before necessary repairs or maintenance can be inspected or carried out at the rental property.<sup>237</sup> With the tenant's consent given at, or immediately before the time of entry, this notice period may be reduced.<sup>238</sup>

## **Summary of Responses**

Some respondents to the Review argued that at times it may be necessary to call tradespeople back within 24 hours in relation to maintenance carried out on the property, which would necessitate entry by an owner before the 72 hour notice period required by the RT Act had elapsed.<sup>239</sup> In situations such as this the RT Act already provides for the owner to enter the property prior to the expiration of the notice period to inspect maintenance if they acquire the permission of the tenant.<sup>240</sup>

## **Policy Position**

The Review believes that the existing provision of the RT Act regulating access is appropriate and supports the recommendation that the current notice period required for access to a property to carry out or inspect maintenance or repairs be maintained.

### **6.5 Entry and Inspection when Collecting Rent**

#### ***Stamfords' Recommendation 93***

*That the Act be amended to remove the owner's current right to inspect premises while collecting rent.*

## **Background Discussion**

Where an agreement exists between the owner and the tenant that rent be collected by the owner at the property, section 46(1)(d) of the RT Act enables the owner to enter and inspect the property at the time of collecting the rent. As such, the Act allows tenants who agree to have the rent collected at their home, to be subject to monthly inspections of the property, without formal notice.

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<sup>237</sup> Section 46(1)(e), RT Act (WA).

<sup>238</sup> Section 46(1)(h), RT Act (WA).

<sup>239</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p. 3; Private submission No. 26 to the Review of the RT Act, Dec 2002.

<sup>240</sup> Section 46(1)(h), RT Act (WA).

No other Australian tenancy legislation contemplates an inspection being carried out when rent is collected at a rental property. Section 86 of the Victorian *Residential Tenancies Act 1997* specifies that, after the first 3 months of a tenancy agreement, a right of entry to inspect a rental property may only be exercised once every 6 months. The report, “*Minimum Legislative Standards for Residential Tenancies in Australia*”, recommends that access to a rental property for the purpose of carrying out an inspection be limited to once every 3 months.<sup>241</sup> In line with this, the Queensland *Residential Tenancies Act 1994* specifies that unless otherwise agreed to by the tenant, inspections are limited to once every 3 months.<sup>242</sup>

### **Summary of Responses**

All respondents aside from the POA supported the removal of the owner’s current right to inspect the property when collecting the rent, agreeing that these tenants should not be subjected to more frequent inspections than other tenants. However, the POA believes that the RT Act should not be amended, as it is “sufficient” as is.<sup>243</sup>

### **Policy Position**

The Review supports the recommendation to remove the owner’s right to inspect a property when collecting rent, as tenants who agree to have rent collected at the property should not be subjected to overly frequent inspections. However, aside from when the owner is collecting rent or showing prospective purchasers or tenants through a property,<sup>244</sup> the RT Act is silent as to the frequency that an owner/agent may inspect or access a property. Therefore, the removal of an owner’s right to inspect a property when collecting rent will remove from the Act any guidance as to the frequency that general inspections may be carried out. The Review believes that the RT Act should provide guidance on this issue.

The Review proposes to amend the RT Act to remove the owner’s right to inspect a property when collecting rent. Furthermore, the Review proposes to amend the RT Act to limit the maximum frequency of general inspections to once every two months.

#### **Proposal 86**

That the RT Act be amended to remove the owner’s current right to inspect the property when collecting the rent.

#### **Proposal 87**

That the RT Act be amended to limit the number of times an owner/agent may carry out a general inspection of a property to a maximum of once every two months.

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<sup>241</sup> Kennedy, Robyn, Peter See & Peter Sutherland, 1995, *Minimum Legislative Standards for Residential Tenancies in Australia*, Report Prepared for the Commonwealth Department of Housing and Regional Development, Canberra, Australian Capital Territory p. 68.

<sup>242</sup> Section 111(2A), RT Act (Qld).

<sup>243</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p.3.

<sup>244</sup> Section 46(1)(f) and (g), RT Act (WA).

## 6.6 Definition of Reasonable Hour

### ***Stamfords' Recommendation 94***

*That the Act be amended to define "reasonable hour" as "between the hours of 9.00am and 8.00pm on a weekday, and 9.00am and 5.00pm on a Saturday, or any other time mutually agreed by both owner and tenant".*

### **Background Discussion**

The RT Act does not currently define the term 'reasonable hour'. There is no standard timeframe used across the different Australian jurisdictions to determine 'reasonable hour'. The report, "*Minimum Legislative Standards for Residential Tenancies in Australia*", recommends that access to a rental property be limited to between the hours of 8am and 6pm excluding Sundays and public holidays.<sup>245</sup> The Report states "*If a lessor cannot attend to repairs or inspections during the rest of the week then consideration should be given to appointing a managing agent*".<sup>246</sup>

### **Summary of Responses**

Stakeholders made various recommendations as to what timeframe should constitute 'reasonable hour', however, all agreed that the term should be defined.

### **Policy Position**

The Review notes that the timeframe suggested in the Stamfords' recommendation is modelled on the timeframe used in the *Door to Door Trading Act 1987* (WA). While this timeframe is appropriate for interacting with salespeople at the front door of a property, 8pm is considered too late for families with young children and the elderly for inspections to occur. As such, the Review proposes to define 'reasonable hour' by adopting one of the timeframes in the report "*Minimum Legislative Standards for Residential Tenancies*".

### **Proposal 88**

That the RT Act be amended to define the term 'reasonable hour' as being between 8am and 6pm from Monday to Friday inclusive (excluding public holidays), between 9am and 5pm on a Saturday, or at any other time mutually agreed to by both the owner and the tenant.

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<sup>245</sup> Kennedy et al, 1995, *Minimum Legislative Standards for Residential Tenancies in Australia*, Report Prepared for the Commonwealth Department of Housing and Regional Development, Canberra, Australian Capital Territory p. 67.

<sup>246</sup> *ibid.*

## 6.7 Time for Inspection

### **Stamfords' Recommendation 95**

*That the Act be amended to require that an owner, at the time of giving a tenant notice of their intention to access the premises, specify a one-hour timeframe within which the owner will enter the premises.*

### **Background Discussion**

The RT Act requires that an owner give notice of the date of an upcoming inspection to a tenant, but does not require that a time of inspection be specified.<sup>247</sup> As a result, a tenant who wants to be present during the inspection may have to spend the entire day at the property waiting for the owner/agent to arrive to carry out the inspection.

### **Summary of Responses**

Tenant advocacy groups were strongly supportive of an owner being required to specify a timeframe within which an inspection must commence. There were no objections from the respondents to the Review to the introduction of a requirement for an owner to specify a timeframe, however, respondents varied in their recommendations as to the length of the timeframe, with one real estate agent suggesting “either four, five or even six hours”.<sup>248</sup>

### **Policy Position**

The Review agrees with the introduction of a specified timeframe for accessing a rental property, however, considers the proposed one-hour timeframe too restrictive. Although an owner/agent can determine what time of day they wish to enter a property, they have less control over tradespeople, delivery people and similar visitors who might need to access a rental property.

Therefore, the Review proposes to amend the RT Act to require an owner/agent to specify a three-hour timeframe within which they, or a person authorised by them, will enter the property. Failure by the owner/agent/authorised person to arrive at the property within the specified three-hour timeframe will not constitute an offence, however, the owner will be required to reschedule the date and time of the visit, again giving the tenant formal notice according to the requirements of the RT Act.

### **Proposal 89**

That the RT Act be amended to require that when giving tenants notice of their intention to access a property, owners/agents specify a three-hour timeframe within which the owner/agent/authorised person will enter the property.

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<sup>247</sup> Section 46(1)(b), RT Act (WA).

<sup>248</sup> Private submission No. 24 to the Review of the RT Act, Dec 2002, p. 9.

## 6.8 Length of Stay on Premises After Entry

### ***Stamfords' Recommendation 96***

*That the Act be amended to state that any person exercising a right of entry to a premises under the Act:*

- *must do so in a reasonable manner; and*
- *must not stay or permit others to stay on the rented premises longer than is necessary to achieve the purpose of the entry without the tenant's consent.*

### **Background Discussion**

The Victorian residential tenancy legislation contains a provision very similar to Stamfords' recommendation.<sup>249</sup> The provision ensures that the tenant's right to quiet enjoyment is not breached by an owner overstaying their welcome on a rental property.

### **Summary of Responses**

None of the respondents to the Review objected to the recommendation to restrict the length of time an owner may remain on a property after completing the purpose for which access was provided, without the tenant's further consent.

### **Policy Position**

The Review supports Stamfords' recommendation and proposes to amend the RT Act accordingly.

### **Proposal 90**

That the RT Act be amended to state that any person exercising a right of entry onto a property under the Act:

- must do so in a reasonable manner; and
- must not stay or permit others to stay on the rented property longer than is necessary to achieve the purpose of the entry without acquiring the tenant's consent to do so.

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<sup>249</sup> Section 87, RT Act (Vic).

## 6.9 Reasonable Number of Occasions

### ***Stamfords' Recommendation 97***

*That the Act not be amended to prescribe the number of occasions that an owner may show prospective buyers or prospective tenants around the premises.*

### **Background Discussion**

The RT Act currently enables an owner to enter a rental property on a “reasonable number of occasions” in order to show prospective tenants and prospective buyers around the property.<sup>250</sup> During the Review a number of respondents expressed concern about the ambiguity of the word reasonable, particularly in reference to the phrase ‘reasonable number of occasions’.

The term ‘reasonable number’ is not defined in residential tenancy legislation in any Australian jurisdiction. It is likely that the reason for this is because its meaning will vary according to the circumstances of each individual case.

No other Australian jurisdiction attempts to define ‘reasonable number’, quite possibly because specifying a number suitable to the term would vary depending upon the situation it was referring to.

### **Summary of Responses**

There were no objections from any respondents to the Review regarding this recommendation, however, TAS recommended that section 32 of the RT Act be amended to enable tenants to apply to the Magistrates Court for a rent reduction on grounds of interference with their right to privacy and quiet enjoyment where an owner/agent shows prospective tenants or buyers through a property on an excessive number of occasions.<sup>251</sup>

### **Policy Position**

The Review believes that it would be inappropriate for the RT Act to specify the number of times an owner/agent may show prospective purchasers or tenants through a property, as such a provision would significantly restrict the opportunity for the owner to sell or re-lease their property (prior to the end of the existing tenancy agreement).

Section 15 of the RT Act already provides a mechanism through which tenants can apply for compensation if their right to quiet enjoyment is breached by an owner showing prospective purchasers or tenants through a property an excessive number of times.

Therefore, the Review supports the Stamfords’ Recommendation not to specify the number of occasions an owner may show prospective buyers or tenants around a rental property.

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<sup>250</sup> Section 46(1)(f) and 46(1)(g), RT Act (WA).

<sup>251</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, pp. 50-52.

## 6.10 “Home Opens”

### ***Stamfords’ Recommendation 98***

*That the Act be amended to permit an owner to hold ‘home opens,’ at a reasonable hour and on a reasonable number of occasions, provided that the owner gives notice to the tenant of not less than 7 nor more than 14 days in advance.*

### **Background Discussion**

A much greater intrusion upon a tenant’s right to quiet enjoyment occurs when an owner holds a ‘home open’ (a property open to inspection by the general public on a certain date at a certain time). Currently, the RT Act does not address the issue of home opens; stating simply that an owner may enter a property on a reasonable number of occasions to show it to prospective purchasers.<sup>252</sup>

The RT Act does not address the issue of responsibility for damage to the property or theft of goods from the property during a home open or when prospective purchasers are shown through a rented property. Section 50 (Vicarious responsibility of tenant for breach by other person lawfully on premises) of the RT Act places the liability for the actions of ‘guests’ of the tenant while they are on the property, upon the tenant. There is no equivalent section in regard to the actions of people present at the property with the permission of the owner.

Section 90 of the Victorian *Residential Tenancies Act 1997* enables a tenant to apply to the Victorian Civil and Administrative Tribunal (VCAT) for an order for compensation if an owner or an owner’s agent or a potential purchaser accompanying them causes damage to the tenant’s goods when the owner/agent is showing the property to the potential purchaser.

The RT Act is silent on whether an owner can require the tenant to be absent from a property during a home open. Nor does it indicate whether or not the tenant’s consent is required for an owner to hold a home open. Opening a property for inspection on an excessive number of occasions could, however, constitute a possible breach of section 46(1)(g).

The report, “*Minimum Legislative Standards for Residential Tenancies in Australia*”, considers it good practice that a notice of intention to sell a property be given to the tenant prior to the owner seeking access with prospective purchasers.<sup>253</sup> This may provide an opportunity for the owner and tenant to negotiate appropriate times and frequency for access to the property.

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<sup>252</sup> Section 46(1)(g), RT Act (WA).

<sup>253</sup> Kennedy, Robyn, Peter See & Peter Sutherland, 1995, *Minimum Legislative Standards for Residential Tenancies in Australia*, Report Prepared for the Commonwealth Department of Housing and Regional Development, Canberra, Australian Capital Territory p. 68.

## **Summary of Responses**

Objection to this recommendation was received from the POA, which stated that it would be “*too restrictive on sale*”.<sup>254</sup> However, the tenant advocacy groups expressed serious concerns about the safety risks posed by holding home opens, maintaining that during home opens, tenants’ possessions are at risk of ‘immediate’ theft from people wandering unaccompanied through the property, and of ‘future’ theft from people posing as potential purchasers who are in fact assessing the value of the home’s contents and checking to see if security devices are installed at the property. Concern was also expressed that a tenant’s home contents insurance may not apply to any theft or damage occurring during home opens.<sup>255</sup>

## **Policy Position**

Home opens are generally viewed as a useful tool for selling a property. However, it is acknowledged that there are potential security risks to tenants associated with opening a private residence to the public. The Review therefore proposes to amend the RT Act to prohibit an owner from requiring a tenant to be absent from a property during a home open.

It is also understood that tenants currently have little recourse against owners/agents in the event that a prospective purchaser, or any other person visiting a property with the owner’s/agent’s permission, steals or damages a tenant’s goods. To address this concern, the Review proposes to amend the RT Act to allow tenants to apply to the Magistrates Court for an order for compensation in the event that the owner/agent, prospective purchaser, or any other person entering a property with the owner’s/agent’s permission, steals or damages a tenant’s goods (similar to section 90 of the RT Act (Vic)).

In addition, the Review proposes to amend the RT Act to create a defence and counter-claim for any tenant who is served with a breach notice, or who is disputing a bond disposal application, that damage to a property was caused by the owner, agent, or any other person who had entered a property with the owner’s/agent’s permission. Following this amendment, DOCEP will be required to conduct community education for tenants, owners, and agents to increase awareness of this defence. For example, in order to rely upon this defence, tenants will need to notify an owner/agent immediately following such damage, and make a record of the damage (e.g. using photographs and file notes).

### **Proposal 91**

That the RT Act be amended to prohibit an owner from requiring a tenant to be absent from the property when an owner/real estate agent is showing prospective purchasers/tenants through a property.

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<sup>254</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p. 3.

<sup>255</sup> Dialogue session with TAS, WACOSS and Shelter WA, 19 Oct 2004.

### **Proposal 92**

That the RT Act be amended to allow a tenant to apply to the Magistrates Court for an order for compensation against the owner/agent, in the event that the owner, agent, or any other person entering a property with the owner's/agent's permission steals or damages a tenant's goods.

### **Proposal 93**

That the RT Act be amended to create a defence and counter-claim for a tenant who is a party to breach-related proceedings, or a party to a bond disposal dispute, that damage to a property was caused by an owner, agent, or any person entering a property with the owner's/agent's permission.

### **Proposal 94**

That DOCEP conduct community education among tenants, owners, and agents to increase awareness of the defence and counter-claim in the amended RT Act in relation to damage caused by other persons entering a property with the owner's/agent's permission.

## **6.11 Definition of Reasonable Notice**

### ***Stamfords' Recommendation 99***

*That the Act be amended to state that, without limiting the generality of the requirement in the Act to give "reasonable notice" in certain instances, an owner may not enter the premises without giving not less than 72 hours notice, except where entry is in the case of emergency or with the prior consent of the tenant.*

## **Background Discussion**

Currently, the RT Act specifies the notice periods required to be given by owners in particular circumstances before they may enter rental properties.<sup>256</sup> For any other purpose not specified the RT Act requires owners to provide notice to the tenant of "*not less than 7 nor more than 14 days*".<sup>257</sup>

## **Summary of Responses**

The tenant advocacy groups and REIWA were supportive of the recommendation. Objection to the recommendation came from the POA, which believed that 24 hours was sufficient notice.<sup>258</sup>

<sup>256</sup> Section 46(1), RT Act (WA).

<sup>257</sup> Section 46(1)(b), RT Act (WA).

<sup>258</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p. 3.

### **Policy Position**

The Review believes that the current notice period required to be given to a tenant prior to an owner entering a property for any purpose other than that specified in the RT Act, is appropriate and provides statutory guidance as to what constitutes ‘reasonable notice’. Accordingly, the Review does not support any change to the RT Act.

## 7. FITNESS OF PREMISES, MAINTENANCE AND REPAIRS

### 7.1 Fitness of Premises

#### 7.1.1 Property/Building Standards

##### **Stamfords' Recommendation 100**

*That the Act not be amended to include a list of minimum standards relating to the quality of premises or management of tenancies.*

##### **Stamfords' Recommendation 101**

*That DOCEP endeavour to raise the awareness of owners renting premises regarding their current obligations.*

### **Background Discussion**

Under the RT Act, it is a term of every tenancy agreement that the owner will provide the property to the tenant in a reasonable state of cleanliness, will provide and maintain the property in a reasonable state of repair, and will comply with all requirements in regard to buildings, health and safety under any other applicable law.<sup>259</sup> Other applicable State legislation includes the *Health Act 1911* (WA) and the *Local Government Act 1995* (WA).

Under the *Health Act 1911*, local governments are empowered to declare any house (or part thereof) unfit for human habitation.<sup>260</sup> Local governments are also empowered under State legislation to make local laws pertaining to the standard of property, including provisions relating to the type and appropriate level of maintenance of the following:

- roofs, gutters and downpipes;
- foundations;
- external and internal walls;
- ventilation;
- floors, ceilings, internal wall finishes, skirtings and architraves;
- fixtures and fittings;
- doors and windows;
- pipes, fittings and fixtures pertaining to water supply, drainage or sewerage,<sup>261</sup> and
- electrical wiring, gas services and fittings.<sup>262</sup>

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<sup>259</sup> Section 42, RT Act (WA).

<sup>260</sup> Section 135(1), *Health Act 1911* (WA).

<sup>261</sup> *Metropolitan Water Supply Sewerage and Drainage Act 1909*.

Local governments may also set standards on a wider range of matters such as:

- termite control and the replacement of termite affected timber;
- the appropriate amount of sleeping space provided for each occupant of a home; and
- the level of natural lighting.

The RT Act itself requires owners to provide and maintain locks or other devices to ensure that rented properties are reasonably secure.<sup>263</sup> Furthermore, under the Building Code of Australia, it is now a legal requirement that all new residential properties have smoke alarms installed.<sup>264</sup> Since 1992, all new houses have been required to have a safety switch installed, to assist in avoiding the risk of serious injury or death by electrocution.<sup>265</sup>

### **Summary of Responses**

The introduction of a set of required minimum standards for both the physical condition and tenant management of rental properties was suggested by some respondents to the Review. These respondents argued that the absence of minimum standards posed a risk to tenants' health and safety. Other respondents raised concerns about the application of uniform standards across all of the various types of tenancies available.

Stamfords noted reports that some low-income tenants may, out of necessity, be accepting sub-standard accommodation, thus compromising their health and wellbeing. However, Stamfords concluded that the existing building, health and safety legislation, in conjunction with the RT Act, provided sufficient coverage and a means through which aggrieved tenants can take action against owners who fail to take responsibility for cleanliness and repairs.<sup>266</sup>

With respect to the suggested introduction of minimum standards, Stamfords observed that many of the standards that applied to homes already existed in other legislation. They expressed the view that the requirement under section 42 of the RT Act that an owner comply with all requirements in respect of building, health and safety under any other written law is adequate.

### **Policy Position**

It is acknowledged that many owners and tenants of rental properties may not be well informed about their obligations and rights in regard to the standards required by the RT Act and the other applicable legislation. It is also acknowledged that many tenants are not aware of their right to make an application to the Magistrates Court to ensure that an owner meets those obligations.<sup>267</sup>

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<sup>262</sup> As required by relevant public authorities.

<sup>263</sup> Section 45(1)(a), RT Act (WA)

<sup>264</sup> Building Code of Australia Volume Two, Part 3.7.2 and Part 2.3.2 (Class 1 buildings – e.g. domestic dwellings), Building Code of Australia Vol. One, Part E2 and Specification E2.2a (Class 2 to 9 buildings – e.g. multi-residential tenancies such as units and motels).

<sup>265</sup> Standards Australia, AS/NZS 3000-2000 Wiring Rules.

<sup>266</sup> Section 15, RT Act (WA).

<sup>267</sup> Section 15, RT Act (WA).

As a means to address this, the Review supports Stamford's recommendation that DOCEP endeavours to raise awareness amongst owners and tenants in respect of each one's rights and obligations under the RT Act and other relevant State and Commonwealth legislation.

#### **Proposal 95**

Through its education program and working in conjunction with tenancy and real estate industry organisations, DOCEP endeavour to increase awareness and understanding among owners and tenants about:

- the rights and responsibilities of owners in relation to building, health and safety standards under all relevant legislation; and
- the right of tenants to make an application to the Magistrates Court where an owner fails to carry out their obligations under relevant legislation.

### **7.1.2 Carpet Cleaning, Mould and Pest Control**

#### **Stamford's Recommendation 117**

*That the Act not be amended to explicitly state the responsibilities of owners and tenants regarding pest control, mould removal and carpet cleaning.*

### **Background Discussion**

Responsibility for carpet cleaning, mould and pest control is often an area of confusion for both tenants and owners. The RT Act does not specifically state who is responsible for attending to these matters, however, sections 38 and 42 are relevant. Section 38(1) requires the tenant to keep the property in a reasonable state of cleanliness and to not intentionally cause or permit damage to the property. Section 42(1) requires the owner to provide the property in a reasonable state of cleanliness, maintain it in a reasonable state of repair, and comply with all requirements in regard to health and safety laws.

### **Summary of Responses**

Concerns were raised by both owner and tenant stakeholders regarding the lack of clarity around this issue. Confusion exists because it is often not clear what the initial cause of the problem is, and because externalities beyond the control of both tenant and owner may be at fault (e.g. uncollected rubbish from a neighbouring house attracting pests).

It is the owner's responsibility to ensure that the property is, upon occupation by a tenant, free from mould and pests, and has clean carpets. The tenant also has a responsibility not to undertake any actions that would result in instances of mould or pest infestation occurring (e.g. failure to store food appropriately), and to keep any carpets clean. It is generally accepted that the tenant is responsible for having the carpets cleaned at the end of a tenancy.

### **Policy Position**

Instances of mould and pest infestations can occur for a number of reasons and consequently may be the result of a failure by either party depending on the circumstances. The Review believes that it would not be feasible to provide for all scenarios in the RT Act and consequently supports Stamfords' recommendation not to apportion responsibilities on this issue.

#### **7.1.3 Security**

##### **Stamfords' Recommendation 103**

*That the Act not be amended to include a definition of "reasonably secure".*

##### **Stamfords' Recommendation 104**

*That the Act not be amended to require that the court consider particular factors regarding a tenancy when determining what is considered "reasonably secure" for that premises.*

##### **Stamfords' Recommendation 105**

*That the current requirement in the Act for an owner to provide and maintain such locks or other devices as are necessary to ensure that the premises are reasonably secure be retained without amendment.*

### **Background Discussion**

Security is a significant concern for both owners and tenants. It is likely that a tenant who feels safe in a property is more likely to continue the tenancy once the initial agreement has expired. Under section 45 of the RT Act, an owner must provide and maintain such locks and other devices as are necessary to ensure that the property is reasonably secure.<sup>268</sup>

In 2001, the Police Security Advisory Committee convened by the Office of Crime Prevention under the chairmanship of Tim Atherton (then Assistant Commissioner, Crime Investigation Support), developed a set of minimum standards of security for residential housing.<sup>269</sup> The standards recommend as a minimum that all windows be fitted with key-locks and all external doors be fitted with deadlocks (including an equivalent locking device on sliding doors).

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<sup>268</sup> Section 45(1)(a), RT Act (WA).

<sup>269</sup> Provided with the submission by the Office of Crime Prevention; Department of the Premier and Cabinet to the RT Act Review, Apr 2002.

With insurance companies increasingly requiring minimum levels of security in properties as a prerequisite to providing home contents insurance, it is reasonable for a prospective tenant to expect that a property has a level of security sufficient to enable them to obtain insurance for their belongings.

### **Summary of Responses**

While there was widespread support amongst the stakeholders for including a definition of “reasonably secure” in the RT Act, the definitions suggested varied considerably. A number of owner advocates proposed that “reasonably secure” should relate to a generally accepted standard of security, unrelated to whether a tenant ‘felt’ secure. Several tenants and tenant advocate groups reported instances of owners’ interpretations of reasonably secure being too low, with security measures often below the minimum standards required to obtain home contents insurance. It was also noted that community notions of what constitutes “reasonably secure” vary over time and that varying interpretations by different magistrates have created inconsistent court rulings in relation to determining what is “reasonably secure”.

### **Policy Position**

The Review proposes to amend the RT Act to enable minimum standards of security for rental properties to be prescribed. The standards will be contained in the Regulations to the Act, so that they may be modified as community expectations and standards change.

It is acknowledged that the prescribed requirements will need to be sufficiently flexible to allow for alternative means of complying with the minimum standard of security where the prescribed method might be impractical.

The minimum standards of security for residential housing developed by the Police Security Advisory Committee will be considered when the prescribed standards are developed, as will the results of the Western Australian 2004 State Supplementary Survey into home safety and security, published in April 2005 by the Australian Bureau of Statistics.

#### **Proposal 96**

That the RT Act be amended to permit minimum standards of security to be maintained by the owner of a rental property to be prescribed by regulation.

#### **7.1.4 Appliances and Utility Services**

##### **Stamfords’ Recommendation 118**

*That the Act not be amended to specifically require an owner, before entering into an agreement, to disclose to a prospective tenant, in a standard form or otherwise, the standard of available amenities of a premises.*

## **Background Discussion**

When inspecting a property with the intent to lease, it is reasonable for a prospective tenant to assume that, unless informed otherwise, the services, appliances and amenities present in the property are functioning effectively. For example, if there is an air-conditioner installed in the property it is reasonable for the prospective tenant to expect that it is in good working order unless the owner/agent advises them otherwise. Similarly, if a telephone is installed in the property, unless it is specified otherwise *prior* to the prospective tenant making an application to lease, the phone should be in good working order and capable of being connected when the tenant takes possession of the property.

Furthermore, failure by the owner/agent to advise a prospective tenant that amenities, appliances and services present in the property are not operational could be construed as misleading the prospective tenant into believing that the rent covers the use of more facilities than it actually does.

## **Summary of Responses**

Some respondents thought a disclosure requirement unnecessary, believing that the onus should be on the prospective tenant to check whether the existing facilities were functioning appropriately.

Other stakeholders supported a requirement for disclosure. Cases were reported where floor coverings, curtains and portable air-conditioners/heaters had been removed by the previous tenant after inspection and before occupation by the new tenant, and instances where it had turned out that particular amenities (especially telephone and aerial connections) did not function or functioned poorly despite no mention of this during the initial inspection.

Complaints of this nature are received regularly by DOCEP, predominantly from tenants in private rental properties.

It is recognised that a tenant will discover the standard of existing facilities when completing the property condition report, however, this occurs *after* the tenancy agreement has been entered into.

## **Policy Position**

In order to promote effective communication in regard to the functioning of services, appliances and amenities in a property and so avoid possible contravention of the *Fair Trading Act 1987 (WA)* in terms of misrepresentation, the Review proposes that the RT Act be amended to include mandatory disclosure in this area.<sup>270</sup>

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<sup>270</sup> Part 2, Div 1, *Fair Trading Act 1987 (WA)*.

### **Proposal 97**

That the RT Act be amended to require the owner (or agent) to disclose to a prospective tenant whether any of the services, amenities or appliances in the property are not available or functioning, if upon inspection of the property, the tenant might reasonably assume that these services, amenities and appliances are available and/or functioning.

## **7.2 Maintenance and Repairs**

### **7.2.1 Locks**

#### **Stamfords' Recommendation 106**

*That the Act be amended to state that, where a party makes a request for the consent of the other party to alter, remove or add any lock or device to the premises, such consent shall not be unreasonably withheld.*

### **Background Discussion**

The amendment to establish compulsory minimum standards of security (proposal 7.2) will retain the onus on owners to maintain and repair the locks in a rental property. The RT Act currently prohibits both an owner and a tenant from altering, removing or adding any lock or (security) device without the consent of the other party.<sup>271</sup>

### **Summary of Responses**

Stakeholders to the Review generally agreed that the current provision was fair, however, it was reported that in some instances consent may be unreasonably withheld by one party to the detriment of the other party. Examples included the refusal by an owner to consent to changing the locks following the departure of a troublesome tenant who may have retained a set of keys to the property. It could also be argued that currently under section 45 of the RT Act, a tenant could refuse to allow an owner to install security measures.

### **Policy Position**

It is proposed that the RT Act be amended in order to ensure that consent to alter, remove or add any lock to a rental property is not unreasonably withheld by either party to a tenancy agreement.

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<sup>271</sup> Section 45(1)(b), RT Act (WA).

### **Proposal 98**

That the RT Act be amended to require that, if either party to a tenancy agreement makes a request for the consent of the other party to alter, remove or add any lock or security device to the property, that consent shall not unreasonably be withheld.

## **7.2.2 Alterations to the Property**

### **Stamfords' Recommendation 107**

*That the Act be amended to require, as a term of every tenancy agreement, that a tenant not affix any fixture or make any renovation or addition to the premises, except with the written consent of the owner (or otherwise as the agreement may provide).*

### **Stamfords' Recommendation 108**

*That the Act be amended to remove the requirement that the owner may not unreasonably withhold consent to allow a tenant to affix any fixture or make any renovation or addition to the premises.*

### **Stamfords' Recommendation 109**

*That sections 47(2)(b) and (c) of the Act, which makes provision for removal of any fixtures by the tenant, should remain unchanged.*

## **Background Discussion**

The RT Act currently allows tenancy agreements to prohibit a tenant from affixing any fixture or making any renovation, alteration or addition to a property (which essentially encompasses Stamfords' recommendation 108), or allows a tenant to do so only with the consent of the owner.<sup>272</sup> If the owner chooses to offer a tenancy agreement that allows the tenant to make alterations to the property with the owner's consent, this consent may not later be unreasonably withheld.

Similar provisions are commonplace in Australian residential tenancies legislation. The most significant difference is in the NSW legislation, which specifies that it is not an implied term of the tenancy agreement that the owner shall not unreasonably withhold their consent.<sup>273</sup>

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<sup>272</sup> Section 47 of the RT Act (WA).

<sup>273</sup> Section 27(2), RT Act (NSW).

It may be necessary to make alterations to a property for a number of reasons, including safety and health reasons. For example, a long-term tenant could develop a disability that requires a handrail to be affixed to a toilet or shower wall. In most circumstances such a request would seem reasonable.

Similarly, it may be necessary for an owner to make alterations to the property that may cause the tenant some temporary inconvenience while the alterations are being done. It could be argued that currently under the RT Act the tenant can deny the owner consent to carry out such alterations because it breaches their right to quiet enjoyment.<sup>274</sup>

In cases when one of the parties believes the other party is being unreasonable (in either their request or refusal to grant consent), section 15 of the RT Act enables an application to be made to the Magistrates Court for a determination on the matter. This process can be lengthy however, and so could compound any inconvenience associated with a delay in renovating or altering the property.

### **Summary of Responses**

Most stakeholders agreed that this provision was adequate, with only one stakeholder supporting Stamford's recommendation that an owner should be able to unreasonably withhold consent.

### **Policy Position**

The RT Act currently prevents an owner from unreasonably withholding consent<sup>275</sup> but does not restrict the tenant's right to do so. It is proposed to address this imbalance by amending the Act to ensure that neither party can unreasonably withhold consent.

## **7.2.3 SMOKE ALARMS AND SAFETY SWITCHES**

### **Background Discussion**

Since 1997 it has been a requirement that all new residential properties or properties that are being substantially renovated have an appropriate number of mains-powered smoke alarms installed.<sup>276</sup> It is also mandatory that new houses have two or more safety switches installed.<sup>277</sup>

Research conducted by the Fire and Emergency Services Authority of Western Australia (FESA) indicates that rental properties are over-represented in groups that do not have smoke alarms installed, and in properties where fire related fatalities have occurred. FESA's statistical analysis suggests that a fatality is almost four times as likely to occur in a rental property than in an owner-occupied property.<sup>278</sup>

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<sup>274</sup> Section 44, RT Act (WA).

<sup>275</sup> Section 47(2)(a), RT Act (WA).

<sup>276</sup> Building Code of Australia Volume Two, Part 3.7.2 and Part 2.3.2 and Vol. One, Part E2 and Specification E2.2a.

<sup>277</sup> Standards Australia, AS/NZS 3000:2000 Wiring Rules.

<sup>278</sup> Correspondence from the Fire & Emergency Services Authority of Western Australia, 23 Nov 2004.

Furthermore, in a 2002 FESA commissioned survey on community attitudes to smoke alarm installation, 67% of the 401 Perth residents surveyed *strongly* supported legislation that would require property owners to install at least one smoke alarm in houses that they rented out. A further 18% supported the legislation.<sup>279</sup>

Safety switches assist in preventing serious injury and death by electrocution, and reduce the risk of fire by detecting electrical leakages to earth in wiring and accessories. The Energy Safety Division of DOCEP recommends that safety switches be installed in all residential properties, particularly in older buildings.<sup>280</sup>

### **Policy Position**

The damage caused to a ceiling by affixing a battery-operated smoke alarm can be repaired. The installation of safety switches in a property is an enhancement to the property. Therefore, in the interests of safety, the Review believes that a request by a tenant to alter a property by installing smoke alarms or safety switches should not be denied, provided these items are installed according to all appropriate standards.

#### **Proposal 99**

That the RT Act be amended to prohibit a tenant from unreasonably withholding consent to allow an owner to affix any fixture or make any renovation, alteration or addition to the property.

#### **Proposal 100**

That the RT Act prohibit an owner from withholding consent to allow a tenant to install smoke alarms or safety switches in a rental property, provided these items are installed according to all applicable installation standards.

### **7.2.4 Urgent Repairs**

#### **Stamfords' Recommendation 110**

*That the Act be amended to provide a more prescriptive definition of "urgent repairs".*

#### **Stamfords' Recommendation 111**

*That the Act not be amended to fix a maximum value of allowable urgent repairs able to be carried out by the tenant without the owner's consent.*

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<sup>279</sup> *ibid.*

<sup>280</sup> DOCEP, 2002, *Energy Safety: Safety Switches*, DOCEP, Western Australia, p. 4.

## **Background Discussion**

Section 43 of the RT Act provides for an owner to compensate a tenant, under certain circumstances, for any reasonable expense incurred by the tenant in carrying out urgent repairs to the property. To give some guidance to owners and tenants, included in the RT Regulations, Schedule 2 “*Information for Tenant*” is a list of examples of incidences requiring work that may be considered as ‘urgent repairs’.<sup>281</sup> These include:

- a burst water service;
- a broken hot water service;
- a sewerage blockage;
- broken sewerage fittings;
- a serious roof leak;
- a gas leak;
- an electrical fault likely to cause damage to property or to endanger human life;
- flooding;
- a fault in a lift in the rented premises;
- substantial damage caused by flooding, storm or fire; and
- a broken refrigerator or washing machine where these are included in the tenancy.

Currently, the RT Act enables parties to contract out of section 43, removing the right of the tenant to carry out urgent repairs.<sup>282</sup> However, proposal 2.12 in this paper recommends that the RT Act be amended to remove the ability to contract out of section 43 and as such, an owner will always be liable for compensating tenants for urgent repairs (providing that the process of carrying out those repairs complies with s.43 of the Act).

## **Summary of Responses**

Many stakeholders agreed that the current provisions in regard to urgent repairs are adequate, however, a number of stakeholders expressed concern about the ability to contract out of this provision. There was general agreement that a more prescriptive definition of what constitutes requiring urgent repair would be useful.

Concern was expressed by owner advocate groups that a tenant might incur excessive rather than reasonable expenses in carrying out urgent repairs, for which the owner would then be required to compensate the tenant in full.<sup>283</sup>

Homeswest’s “Emergency and Priority Maintenance Policy” states that emergency maintenance problems will be attended to, during and after normal working hours, within 3 hours (if they conform to specific criteria, or on medical grounds). In addition, Homeswest will attend to priority maintenance problems, during normal working hours, within 48 hours (if they conform to specific criteria, or on medical grounds).<sup>284</sup>

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<sup>281</sup> Schedule 2, clause 8, RT Regulations (WA).

<sup>282</sup> Section 82(3), RT Act (WA).

<sup>283</sup> Stamfords’ Report, Chapter 12, p. 164.

<sup>284</sup> Homeswest, *Homeswest Maintenance Policy: Emergency & Priority Maintenance Policy* (last updated April 2002), viewed October 2005, <[http://www.housing.wa.gov.au/Files/homes\\_maintpol.pdf](http://www.housing.wa.gov.au/Files/homes_maintpol.pdf)>.

## **Policy Position**

Inclusion within the RT Regulations of a list of examples of incidences that can be considered to require urgent repair will provide guidance for both tenants and owners as to when a tenant can expect to be compensated for attending to urgent repairs. Thus, it is proposed that the RT Act be amended to allow types of urgent repairs to be prescribed (based on but not limited to the examples included in clause 8, Schedule 2 of the RT Regulations).

In order to address owner/agent concerns that tenants may incur excessive expense when having urgent repairs carried out (for which the owner must then compensate the tenant), the RT Act will be amended to include the *ability* to prescribe in the Regulations a maximum amount that a tenant may incur in carrying out urgent repairs. The provision will be drafted to take into account variables such as the differences in costs of carrying out repairs in regional and remote areas of WA when setting any maximum amount that may be incurred in any one instance.

### **Proposal 101**

That the RT Act be amended so that types of urgent repairs that may be carried out by a tenant, for which the owner will be liable, may be prescribed. It should be specified that the list of examples is not an exhaustive one.

### **Proposal 102**

That the RT Act be amended to enable a maximum value of allowable “urgent repairs” that may be carried out by the tenant without the owner’s consent, to be prescribed in the RT Regulations.

### **Stamfords’ Recommendation 113**

*That, if the ability to contract out of section 43 is removed, Homeswest not be exempt from compensating tenants for any appropriate urgent repairs until Homeswest undertakes a review of all their policies and procedures regarding the carrying out of urgent repairs, to ensure that this process is conducted efficiently and effectively.*

## **Background Discussion**

As discussed in chapter 2.3 above, the Review proposes to remove the ability to contract out of those sections of the RT Act identified in section 82(3), other than sections 38 (Tenant’s responsibility for cleanliness and damage) and 46 (Owner’s right of entry). Following this amendment, parties, including Homeswest, will no longer be able to contract out of section 43 (Compensation where tenant sees to repairs).

In Phase 1 of the Review, Homeswest stated that it did not allow tenants to carry out urgent repairs, as this process was covered by its policies and procedures. Homeswest indicated that it intended to seek an exemption from the application of section 43 in the event that contracting out was removed. The Stamfords Report noted feedback from Homeswest tenants about delays in Homeswest carrying out repairs, however, generally agreed that Homeswest might be entitled to seek such an exemption.<sup>285</sup>

Feedback from DOCEP's Building and Tenancy Industries Branch and Indigenous Community Education Team confirms that many complaints are received from Homeswest tenants about delays in Homeswest conducting urgent repairs.

### **Summary of Responses**

DHW and the Aboriginal Housing and Infrastructure Unit opposed the recommendation, explaining that:

- Homeswest has specified timeframes for urgent repairs, which are documented in its Customer Charter and are reviewed regularly;
- Homeswest already has an effective after-hours emergency service, with the service parameters clearly outlined to the tenant at occupation; and
- removal of the ability to contract out of section 43 might lead to disputes between Homeswest and tenants over what constitutes 'appropriate urgent repairs'.<sup>286</sup>

TAS supported the recommendation, stating that:

- Homeswest should not receive any exemption from the RT Act, as it conducts its tenancy management as a business venture the same as any other owner;
- significant problems in relation to maintenance exists and Homeswest should undertake a review of its maintenance policies and procedures; and
- although the majority of Homeswest tenants cannot afford to engage an independent contractor to carry out urgent repairs, this does not justify Homeswest's exemption from section 43 (e.g. a welfare agency may be able to pay for urgent repairs on a tenant's behalf, the costs of which should be reimbursed by Homeswest).<sup>287</sup>

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<sup>285</sup> Stamfords' Report, p. 165.

<sup>286</sup> DHW, *Submission to the Review of the RT Act*, Dec 2002, p. 12; Aboriginal Housing and Infrastructure Unit, *Submission to the Review of the RT Act*, Sep 2002, p. 3.

<sup>287</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 55.

## **Policy Position**

The Review believes that, in the absence of strong supporting rationale, parties should not be able to contract out of, or be exempt from, key provisions in the RT Act. Under section 43, owners are only obliged to compensate tenants for reasonable expenses incurred in relation to urgent repairs after the tenant has made a reasonable attempt to notify the owner of the state of disrepair and their intention to incur repair expenses. Given that Homeswest's "Emergency and Priority Maintenance Policy" requires notification of repairs needed, and repairs are to be carried out within 3 or 48 hours, it appears unlikely that many tenants would bear the cost of repairs themselves. In addition, as mentioned by TAS, a large proportion of Homeswest tenants would not be able to afford to pay any repair expenses. These factors indicate that there is minimal rationale for retaining Homeswest's ability to contract out of section 43.

### **Proposal 103**

That, along with all other owners, Homeswest's ability to contract out of section 43 (Compensation where tenant sees to repairs) be removed.

## **7.2.5 Nominated Contractor**

### **Stamfords' Recommendation 112**

*That the Act state that an owner may specify a nominated contractor for undertaking certain repairs, provided that the Act enable a tenant to utilise another contractor where the nominated contractor is not available or is unable to complete the work within a reasonable timeframe.*

## **Background Discussion**

The RT Act does not prohibit an owner from nominating a preferred contractor to carry out repairs, nor does it require a tenant to use an owner's nominated contractor. Section 43 of the RT Act does stipulate that an owner is not obliged to compensate a tenant for carrying out urgent repairs unless, among other things and where it is required, the repairs are carried out by a licensed tradesperson.

## **Summary of Responses**

Response to this recommendation was mixed, with concerns that owners may exploit the provision to nominate friends or associates, and that the nominated contractor may not be available at the time the urgent repair is required.

## **Policy Position**

As it is currently drafted, the RT Act encourages tenants to use licensed tradespeople to carry out repairs. This should be adequate to ensure a level of professionalism in the work carried out. However, within the parameters of professionalism, the Review believes that there should also be an onus upon the tenant to attempt to reasonably minimise the costs of any repairs undertaken, by for example, obtaining three quotes, including one from the owner's preferred contractor. A requirement that a tenant must use the services of the owner's nominated contractor is not appropriate.

### **Proposal 104**

That the RT Act be amended to include a requirement that a tenant should take reasonable action to minimise the expense of any urgent repairs undertaken.

## **7.2.6 Damage**

### **Stamfords' Recommendation 114**

*That section 38 of the Act be amended to require a tenant to notify the owner "as soon as practicable" of any damage to the premises, rather than "within three days".*

## **Background Discussion**

When damage to a property occurs that does not require urgent attention, the RT Act requires that the tenant notify the owner about the damage within three days of its occurrence.<sup>288</sup> In most other Australian jurisdictions a tenant is required to notify the owner of any damage as soon as is practicable rather than within a set timeframe.<sup>289</sup>

A three-day timeframe to report damage could inadvertently result in an unintentional breach of the tenancy agreement by the tenant. For example, it could be argued that a breach had occurred if a tenant noticed some damage to the property and was not able to contact the owner because the owner was away on holiday. Similarly, if a tenant was away on holiday, in hospital or otherwise absent from the property (temporarily at a women's refuge for example), and did not notice some new damage until they returned, it could be argued that a breach had occurred because the owner had not been notified within three days of the damage occurring.

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<sup>288</sup> Section 38(b), RT Act (WA).

<sup>289</sup> The equivalent legislation in Victoria, New South Wales, Northern Territory and Queensland specifies that the owner be notified as soon as practicable, Tasmanian legislation allows seven days.

## **Summary of Responses**

Support for this recommendation was fairly evenly split. Owner advocates were concerned that damage could escalate if it wasn't reported immediately,<sup>290</sup> while tenant advocates were concerned that tenants could jeopardise their tenancy by being unaware that damage had occurred.

## **Policy Position**

In order to avoid unintentional breaches of a tenancy agreement, the Review proposes to amend the RT Act to require a tenant to notify the owner as soon as practicable of any damage occurring to the property.

### **Proposal 105**

That section 38 of the RT Act be amended to require a tenant to notify the owner as soon as practicable of any damage occurring to the property.

## **7.2.7 Ordinary Repairs**

### **Stamfords' Recommendation 102**

*That the Act not be amended to require an owner to maintain appropriate insurance coverage to meet their obligations under the Act.*

### **Stamfords' Recommendation 115**

*That the Act be amended to require that an owner conduct all necessary maintenance and repairs within a reasonable timeframe.*

### **Stamfords' Recommendation 116**

*That the Act not be amended to allow tenants to withhold rent when owners fail to carry out ordinary maintenance and repairs.*

## **Background Discussion**

Currently the RT Act places no obligation upon the owner in regard to timeframes within which to carry out routine maintenance or repairs, perhaps assuming that in the interest of maintaining good owner-tenant relations, owners will carry out routine maintenance and repairs within a reasonable timeframe.

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<sup>290</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p. 3.

Sometimes, circumstances beyond the control of an owner may impact upon their ability to carry out repairs promptly, including delays in the availability of tradespeople or required materials, or the complexity of the repairs. In such instances, delays are understandable.

In some cases, owners may not have the financial capacity to carry out necessary repairs and it has been suggested by some tenant stakeholders that owners should be required to maintain insurance coverage to ensure that this does not occur. There are, however, problems with this proposal, including the question as to whether such insurance coverage currently exists in the market place. Furthermore, it may be unreasonable to require those owners that do have the financial capacity to carry out repairs to maintain insurance against not being financially capable of carrying out repairs.

It should be noted that withholding rent is an inappropriate response to an owner's failure to conduct repairs and leads to the tenant being in breach of the terms and conditions of the tenancy agreement. The failure to carry out necessary repairs may constitute a breach of the owner's obligations under the RT Act,<sup>291</sup> and the correct process for remedying such a situation is available under section 15 of the Act.

### **Summary of Responses**

Tenant advocacy groups supported the recommendation for reasonable timeframes for the completion of routine maintenance and repairs. TAS reported that 10% of all calls to its State-wide advice line relate to tenants complaining of the failure by owners to carry out routine maintenance and repairs.<sup>292</sup> Tenant advocacy groups indicated that this was also a problem for tenants of public housing.

### **Policy Position**

In order to provide some guidance as to how promptly ordinary repairs are to be carried out and to allow for the potential impact of outside influences, the Review proposes to amend the RT Act to require an owner to carry out all necessary maintenance and repairs within a reasonable period of time.

#### **Proposal 106**

That the RT Act be amended to require that an owner conduct all necessary maintenance and repairs within a reasonable period of time.

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<sup>291</sup> Section 42, RT Act (WA).

<sup>292</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 56.

## 8. TERMINATION

### 8.1 Termination Without Ground

#### **Stamfords' Recommendation 119**

*That the current provisions in the Act allowing parties to terminate a tenancy agreement without stating any ground be retained.*

#### **Stamfords' Recommendation 120**

*That the current 60 day notice period required for 'no ground' termination be retained.*

#### **Background Discussion**

The RT Act allows an owner to give not less than 60 days notice of termination of a periodic tenancy without specifying any ground for the notice.<sup>293</sup> A tenant is also able to terminate a periodic tenancy without specifying any ground by giving not less than 21 days notice.<sup>294</sup>

The availability of 'no ground' termination by owners and relevant notice periods in all Australian jurisdictions are summarised in the table below.

**Table 4. "No Ground" terminations**

<i>Australian jurisdictions</i>	<i>'No Ground' Termination by Owner</i>	<i>Notice Period</i>
ACT	No	N/A
NSW	Yes – sec. 58	60 days
NT	Yes – sec. 89	42 days
QLD	Yes – sec. 165 and 197	2 months
SA	Yes – sec. 83	90 days
TAS	No	N/A
VIC	Yes – sec. 263	120 days
WA	Yes – sec. 64	60 days

Notice of termination without specifying any ground was once again one of the more contentious issues discussed in Phase 2 of the Review.

<sup>293</sup> Section 64, RT Act (WA).

<sup>294</sup> Section 68, RT Act (WA).

## **Summary of Responses**

Owners and owner advocacy groups, including DHW, REIWA, and POA, supported Stamfords' recommendation 119. DHW and POA also supported Stamfords' recommendation 120. These stakeholders agreed with Stamfords' reasoning that owners should be able to regain possession of their property, after adequate notice has been given. REIWA stated that 60 days notice by owners was too long, and that it should be reduced to 30 days notice.<sup>295</sup>

Tenant advocacy groups, on the other hand, reinforced their original arguments from Phase 1 of the Review by strongly opposing Stamfords' recommendation 119. They argued that housing is a basic human need and right, and that the ability to terminate without ground, or without "just cause", prevents the tenant from being able to challenge this method of termination in court. One respondent also stated that the absence of any requirement to give a reason for eviction made any claim under Equal Opportunity legislation virtually impossible to determine in the tenant's favour.<sup>296</sup>

Tenant advocacy groups, including TAS and Shelter WA, stated that section 64 (no ground termination by owner) should be abolished. Shelter WA added that, should section 64 be retained, the RT Act should be amended to allow the Magistrates Court to hear "all the circumstances" of a case of no ground termination by the owner.<sup>297</sup> This issue relates to Stamford's recommendation 124 and is discussed further in chapter 8.1.2.

In relation to the notice period for no ground termination by an owner, the tenant advocacy groups argued that, should section 64 be retained, 60 days notice was too short and needed to be extended. Some groups suggested that the notice period be calculated on a sliding scale, proportionate to the length of a particular tenant's occupancy.

Public and community housing providers raised the issue that due to legal uncertainty surrounding the use of other termination provisions, and despite a legitimate reason for termination existing, use of section 64 is an option for termination.<sup>298</sup> These housing providers are aware that the use of section 64 creates a negative perception among tenants and tenant advocacy groups,<sup>299</sup> however, they believe they are prevented from using more "acceptable" termination provisions because of the way the RT Act is currently drafted.

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<sup>295</sup> REIWA, *Submission to the Review of the RT Act*, 9 Dec 2002, p. 31.

<sup>296</sup> Dr Jeannine Purdy, *Submission to the Review of the RT Act*, 11 Dec 2002, p. 3.

<sup>297</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, pp. 57 – 58; Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 22.

<sup>298</sup> DHW, *Submission to the Review of the RT Act*, Dec 2002, pp. 2-3 & 12; CHCWA, *Submission to the Review of the RT Act*, 26 Apr 2002, pp. 20 – 22.

<sup>299</sup> See, for example, Ninnette, Robyn & Anti-Section 64 Coalition 1995, *No Just Cause: Homeswest's Abuse of Western Australian Eviction Laws*, Perth, Western Australia.

DHW in particular highlighted the following situations in which termination of a tenancy agreement may be considered:

- a tenant conducting illegal activities in a property;
- a tenant engaging in ‘anti-social behaviour’;
- a property becoming ‘under-occupied’ as the total number of occupants in that property declines;
- a tenant no longer meeting the eligibility criteria for public housing; or
- the Government requiring vacant possession in order to demolish, redevelop, or substantially renovate properties.<sup>300</sup>

DHW cited an example of difficulty with evicting tenants carrying out illegal activities on a property, such as drug dealing. Under section 39(a) of the RT Act, it is a term of every tenancy agreement that a tenant shall not use the property for illegal purposes. If DHW is made aware that a tenant is conducting illegal activities on a rental property, this conduct constitutes a breach of the tenancy agreement, and DHW initiates termination procedures by issuing a ‘breach notice’ under section 62 of the RT Act.<sup>301</sup> Section 62 requires that the breach notice must specify that the breach be remedied within 14 days, otherwise notice of termination will be given.

DHW personnel have informed DOCEP that on previous occasions, when DHW has applied to the then Local Court for orders terminating the tenancy and possession, various magistrates have refused granting those orders on the basis that the breach of the tenancy agreement has been remedied.<sup>302</sup> This is because between day 1 and day 14 following the service of the breach notice, the tenant has ceased the illegal activities, which rectifies the breach. As a result, the termination procedure fails. DHW reports that in some of these cases, the illegal activities are then resumed. This in turn continues to have an adverse effect on other residents in adjacent premises.

Similar issues arise when DHW initiates termination procedures under section 62 for breaches of tenancy agreements where tenants are causing a nuisance (see section 39(b)). DHW reports difficulties obtaining termination and possession orders from magistrates, as tenants are able to ‘remedy’ the breach by ceasing, as DHW calls it, ‘anti-social behaviour’ between day 1 and day 14 following the service of the breach notice.

DHW defines ‘anti-social behaviour’ as:

- “an ongoing pattern of aggressive, threatening or disruptive behaviour, which adversely affects one or more neighbours; and
- possibly involving serious damage to the tenanted property, adjoining premises or any part of a common area.

Examples of anti-social antisocial behaviour in or around the premises include but are not restricted to:

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<sup>300</sup> Dialogue session between DOCEP and DHW, 12 Apr 2005.

<sup>301</sup> I.e. Notice of termination by owner upon ground of breach of term of agreement.

<sup>302</sup> Dialogue session between DOCEP and DHW, 12 Apr 2005.

- playing loud music;
- behaving in an aggressive, threatening manner;
- using obscene language or behaviour;
- hosting uncontrollable parties;
- fighting;
- behaving violently; and
- entering neighbouring properties without permission.<sup>303</sup>

Given these difficulties in termination of tenancies, DHW submits that it is more appropriate that termination procedures for illegal activities and ‘anti-social behaviour’ be initiated under a new provision, similar to section 73 of the RT Act. Section 73 allows for termination of the agreement where the tenant is causing serious damage or injury. Under this section, an owner can apply to a magistrate for an order terminating a tenancy agreement if the tenant has intentionally or recklessly caused, or is likely to cause, serious damage to the premises or injury to the owner, owner’s agent, or other occupant of adjacent premises. If a magistrate terminates a tenancy agreement under section 73, they must also make an order for possession of the premises of immediate effect.<sup>304</sup>

### **Policy Position**

The Review agrees with Stamfords’ view that property owners are entitled to regain possession of their properties, provided that sufficient notice to vacate is given. It is believed that, should property owners be obliged to give a ground for termination, some may prefer to terminate the tenancy using breach procedures, which have shorter notice periods and may also result in an adverse listing on a tenancy database.

The Review, therefore, agrees with Stamfords’ recommendation 119 that the current provisions in the RT Act allowing parties to terminate a tenancy agreement without stating any ground be retained.

In relation to Stamfords’ recommendation 120, the Review acknowledges matters raised by the tenant advocacy groups indicating that 60 days notice is sometimes too short to enable tenants to successfully obtain alternative accommodation. For example, tenants may experience hardship in having to move out in 60 days due to education or work related commitments, or because they live in a regional area where there is a limited supply of affordable rental housing.

It is noted that the RT Regulations were amended in December 2004 to extend the ‘no ground’ termination notice period from 60 days to 120 days for tenants renting a site only (sometimes known as ‘park home owners’) from a park operator.<sup>305</sup> This amendment arose from a recommendation in the Stamfords Report that site-only tenants may suffer undue hardship in having to relocate a moveable dwelling (e.g. a park home) within 60 days, and therefore that time period should be extended to 120 days.<sup>306</sup>

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<sup>303</sup> Homeswest’s draft *Good Neighbour Policy*, Version 27 Jun 2005 LC, pp. 1 – 2.

<sup>304</sup> Section 73(2), RT Act (WA).

<sup>305</sup> See regulation 5E (More notice required to terminate certain tenancies), RT Regulations (WA).

<sup>306</sup> See Stamfords’ Recommendation 169, page 220.

It is recommended that in retaining no ground termination for property owners, the RT Act be amended to allow for tenants (who do not fall within the 'park home owner' category) to apply for an extension of time of an additional 60 days to vacate a property (i.e. a cumulative total of 120 days). It seems reasonable that an application for an extension should be made within 14 days of the termination being received. In the event that an extension of time would cause undue hardship to an owner, the magistrate will have the ability to make an order requiring the tenant to compensate the owner, if this is appropriate.

The Review does not propose to adopt DHW's suggestion to create a new termination mechanism to address illegal activities and 'anti-social behaviour' via a new section similar to section 73 of the RT Act. Given the lack of alternative housing options faced by a public or community housing tenant, it is believed inappropriate for a court to order immediate possession in such circumstances. In addition, the Review notes that the issue of termination based upon 'anti-social behaviour' is a highly complex and contentious one.

**Proposal 107**

That the current provisions in the RT Act allowing parties to terminate a tenancy agreement without stating any ground be retained.

**Proposal 108**

That the RT Act be amended to allow tenants, upon receipt of a section 64 'no ground' termination notice, to apply to the Magistrates Court for an order extending the time to vacate up to an extra 60 days (i.e. a cumulative total of 120 days from the date of service of the termination notice) on the grounds of undue hardship (an "extension of time order").

**Proposal 109**

That the RT Act be amended to allow a tenant to apply for an extension of time order at any time before day 7 of the section 64 termination notice (i.e. one week into the 60-day notice period).

**Proposal 110**

That the RT Act be amended to require the Magistrates Court, in granting an extension of time order, to consider the relative hardship to the private owner and tenant, and have the power to grant compensation if appropriate.

**Proposal 111**

That the relevant termination forms be amended to reflect the above changes in the RT Act.

**8.1.1 Vacating While on Receipt of ‘No Ground’ Termination Notice**

**Stamfords’ Recommendation 121**

*That the difference between the notice periods required to be given by owners and tenants for termination without ground be retained.*

**Stamfords’ Recommendation 122**

*That the ability for a tenant to give notice of termination without ground whilst on receipt of similar notice from an owner be retained.*

**Background Discussion**

As stated above, the RT Act allows a tenant to give 21 days notice to terminate a periodic tenancy, as compared to 60 days notice required of the owner. The obligation on owners to give more notice is in recognition of the inconvenience to the tenant to locate alternative accommodation. The Stamfords Report mentioned that, on a number of occasions, owner respondents had experienced some loss of rent, when tenants had given 21 days notice to vacate after receiving a 60-day termination notice.<sup>307</sup>

**Summary of Responses**

With the exception of REIWA, most respondents to the Review supported Stamfords’ recommendations 121 and 122.

**Policy Position**

Given the level of support for recommendations 121 and 122, and the greater degree of inconvenience to a tenant, as compared to that of an owner, in receipt of a ‘no-ground’ termination notice, the Review proposes that the difference in notice periods be retained. In addition, it is intended that the ability of a tenant to give 21 days notice of termination, after having received a 60-day termination notice be retained for both private and public tenants.

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<sup>307</sup> Page 175.

### 8.1.2 Challenging ‘No Ground’ Termination

#### **Stamfords’ Recommendation 123**

*That section 15 of the Act, which allows a party to make application to a court for relief, be amended to make clear that a tenant, upon receipt of a notice of termination, is able to apply to a court for an order against such termination, on the ground that the owner was partly or wholly motivated by the fact that the tenant had complained to a public authority or taken steps to enforce their rights as a tenant.*

#### **Background Discussion**

It is unclear in the RT Act whether a tenant can challenge a termination notice immediately after receipt of such a notice, or whether a tenant is obliged to wait until the owner has applied for a court order for possession of a property.<sup>308</sup> Under section 71(3)(b)(i) of the RT Act, if a magistrate is satisfied that an owner was motivated to terminate the tenancy wholly or partly by the fact that the tenant had complained to a public authority or taken steps to enforce their rights as a tenant, the magistrate may refuse to make an order for possession.

If a tenant is unsuccessful in challenging termination during a court hearing to determine an order for possession, they may face eviction within seven days of the order being made.<sup>309</sup>

#### **Summary of Responses**

Both tenant and owner advocacy groups, apart from the POA, supported the Stamfords recommendation.

#### **Policy Position**

The Review proposes to clarify in the RT Act the timing of the tenant’s ability to challenge a notice of termination. Should a tenant’s challenge in court not succeed, a tenant will have the remainder of the termination notice period (e.g. 60 days for ‘no ground’ termination) within which to find alternative accommodation (as opposed to seven days within a court order for possession).

#### **Proposal 112**

That the RT Act be amended to make it clear that a tenant, upon receipt of notice of termination, is able to apply to the Magistrates Court for an order against such termination on the ground that the owner was partly or wholly motivated by the fact that the tenant had complained to a public authority or taken to steps to enforce their rights as a tenant.

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<sup>308</sup> Under section 71, RT Act (WA).

<sup>309</sup> Section 71(5), RT Act (WA).

### **Stamfords' Recommendation 124**

*That the Act not be amended to require a court to consider, in the case where a 'no ground' termination notice has been given, "all the circumstances" such as to justify termination.*

### **Background Discussion**

It has been previously argued by tenants and tenant advocacy groups that, apart from challenging 'no ground' termination during a court hearing for an order for possession, there are no further avenues for challenging this type of termination. By comparison, when an owner issues a notice of termination for breach of an agreement and applies to the Magistrates Court for an order for possession, the magistrate must be satisfied that notices have been properly issued, grounds have been established, and the "breach is in all the circumstances such as to justify termination".<sup>310</sup>

### **Summary of Responses**

REIWA and POA supported this recommendation. TAS, Shelter WA, CHCWA, and MIDLAS all strongly opposed the recommendation, reiterating that the Magistrates Court should have the ability to take into account all circumstances of a case before deciding whether or not to make an order for possession. Some of these groups argued that in all cases of termination, the Magistrates Court should consider: whether notices have been served correctly; all the circumstances of the case; the issue of retaliation; and the relative hardship to both parties.<sup>311</sup>

### **Policy Position**

As discussed in relation to recommendation 123 above, it is possible for a tenant to challenge 'no ground' termination on the basis of retaliation by the owner. In addition, a tenant may argue at a court hearing for an order for possession that notices have not been served correctly. The Government, however, agrees with the reasoning in the Stamfords Report that private owners are entitled to regain possession of their property, provided adequate notice is given to a tenant to find alternative accommodation.

As discussed above, it is intended that the RT Act be amended to allow a tenant to apply to the Magistrates Court for an extension of time for vacating a rental property. Therefore, the Review supports the Stamfords recommendation that the RT Act not be amended to require magistrates to consider "all the circumstances" of a case in granting an order for possession after 'no ground' termination.

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<sup>310</sup> Section 71(2), RT Act (WA).

<sup>311</sup> CHCWA, *Submission to the Review of the RT Act*, 26 Apr 2002, pp. 20 - 22 ;TAS, *Submission to the Review of the RT Act*, Dec 2002, pp.59 - 61; Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 24.

## 8.2 Sale of the Property

### **Stamfords' Recommendation 125**

*That no additional disclosure be required by an owner giving a tenant notice of termination on the ground that the owner has entered into a contract of sale with vacant possession of the premises.*

### **Background Discussion**

In relation to periodic tenancies only, an owner can give 30 days notice of termination to a tenant if they have entered into a contract for sale of the property, and the contract requires the owner to give vacant possession of the property to the purchaser.<sup>312</sup>

It is an offence under the RT Act for an owner or agent to give notice of termination on this ground, if the ground does not in fact exist.<sup>313</sup> A tenant, however, has almost no ability to ascertain whether an owner has actually entered into a contract for sale of the property. This difficulty has led tenants and tenant advocacy groups to argue that owners should be required to provide proof of the contract for sale, as well as the special condition that vacant possession be given.

DOCEP's Building and Tenancy Industries Branch has received complaints from tenants about the use of this form of termination. In response to these complaints, DOCEP contacts relevant parties (e.g. owner, property manager, selling agent, or purchaser) to confirm whether a contract of sale requiring vacant possession has been entered into. Without disclosing details subject to privacy laws, DOCEP then informs a tenant whether a contract of sale exists.

### **Summary of Responses**

Most stakeholders, including TAS, REIWA, and POA, accepted the Stamfords recommendation.

### **Policy Position**

The Review agrees with the Stamfords Report that requiring an owner to provide a copy of the contract for sale to the tenant would impose an unnecessary burden as well as infringe the privacy of the parties to the sale.<sup>314</sup> It is acknowledged, however, that there may be instances when an owner falsely states that a contract of sale has been entered into, or situations where an owner is unaware of their obligations under the RT Act as to the necessity for a contract of sale. The Review, therefore, proposes that community education be conducted to reinforce with owners and agents the necessity for a valid contract for sale, and to inform tenants of the ability to lodge a complaint with DOCEP if they are uncertain of the truthfulness of a termination notice on grounds of sale.

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<sup>312</sup> Section 63, RT Act (WA).

<sup>313</sup> Section 63(3), RT Act (WA).

<sup>314</sup> Page 178.

### **Proposal 113**

That DOCEP conduct community education in relation to section 63 of the RT Act to:

- (1) reinforce with owners and agents the necessity for a valid contract for sale requiring vacant possession, before a termination notice for a periodic tenancy can be issued; and
- (2) inform tenants of the ability to lodge a complaint with DOCEP if they are uncertain of the truthfulness of a termination notice under section 63.

## **8.3 Terminating Fixed Term Tenancies**

### **Stamfords' Recommendation 126**

*That, with the exception of recommendation 129, the Act not be amended to create any further provision for parties to terminate a fixed term agreement prior to the end of the fixed term.*

### **Background Discussion**

Apart from termination procedures arising from a breach of the tenancy agreement or non-payment of rent, there are few options to terminate a fixed-term tenancy. An owner can apply to the Magistrates Court to terminate a fixed-term tenancy on the ground of undue hardship.<sup>315</sup> Stamfords and various respondents to Phase 1 of the Review pointed out that there should be a parallel provision allowing a tenant to apply to the Magistrates Court to terminate a fixed-term tenancy on the ground of undue hardship (this is discussed further in chapter 8.5).<sup>316</sup>

### **Summary of Responses**

Almost all respondents, with the exception of MIDLAS, supported the Stamfords recommendation.

### **Policy Position**

As the fundamental basis of a fixed-term tenancy is that both parties are guaranteed, to some extent, that the agreement is binding until the end of the term, the Review agrees with the Stamfords recommendation. The Review does not propose to introduce any additional options for terminating fixed-term tenancies (except on the grounds of undue hardship to the tenant as discussed in chapter 8.5).

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<sup>315</sup> Section 74, RT Act (WA).

<sup>316</sup> Page 179.

## 8.4 Expiration of Fixed Term Tenancies

### **Stamfords' Recommendation 127**

*That the Act be amended to:*

- *require that, unless either party gives adequate notice (as prescribed) that they intend not to continue the tenancy, a fixed-term tenancy at its conclusion rolls over into a periodic tenancy, on the same terms as the original agreement; and*
- *prescribe adequate notice of intention not to continue a tenancy following the conclusion of a fixed-term tenancy as 30 days' notice for owners and 21 days' notice for tenants.*

### **Stamfords' Recommendation 128**

*That the information required to be given to the tenant by the owner before the commencement of a tenancy include information regarding the rights and obligations of a tenant following a 'roll over' from a fixed term tenancy into a periodic tenancy.*

## **Background Discussion**

Under the RT Act, a party to a fixed-term tenancy is not required to give the other party notice that they wish to continue the tenancy. Both parties are to assume that the tenancy will end on the expiry date. If, however, the tenant continues to occupy the property and the owner continues to accept rent and treat the property as being rented to that tenant after the expiry date, the tenancy is deemed to have 'rolled over' from a fixed-term into a periodic tenancy.<sup>317</sup>

In Phase 1 of the Review, respondents expressed concern that the lack of notice from one party to the other in the weeks leading up to the expiry of a fixed-term tenancy meant that an owner would require possession of the property, or a tenant would vacate the property, on the expiry date, and that this could be to the detriment of the other party (even though technically, the lease ends on that date).

Requirements in other Australian jurisdictions to give notice of intention to end a fixed-term tenancy are summarised below.

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<sup>317</sup> Section 60(2), RT Act (WA).

**Table 5. Notice periods for fixed term tenancies**

<i>Australian jurisdictions</i>	<i>Notice of intention to end a fixed-term tenancy required?</i>	<i>Notice Period</i>
ACT	Yes – Schedule 1, clause 88	Not less than 3 weeks notice by tenant
NSW	Yes – section 60	14 days notice by either owner or tenant
NT	Yes – sections 90 and 95	14 days notice by either owner or tenant
QLD	Yes – section 197	14 days notice by owner
SA	No	Not applicable
TAS	Yes – section 42	28 days notice by owner
VIC	Yes – section 261	If duration of fixed-term tenancy is less than 6 months – owner must give 60 days notice. If duration of fixed-term tenancy is 6 months or more – owner must give 90 days notice.

The Stamfords Report also mentioned that due to substantial differences between fixed-term tenancies and periodic tenancies, particularly in relation to termination procedures, it would benefit tenants to receive information about these differences at the start of a fixed-term tenancy.<sup>318</sup>

### **Summary of Responses**

All respondents supported both recommendations. Some respondents differed, however, in the length of notice required before termination of a fixed-term tenancy.

### **Policy Position**

The Review agrees with Stamfords' assessment that the lack of notice to end a fixed term tenancy can give rise to confusion among owners and tenants as to whether the tenant should continue to occupy the property, even though the tenancy agreement ought to have ended on the expiry date.

Currently, DOCEP encourages parties to communicate with each other well in advance of the expiry date. It is believed, however, that making a termination notice mandatory would substantially assist in improving communication between parties in relation to this issue, as well as align the RT Act with equivalent requirements in RT Acts in other jurisdictions.

The Review recommends that only owners be required to give 30 days notice whether or not they wish the tenancy to continue beyond the expiry date. It is not considered necessary for tenants to give 21 days notice (as recommended by Stamfords), as it will generally be in an owner's best interests to negotiate any extensions or renewals of lease agreements with their tenant well in advance of the current lease agreement's expiry date. As a result, a tenant will most likely respond to an owner's query as to their intention to occupy or move out of the property, and an agreement can be reached about any extensions or renewals.

<sup>318</sup> Page 180.

On the other hand, situations may arise where a tenant, who has relied upon assurances that their lease is going to be extended or renewed, does not make arrangements to vacate a property on the expiry date. Then, at some time close to, or on, the expiry date, an owner may experience a change in plans, and require the tenant to vacate a property in a short space of time.

Introducing mandatory notices to be issued by owners at least 30 days before an expiry date will serve to highlight to tenants the 'true' expiry date, as well as give tenants sufficient time to organise alternative accommodation and removalist services.

It is also proposed that the fixed-term termination notice not be given too far in advance of the 'natural' expiry date (e.g. shortly after the tenancy agreement has commenced), in order to avoid unduly early termination notices.

In the event that an owner wishes to charge increased rent at the commencement of the new tenancy agreement, where the tenant(s) is remaining in the same property, an owner must give that tenant at least 30 days notice of the increased rental rate. It is envisaged that in practice, owners will give this notice of increased rent at the same time as negotiating the new tenancy agreement. See chapter 5.6 for further discussion of this issue.

It is recognised that Schedule 2 (Information for Tenant) of the RT Regulations which is to be given to a tenant at the start of a tenancy needs to be amended to include information about the effect of a 'roll over' from a fixed-term tenancy into a periodic tenancy.

**Proposal 114**

That the RT Act be amended to require that, unless either party gives adequate notice to terminate a fixed-term tenancy, after its expiry date, the fixed-term tenancy rolls over into a periodic tenancy on the same terms as the original agreement (apart from the inherent differences between fixed-term and periodic tenancies).

**Proposal 115**

That the RT Act be amended to require owners to give at least 30 days notice (and no more than a prescribed maximum time period) of termination of a fixed term tenancy. Such notice can be served up to and including the last day of the fixed term, and a tenant cannot be required to vacate the property before the expiry date.

**Proposal 116**

That Schedule 2 (*Information for Tenant*) of the RT Regulations be amended to inform tenants of:

- the notice requirements for termination of fixed-term tenancies; and
- the rights and obligations of owners and tenants following a 'roll over' from a fixed-term tenancy into a periodic tenancy.

## 8.5 Termination on Ground of Hardship

### **Stamfords' Recommendation 129**

*That the Act be amended to allow:*

- *a tenant to make application to a court for termination of an agreement (either periodic or fixed term) on the ground that the tenant would suffer undue hardship if they were required to terminate the agreement under any other provision of the Act; and*
- *the court to make an order regarding the compensation of the owner for any loss caused as a result of the above termination.*

### **Background Discussion**

Section 74 of the RT Act allows an owner to apply to the Magistrates Court for an order terminating a tenancy agreement on the ground of undue hardship. A magistrate hearing such an application may also make orders relating to possession of the property and any compensation payable to the tenant. Currently, no parallel provision exists for tenants to apply for termination of a tenancy agreement on the ground of undue hardship.

### **Summary of Responses**

Almost all respondents, including TAS, Shelter WA, REIWA and POA, supported this recommendation.

### **Policy Position**

Given the strong level of stakeholder support for recommendation 129, and the lack of balance in the RT Act in relation to the right to apply for termination on the ground of undue hardship, the Review proposes that a similar provision to section 74 be included for tenants.

### **Proposal 117**

That the RT Act be amended to allow:

- a tenant to apply to the Magistrates Court for termination of a fixed-term or periodic tenancy agreement on the ground that they would suffer undue hardship if they were required to terminate the agreement under any other provision of the RT Act; and
- the Magistrates Court to make an order as to the compensation of an owner for any loss caused by such termination.

## 8.6 Termination in Other Circumstances

### 8.6.1 Termination where Mortgagee takes Possession of Premises

#### **Stamfords' Recommendation 130**

*That the current requirement in the Act for a mortgagee in respect of the premises [to] give a tenant "reasonable notice" of their intention to take possession of the premises in pursuance of the mortgage be retained.*

#### **Background Discussion**

It is possible for a residential tenancy agreement to be terminated by a mortgagee (e.g. a bank or financial institution) taking possession of the property in pursuance of a mortgage.<sup>319</sup> The RT Act provides some protection to tenants in relation to persons having superior title, such as mortgagees, in section 81. This section requires a magistrate or court to be satisfied, before making an order for possession of the property, that the tenant has had "reasonable notice" of the court proceedings.

According to the Stamfords Report, there is potential for mortgagees or the courts to vary widely in their interpretation of the word "reasonable", sometimes resulting in tenants having to vacate properties within a relatively short period of time (e.g. 10 days).<sup>320</sup>

When a mortgagor (i.e. owner) defaults on their mortgage repayments, a mortgagee may commence an action in the Supreme Court to seek court orders for, among other things, possession of the property.<sup>321</sup> Research and discussion with relevant staff at the Supreme Court indicates that registrars of the Supreme Court regularly issue orders for possession with the proviso that such orders be served on mortgagors at least 28 days in advance of the date they must vacate the property. It is not known whether all registrars also require mortgagors to serve orders for possession with 28 days notice on tenants occupying a mortgaged property.

#### **Summary of Responses**

REIWA reiterated its position stated in Phase 1 of the Review that rather than "reasonable notice", tenants should be given 30 days notice to vacate the property.<sup>322</sup> TAS supported the Stamfords recommendation, however, it was concerned that section 81 of the RT Act was unworkable in that if a mortgagor had an order for immediate possession from a higher court, it overrode this section of the RT Act.<sup>323</sup> POA supported this recommendation.<sup>324</sup>

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<sup>319</sup> Section 60(1)(e), RT Act (WA).

<sup>320</sup> Pages 181-182.

<sup>321</sup> In accordance with Order 62A (Mortgage Actions) of the *Rules of the Supreme Court 1971* (WA).

<sup>322</sup> REIWA, *Response to the Statutory Review of the RTA*, 9 Dec 2002, p. 33.

<sup>323</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 63.

<sup>324</sup> POA, *Submission to the Review of the RT Act*, 10 Dec 2002, p. 4.

## **Policy Position**

Instances may occur where a tenant is unaware of the owner defaulting on their mortgage repayments, and of the owner's bank subsequently commencing mortgage enforcement proceedings in the Supreme Court. It is acknowledged that a tenant should receive adequate notice of having to vacate the property, and that it may be possible an order for possession is not always served on the tenant as well as the owner. The Review believes that tenants should receive a copy of any order for possession at least 30 days in advance of the vacating date, and that the RT Act be amended accordingly. This notice period appears appropriate as, in an analogous situation, a tenant in a periodic tenancy must receive 30 days termination notice when an owner has entered into a contract of sale of the property.<sup>325</sup>

In addition, it is recommended that DOCEP consult with the Department of the Attorney General and the Supreme Court in ascertaining whether complementary provisions be included in the *Rules of the Supreme Court 1971 (WA)*.

### **Proposal 118**

That section 81 of the RT Act be amended to require that a tenant receive at least 30 days notice to vacate a property by being served with an order for possession issued in a court action.

### **Proposal 119**

That DOCEP consult with the Department of the Attorney General and the Supreme Court to ascertain whether complementary provisions should be included in the *Rules of the Supreme Court 1971 (WA)* to compel mortgagees to serve orders for possession on tenants 30 days in advance of the vacating date.

## **8.6.2 Termination Upon Death of Tenant**

### **Stamfords' Recommendation 131**

*That the Act be amended to state that, where one of two or more tenants who are parties to an agreement dies, the tenancy and the tenancy agreement continue to operate, with the remaining tenant(s) as sole tenant, joint tenants, or tenants in common, as the case requires.*

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<sup>325</sup> Section 63(2), RT Act (WA).

## **Background Discussion**

The RT Act does not contain any provisions dealing with the tenancy agreement or rights and obligations of co-tenants and occupants of the property following the death of a tenant. Stamfords reported that respondents to Phase 1 of the Review were concerned about issues such as the imposition of liability for the deceased tenant's share of rent upon remaining co-tenants, and the possible ability of the owner to terminate the tenancy agreement and immediately evict any remaining occupants.<sup>326</sup> Stamfords recommended adopting a provision similar to section 127 of the *Residential Tenancies Act 1987 (ACT)*.

## **Summary of Responses**

REIWA and POA both supported this recommendation. TAS supported the recommendation, however, they argued that the RT Act should also make specific provision for remaining occupants to have a tenancy vested in them upon the death of a tenant. They gave an example where a tenant's son, daughter, husband, or wife who had resided in the property for a significant period of time and had contributed to fulfilling the obligations under the tenancy agreement had no standing under the RT Act after their parent or partner passed away. TAS recommended that a provision similar to section 35 of the *Residential Tenancies Act 1987 (NSW)* be adopted in the RT Act.<sup>327</sup>

## **Policy Position**

It is understood that, although the RT Act is silent on the status of a tenancy agreement and the obligations of remaining co-tenants following the death of a tenant, general contract law stipulates that co-tenants and owners are bound to continue with a tenancy on its original terms and conditions. Remaining occupants, on the other hand, may face eviction if they are unable to prove to a court that they have essentially been behaving as tenants (e.g. paying rent to the owner, maintaining the property) under the tenancy agreement.

The Review agrees with the Stamfords recommendation, as well as TAS's reasoning, that it would benefit parties if remaining occupants could apply to the Magistrates Court to be recognised as tenants under a tenancy agreement. Section 35 (Recognition of certain persons as tenants) of the RT Act (NSW) applies not only when a tenant dies, but also to situations where a "tenant no longer occupies the premises".<sup>328</sup> In light of feedback from DOCEP's Building and Tenancy Industries Branch that situations arise where a tenant simply leaves a property and their partner behind, it is thought appropriate that this situation also be covered in the RT Act.

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<sup>326</sup> Page 182.

<sup>327</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, pp. 63-64.

<sup>328</sup> Section 35(1)(b), RT Act (NSW).

### **Proposal 120**

That a provision similar to section 127 (Death of 1 of more than 2 tenants) of the *Residential Tenancies Act 1997* (ACT) be incorporated into the RT Act, such that where one of two or more tenants dies, the tenancy agreement continues to operate with the remaining tenant(s) as sole tenant, joint tenants, or tenants in common, as the case requires.

### **Proposal 121**

That a provision similar to section 35 (Recognition of certain persons as tenants) of the *Residential Tenancies Act 1987* (NSW) be incorporated into the RT Act, such that where a tenant dies or no longer occupies the property, a remaining occupant may apply to the Magistrates Court to be recognised as a tenant under the tenancy agreement.

## **8.7 Abandonment**

### **Stamfords' Recommendation 132**

*That the Act be amended to allow an owner to give notice of termination of an agreement where the owner has reasonable grounds for thinking that the tenant has abandoned the premises.*

### **Stamfords' Recommendation 133**

*That the Act be amended to provide guidance as to what constitutes 'reasonable grounds' for thinking that a tenant has abandoned the premises.*

## **Background Discussion**

Under section 60(1)(f) of the RT Act, a tenancy agreement is terminated where a tenant abandons the property. When this occurs, an owner is entitled to compensation from the tenant for any loss (including loss of rent) caused by the abandonment, but is to take reasonable steps to minimise their loss.<sup>329</sup> An owner may apply to the Magistrates Court for an order declaring that the tenant has abandoned the property on a particular day,<sup>330</sup> and that the tenant pay compensation to the owner.<sup>331</sup> It is not compulsory, however, for an owner to make such an application to the Magistrates Court.

DOCEP's conciliation officers advise owners, who are in doubt about whether to regard a property as being abandoned, to apply to the Magistrates Court for an order declaring the date of abandonment.

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<sup>329</sup> Section 78(1), RT Act (WA).

<sup>330</sup> Section 77, RT Act (WA).

<sup>331</sup> Section 78(2), RT Act (WA).

The Stamfords Report pointed out that the RT Act does not provide a clear process for owners recovering possession of abandoned premises.<sup>332</sup> Tenant respondents to Phase 1 of the Review argued that the RT Act does not adequately protect tenants when they are away from the property for long periods of time due to holidays or unexpected illnesses or accidents. Owner respondents commented that dealing with the abandonment of a property was problematic due to a lack of guidance in the RT Act.

The Stamfords Report recommended adopting the procedures under section 221 (Termination of agreement by lessor if premises abandoned) of the *Residential Tenancies Act 1994* (Qld). Section 221 requires owners to issue an Abandonment Termination Notice (Form 15) to the tenant if they believe on reasonable grounds that the tenant has abandoned the property. “Reasonable grounds” under the RT Act (Qld) include:

- a failure of the tenant to pay rent under the agreement;
- the presence at the property of uncollected mail, newspapers or other material;
- reports from neighbours or from other persons indicating the tenant has abandoned the property;
- the absence of household goods at the property;
- the disconnection of services (including gas, electricity and telephone) to the property; and
- a failure of the tenant to respond to an entry notice.<sup>333</sup>

If the tenant does not respond within seven days after receiving a notice, the owner is entitled to vacant possession of the property.<sup>334</sup> A tenant may dispute such a notice by applying to the Queensland Small Claims Tribunal either for an order setting aside the notice (if the application is made within seven days after the notice is given) or an order for compensation (if the application is made within 28 days after the notice is given).<sup>335</sup>

Alternatively, an owner may apply to the Small Claims Tribunal for an order declaring abandonment instead of giving an Abandonment Termination Notice to the tenant. The owner must also believe on “reasonable grounds” that the property has been abandoned, and the Small Claims Tribunal may have regard to these grounds before making any orders.<sup>336</sup>

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<sup>332</sup> Page 183.

<sup>333</sup> Section 221(5), RT Act (Qld).

<sup>334</sup> Section 221(4), RT Act (Qld).

<sup>335</sup> Section 221A, RT Act (Qld).

<sup>336</sup> Section 222, RT Act (Qld).

## **Summary of Responses**

The Aboriginal Housing and Infrastructure Unit of the Department of Housing and Works, REIWA and POA supported recommendation 132. REIWA also suggested that a termination notice issued on the ground of abandonment be given to a tenant with seven days notice.<sup>337</sup> TAS and Shelter WA supported recommendation 132, but argued that an owner should be required in all instances to file an application at the Magistrates Court for an order declaring that the property had been abandoned.<sup>338</sup>

All respondents supported recommendation 133, with some respondents recommending additional matters which might constitute “reasonable grounds” (e.g. steps that an owner has taken to contact the tenant/tenant’s next of kin/tenant’s employer; any history of absence from the property due to employment commitments or medical treatment).

## **Policy Position**

It is recognised that owners are faced with uncertainty about when to regard their property as being abandoned, and tenants face the possibility of having their tenancy agreements terminated while they are absent for a long period of time due to circumstances outside of their control. It is therefore recommended that more clearly defined procedures be introduced to protect the rights of both parties.

In circumstances where an owner believes on reasonable grounds that their property has been abandoned, the Review proposes that a new right of access be introduced. “Reasonable grounds” may include those grounds contained in section 221 of the Queensland RT Act.

Also similar to the Queensland RT Act, an owner should be able to issue a Notice of Entry to the tenant notifying them that the owner believes the property to be abandoned, and that they intend to enter the property after 24 hours has elapsed to inspect, secure, and make the property safe (e.g. turn off lights, tighten dripping taps). The Notice of Entry should specify that the owner may apply to the Magistrates Court for orders declaring abandonment and granting immediate possession of the property. In order to increase the chances of a tenant receiving a Notice of Entry, an owner will be required to serve a copy both at the property and at the tenant’s last known place of employment (if details have been previously supplied by the tenant).

Following an inspection of the property pursuant to a Notice of Entry, the Review proposes that, should an owner wish to obtain possession of the property, an owner may file an application at the Magistrates Court for an urgent hearing. The Review contends it is insufficient protection for tenants for the RT Act to allow owners to form their own conclusion that a property has been abandoned and regain possession of the property without a court order.

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<sup>337</sup> REIWA, *Submission to the Review of the RT Act*, 9 Dec 2002, p. 33.

<sup>338</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 64; Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 25.

DOCEP's experience in conciliating abandonment cases indicates that the current provisions are open to abuse by unscrupulous owners. The Review acknowledges that the majority of owners, however, may suffer increasing economic loss arising from overdue rent, and therefore proposes that the Magistrates Court lists abandonment hearings urgently (e.g. within 2 business days, or such other time period as is prescribed – see discussion in relation to 'Urgent Hearings' in chapter 9.7.2 of this Paper).

Notice of a hearing to determine abandonment must be served both at the rental property and at the tenant's last known place of employment (if details have been supplied by the tenant).

It is envisaged that a magistrate may delegate an abandonment hearing to a registrar. Owner applicants must attend the abandonment hearing to prove why they believe on "reasonable grounds" that the property has been abandoned.

The Magistrates Court may make an order declaring the date the property is deemed to have been abandoned, an order granting immediate possession, and an order that the tenant pay to the owner all amounts owing under the tenancy agreement. An owner must serve a copy of the court orders upon the tenant at the property and at the tenant's last known place of employment.

A tenant who does not attend the Magistrates Court hearing would be able to apply to the Magistrates Court under section 17 of the RT Act to have the order(s) varied or set aside, if they do so within 14 days of the order(s) being made. For those tenants who, due to circumstances outside of their control, are unable to attend the Magistrates Court hearing and miss the 14-day time limit under section 17, it is proposed to amend the RT Act to allow them to apply 'out-of-time'.

### **Proposal 122**

That the RT Act be amended to set out what constitutes “reasonable grounds” for an owner believing that a property has been abandoned, in similar terms to section 221 of the *Residential Tenancies Act 1994 (Qld)*.

### **Proposal 123**

That the RT Act be amended to create a right of access to a property by an owner after serving a *Notice of Entry* (giving 24 hours notice) at the property and at the tenant’s last known place of employment (if applicable), that the owner:

- believes on reasonable grounds that the property has been abandoned;
- intends to enter the property for the purposes of inspecting and making the property secure and safe; and
- may apply to the Magistrates Court for orders declaring abandonment and granting immediate possession.

### **Proposal 124**

That the RT Act be amended to require owners to obtain court orders declaring abandonment and granting immediate possession before an owner can recover possession of their property, subject to further consultation with the Magistrates Court.

### **Proposal 125**

That the RT Act be amended to allow owners to file an urgent application for an ‘abandonment hearing’:

- which the Magistrates Court is to list within the ‘urgent-hearing timeframe’ (e.g. two business days of filing);
- for which the owner is to serve a copy of the notice of hearing on the tenant at the rental property and the tenant’s last known place of employment (if applicable);
- which the Magistrates Court may delegate to a registrar;
- before which an owner is to attend and present evidence supporting their claim that the property is abandoned;
- where the Magistrates Court may make orders declaring abandonment, granting immediate possession, and requiring the tenant to pay to the owner all money owing under the tenancy agreement;
- after which an owner is to serve a copy of the court orders on the tenant at the rental property and at the tenant’s last known place of employment; and

- after which a tenant, who fails to attend the hearing and fails to lodge an application under section 17 (Application to vary or set aside order) of the RT Act, may apply to the Magistrates Court for their section 17 application to be heard 'out of time'.

**Stamfords' Recommendation 134**

*That the Act be amended to make adequate provision for documents left on a premises [sic] after the termination of an agreement (in the case of abandonment or otherwise).*

**Background Discussion**

Section 79 of the RT Act provides detailed procedures for dealing with abandoned goods. If goods are left behind after termination of the tenancy agreement, after two days the owner may remove and destroy or dispose of the goods if –

- (a) the goods are perishable foodstuffs; or
- (b) the estimated value of the goods is less than the total estimated cost of the removal, storage and sale of the goods.<sup>339</sup>

If an owner is unsure whether goods fall within the above two categories, they may request the Commissioner for Consumer Protection to give an opinion in writing as to whether the goods fall into either of those two categories. If that owner is later found liable for the removal, destruction or disposal of the goods, and the owner relied upon the Commissioner's written opinion to do so, the owner is entitled to be indemnified out of the RAF.<sup>340</sup>

If the goods left behind do not fall into the above two categories, an owner is to store the goods in a safe place for at least 60 days and notify the former tenant within seven days of such storage.<sup>341</sup> The former tenant (and anyone else who may have a lawful right to the goods) may reclaim the goods if they pay the owner the costs of removal and storage of the goods.<sup>342</sup>

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<sup>339</sup> Section 79(1), RT Act (WA).

<sup>340</sup> Section 79(5), RT Act (WA).

<sup>341</sup> Section 79(2) & (3), RT Act (WA).

<sup>342</sup> Section 79(7), RT Act (WA).

If the goods are not reclaimed within 60 days, an owner may sell the goods at a public auction and retain out of the proceeds of the sale the reasonable costs of removing, storing and selling the goods.<sup>343</sup> If there is any surplus money from these proceeds after the owner has deducted their expenses and any money owed under the former tenancy agreement, an owner is to pay that surplus into the Magistrates Court.<sup>344</sup> The Magistrates Court shall then credit that surplus into the RAF.<sup>345</sup>

The Stamfords Report commented that although section 79 dealt with abandoned goods appropriately, tenants and tenant advocacy groups had voiced concern over the disposal of abandoned personal documents. As personal documents generally have no resale value, an owner is entitled to dispose of them after waiting two days after the termination of the tenancy agreement.<sup>346</sup> Stamfords recommended that WA adopt a provision similar to section 230B (Documents left on premises) of the Queensland RT Act. Section 230B provides that if a tenancy agreement is terminated and documents are left on the rental property, an owner is to give the documents to the former tenant, the lawful owner of the documents, or the public trustee (if the owner does not know the location of the former tenant or document-owner). If the documents are given to the public trustee, the public trustee must retain the documents for at least six months, after which, if they are not claimed, the public trustee may dispose of them as it considers appropriate.

DOCEP's Building and Tenancy Industries Branch currently advises owners, who are in doubt about how to deal with abandoned documents, to deliver those documents to the Police Department 'Lost and Found' section.

### **Summary of Responses**

REIWA, POA, MIDLAS, the Aboriginal Housing and Infrastructure Unit of DHW, and Giz Watson MLC all supported Stamfords' recommendation 134. TAS and Shelter WA supported the recommendation, however, both believed that the RT Act should also provide some protection for other personal items of non-economic value (e.g. a tenant's item of furniture which holds sentimental value but little dollar value).<sup>347</sup> Shelter WA also added that the term "documents" should include photographs.

The WA Public Trustee's formal response to the recommendation is that its office has undergone a major business process re-engineering plan over the last 4 to 5 years whereby many of the non-core business functions have been outsourced to external contractors. Some of the functions that have been outsourced include the search and removal function in relation to client possessions and the storage of client valuables. As such, the Public Trustee does not have the capacity to take on the role of receiving abandoned documents.<sup>348</sup>

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<sup>343</sup> Section 79(9), RT Act (WA).

<sup>344</sup> Section 79(10), RT Act (WA).

<sup>345</sup> Section 79(11), RT Act (WA).

<sup>346</sup> Section 79(1), RT Act (WA).

<sup>347</sup> TAS, *Submission to the Review of the RT Act*, Dec 2002, p. 65; Shelter WA, *Submission to the Review of the RT Act*, Dec 2002, p. 26.

<sup>348</sup> Letter dated 12 Aug 2005 from Mr Sean Conlin, Acting Public Trustee, Public Trustee, Department of Justice.

## **Policy Position**

Research into the relevant provisions in the Queensland RT Act and feedback from the WA Public Trustee about the proposed adoption of similar provisions indicates that it is not realistic to expect the WA Public Trustee to take receipt of documents left behind on rental properties.

Feedback from DOCEP's Building and Tenancy Industries Branch indicates that the majority of applications for indemnity certificates originate from Homeswest, which in turn indicates that there are a considerable number of Homeswest properties being abandoned by tenants. The Review does not believe that the WA Public Trustee has the capacity or resources to receive, handle and store abandoned documents from Homeswest and other owners.

It is acknowledged, however, that the RT Act does not make adequate provision for documents left behind. The Victorian RT Act requires owners to take reasonable care of personal documents left behind for a period of 90 days. Owners may remove but must not destroy or dispose of the documents, except in accordance with the RT Act. They must also take reasonable steps to notify the former tenant as to when and from where documents may be collected.<sup>349</sup> If the documents are unclaimed at the end of 90 days, owners may dispose of the documents.<sup>350</sup> Owners may apply to the VCAT for compensation for the costs of removal, storage, and attempted tenant notification of abandoned documents.<sup>351</sup>

The Review proposes that the RT Act be amended to adopt provisions similar to the Victorian RT Act in relation to documents left behind, however, with the key differences that:

- documents (including photographs) be retained for 60 days; and
- owners can apply to the Magistrates Court for compensation from the RAF for the reasonable costs of removal, storage, and tenant notification.

The 60 day period is more appropriate, given that the obligation in the RT Act to retain abandoned goods is also 60 days. It is also believed that compensation from the RAF is appropriate as owners will face additional responsibilities for taking care of items which have no monetary value, and therefore cannot be reimbursed for any related expenses from the sale of such items.

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<sup>349</sup> Section 380, RT Act (Vic).

<sup>350</sup> Section 381, RT Act (Vic). Although laws relating to the disposal of important documents, for example, passports, still apply. Owners need to note it may be an offence under certain State and Commonwealth legislation to destroy certain documents.

<sup>351</sup> Section 400, RT Act (Vic).

### **Proposal 126**

That the RT Act be amended to require owners to:

- take reasonable care of personal documents (including photographs) abandoned, or otherwise left behind, for a period of 60 days;
- remove and/or store, but not dispose of, personal documents except in accordance with the RT Act; and
- take reasonable steps to notify the (former) tenant as to when and from where personal documents may be collected.

### **Proposal 127**

That the RT Act be amended to allow owners to apply to the Magistrates Court for compensation from the RAF for the reasonable costs of removal, storage, and tenant notification in relation to personal documents which have been abandoned, or otherwise left behind.

## **8.8 Eviction**

### **Stamfords' Recommendation 135**

*That the current requirement to obtain a court order before entering a premises with the intention of recovering possession of the premises (or part thereof) be retained.*

### **Background Discussion**

An owner wishing to regain possession of their property, following a notice of termination which a tenant has refused to comply with, must apply to the Magistrates Court to obtain an order terminating the tenancy agreement and an order for possession.<sup>352</sup> An owner must make this application within 30 days of the day which a tenant was supposed to have vacated a property.<sup>353</sup> The Magistrates Court may suspend the operation of such orders for up to 30 days, depending upon the relative hardship to the tenant as compared to the owner.<sup>354</sup> In addition, the Magistrates Court may refuse to make such orders in certain circumstances, including a situation where an owner has attempted to terminate a tenancy agreement based upon a tenant's breach, and the tenant has in fact already remedied the breach.<sup>355</sup>

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<sup>352</sup> Section 71(1), RT Act (WA).

<sup>353</sup> *ibid.*

<sup>354</sup> Section 71(3), RT Act (WA).

<sup>355</sup> Section 71(3)(b)(ii), RT Act (WA).

The RT Act prohibits a person from entering a property, or any part of a property, for the purpose of recovering possession from a tenant, whether such entry is peaceful or otherwise, without an appropriate court order.<sup>356</sup>

An owner wishing to enforce a court order for possession is to apply to the Magistrates Court for a Warrant authorising a bailiff to physically evict a tenant. Research conducted by the Australian Housing and Urban Research Institute (AHURI) reports:

- “• The overwhelming majority of evictions are initiated by landlords because of arrears of rent. Few tenants appear at eviction proceedings, but research suggests that those who do appear are less likely to be evicted.
- Landlords’ applications to the appropriate court or tribunal for possession may result in a conditional, rather than an immediate, order for possession. This may give tenants a second chance to preserve their tenancy.
- The available evidence suggests that one to two per cent of tenancies end in a bailiff- or police-assisted eviction. Several factors, including a tightening housing market [and] declining access to public rental housing may have contributed to an increase in the rate of eviction in recent years”.<sup>357</sup>

The Stamfords Report noted that many owners had complained about tenants being permitted to remain in properties for several months during the legal and court processes.<sup>358</sup> DOCEP’s Building and Tenancy Industries Branch also receives many letters from owners complaining about the protracted eviction process via the court system which results in substantial amounts of rental arrears and other debts owed by tenants which those owners have great difficulty recovering.

No Australian jurisdiction allows a person to enter a rental property with the intention of recovering possession from a tenant without a court order.<sup>359</sup>

### **Summary of Responses**

TAS, Shelter WA, MIDLAS, REIWA, and POA supported the recommendation.

### **Policy Position**

The Review is aware that owners may suffer substantial financial loss in the form of rental arrears and other damages while dutifully following the court process for an order for possession and warrant to evict a defaulting tenant. It does not appear appropriate, however, to address this issue by amending the RT Act to allow owners to enter rental properties with the intention of recovering possession without a court order. To introduce such an amendment would remove a fundamental protection afforded to tenants by the RT Act, that is, the right to natural justice dispensed in an independent court system in the resolution of a tenancy dispute.

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<sup>356</sup> Section 80, RT Act (WA).

<sup>357</sup> Slatter, Michele; Beer, Andrew 2004, *Evictions and Housing Management: Toward More Effective Strategies*, for the Australian Housing and Urban Research Institute, Southern Research Centre, pp. i – ii.

<sup>358</sup> Stamfords’ Report, p. 187.

<sup>359</sup> Note: Under the Northern Territory *RT Act 1999*, a landlord can apply to either the Commissioner of Tenancies or the Court for an order for possession (Part II, Division 4).

Given that no other Australian jurisdiction allows owners to enter properties to recover possession without a court order, and all the stakeholders supported the recommendation, it is proposed that section 80 of the RT Act be retained.

It is anticipated that amendments to the RT Act in relation to urgent hearings (as discussed in chapter 9 – *Tenancy Disputes*), and improvements to the enforcement mechanisms in the Magistrates Court pursuant to the new *Civil Judgments Enforcement Act 2004* (WA) will alleviate some of the problems experienced by owners in regaining possession of their properties.

## 9. TENANCY DISPUTES

### 9.1 The Current Dispute Resolution Mechanism

The RT Act provides for the settling in court of disputes between tenants and property owners that cannot otherwise be conciliated. Disputes involving claims of less than \$10,000 are heard by a magistrate in the Minor Cases Division of the Magistrates Court.<sup>360</sup> In certain circumstances, the RT Act also enables the registrar of the Magistrates Court to hear applications.<sup>361</sup>

The most common disputes resolved through the Magistrates Court involve:

- refusal to return bond money;
- rent arrears;
- property damage;
- property maintenance; and
- problems when concluding tenancy agreements.

The Magistrates Court provides an opportunity to hold a pre-trial conference if both parties attend the court hearing and are agreeable to the conference being conducted. If the dispute is not completely resolved at the pre-trial conference the outstanding matters progress to a hearing before a magistrate.

Prior to instigating legal proceedings tenants and owners may contact DOCEP on the Consumer Protection Advice Line for advice or may lodge a complaint with the Department. DOCEP currently conciliates disputes between owners and tenants in an attempt to negotiate an outcome acceptable to both parties.

### 9.2 Reform of the Lower Court System

In November 2004, legislation was passed by State Parliament to reform the lower court system in Western Australia. The legislation package included the *Magistrates Court Act 2004*, the *Magistrates Court (Civil Proceedings) Act 2004* (MCCP Act) and the *Courts Legislation Amendment and Repeal Act 2004*.

The *Magistrates Court Act 2004* (MC Act) established a new court, the Magistrates Court of Western Australia.<sup>362</sup> This Court replaced the Local Court, Court of Petty Sessions and Small Claims Tribunal, and deals with civil and criminal matters at various locations throughout Western Australia.

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<sup>360</sup> Section 12 of the RT Act (WA) and Regulation 7, RT Regulations.

<sup>361</sup> Section 13A(2) of the RT Act (WA).

<sup>362</sup> Clause 4 of the Magistrates Court Act.

The MCCP Act provides for the civil jurisdiction of the Magistrates Court.<sup>363</sup> The Magistrates Court has a general civil jurisdiction for monetary claims up to \$50,000, and a minor cases jurisdiction for claims up to \$7,500. On 1 January 2009, the limits will increase to \$75,000 and \$10,000 respectively. Within these monetary limits, the Magistrates Court also has jurisdiction in regard to claims for equitable relief and consumer/trading claims.

The *Courts Legislation Amendment and Repeal Act 2004* (CLAR Act) introduced a uniform system of enforcing the civil judgements of the Magistrates Court, District Court and Supreme Court, and repealed the *Local Court Act 1904 (WA)*.<sup>364</sup> Part 16 of the CLAR Act amended the RT Act such that residential tenancy disputes of up to \$10,000 may be heard and determined in the Minor Disputes Division of the Magistrates Court.<sup>365</sup>

One of the stated aims of the legislation reform package is to make court proceedings easier to understand and to increase access to a less formal and quicker dispute resolution system.<sup>366</sup> Specific initiatives include the ability to appoint acting magistrates for a limited period of time to assist the Magistrates Court in dealing with heavy workloads, the opportunity to have matters heard in magistrates' chambers, the ability of the Magistrates Court to order mediation, and an ability for judgement creditors to appropriate part of the wages of judgement debtors under certain conditions.<sup>367</sup>

The new courts legislation came into operation on 2 May 2005. It will be some time before the full impact of the changes to the lower court system become evident and therefore any proposals in this paper regarding the dispute resolution functions of the RT Act will bear this in mind.

### 9.3 Formal Court Systems

#### **Background Discussion**

Reviews of dispute resolution systems in Australian jurisdictions have shown that owners and their property managers are the primary users of the formal tenancy dispute resolution systems.<sup>368</sup> Studies have also shown low rates of appearance by tenants as respondents in hearings, a finding that has been corroborated by officers of the then Western Australian Department of Justice.<sup>369</sup> If a respondent fails to attend a hearing the result is usually a default judgement against them.

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<sup>363</sup> Part 2 of the Magistrates Court CP Act.

<sup>364</sup> Section 4, CLAR Act.

<sup>365</sup> Section 119, CLAR Act.

<sup>366</sup> Hon. Jim McGinty MLA, 2003, Second Reading Speech – *Magistrates Court (Civil Proceedings) Act 2003*, Hansard, pp. 14277b - 14278a /1.

<sup>367</sup> Appropriation of wages is limited to a maximum of ten percent of earnings to give some income protection to the judgment debtor. - see Hon. Jim McGinty MLA, 2003, Second Reading Speech – *Civil Judgments Enforcement Act 2003*, Hansard, pp. 14278b – 14279a/1. See also sections 4, 19 and 35 of the *Civil Judgments Enforcement Act 2004*.

<sup>368</sup> Slatter, M. and Beer, A. 2004 *Evictions and Housing Management: Toward More Effective Strategies*, Australian Housing and Urban Research Institute, Melbourne; and Tenants Advice Service Inc., 2002, *Residential Tenancies Act Review 2001: Recommendations of the Tenancy Network WA*, Tenants Advice Service Inc., Perth, Western Australia.

<sup>369</sup> Meeting of 30 July 2004 at Central Law Courts, Perth, WA, with Officers of the then Department of Justice.

A number of factors contribute to this failure to attend court, including the design of court documents, tenants' poor coping skills, and the absence of clear directions to sources of support and assistance.<sup>370</sup>

Feedback from submissions to the Review indicate that the court system can be formal and intimidating to those unfamiliar with it. Court processes are time consuming and can be complex, even incomprehensible for some people. Often tenants adopt the view that it is not worth the loss of a day's wages to attend court. Such is the aversion to participating in the legal process that sometimes just the threat of legal action by an owner is sufficiently daunting to make a tenant acquiesce.

Mark Metters, in his 2002 study on poverty in South Australia, found that it was unlikely that written information alone would prepare people adequately to protect or pursue their rights.<sup>371</sup> When confronted with formal-looking documents many people simply assume the worst and 'switch off'. Metters' study indicated that face-to-face support and explanation are also required to enable people to participate effectively in the legal process.

As was stated previously, an aim of the reform of the lower court system is to make court proceedings less formal and easier to understand.<sup>372</sup> The new legislation provides a framework for achieving this aim, and anticipated improvements will emerge as the reform agenda is put into action.

## 9.4 Alternatives to the Current Dispute Resolution System

### 9.4.1 Alternative Dispute Resolution

#### ***Stamfords' Recommendation 144***

*That DOCEP's review of alternative dispute resolution processes include:*

- *consideration of an expansion of the pre-trial conference system to other Local Courts; and*
- *a review of DOCEP's current conciliation function, including investigation of best practice in other Australian jurisdictions.*

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<sup>370</sup>Slatter, M. and Beer, A. 2004 *Evictions and Housing Management: Toward More Effective Strategies*, Australian Housing and Urban Research Institute, Melbourne.

<sup>371</sup>Metters, Mark (Ed.) 2002, *Poverty Trapped. Experts speak about their experiences of poverty in South Australia*, Anglicare SA, North Adelaide.

<sup>372</sup>Hon. Jim McGinty MLA, 2003, Second Reading Speech – *Magistrates Court (Civil Proceedings) Act 2003*, Hansard, pp. 14277b - 14278a /1.

## **Background Discussion**

The term Alternative Dispute Resolution (ADR) is most commonly used to refer to methods of resolving disputes without using the court system. Generally in an ADR scheme an independent and impartial third person assists the disputing parties to reach a resolution. ADR is also used to refer to non-adversarial approaches to dispute resolution that focus on achieving a win-win solution. In both interpretations the common element is the use of an independent third person to mediate between the disputing parties.<sup>373</sup>

A type of court-initiated ADR is currently available in the form of pre-trial conferences at the Magistrates Court, with the magistrate or registrar acting as the mediator. Pre-trial conferences have quite a high success rate in resolving disputes and thus avoiding court proceedings, however, parties do not have access to a conference until formal legal proceedings have been initiated. Furthermore, the option to hold a pre-trial conference is currently not available at all Registries of the Magistrates Court.

A recent report completed by DOCEP on ADR services in Western Australia found that ADR services are underdeveloped, particularly in regional areas, in comparison to other Australian jurisdictions.<sup>374</sup> The report also noted that the then Department of Justice had been reviewing recommendations made by the Law Society of Western Australia for the expansion and further development of ADR services.

The relative success of pre-trial conferences in resolving disputes without resorting to formal court hearings indicates that ADR methods are appropriate for residential tenancy disputes. It also indicates that less formal processes appear to be preferable mechanisms for resolving tenancy disputes.

Part 5 of the MCCP Act enables the Magistrates Court to order that a case be mediated (with or without the consent of the parties involved), and enables the Magistrates Court to appoint a mediator.<sup>375</sup> The inclusion of this ability in the new legislation may indicate a deliberate attempt to direct the dispute resolution process away from court-determined resolution toward resolution through mediation.

### **9.4.2 A Residential Tenancy Tribunal**

#### ***Stamfords' Recommendation 140***

*That the current dispute resolution process be transferred to an independent residential tenancies tribunal, or to the proposed State Administrative Tribunal.*

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<sup>373</sup> DOCEP report, 2003, *Review of Alternative Dispute Resolution Processes Available in the Western Australian Community*, p5.

<sup>374</sup> *ibid*, p45.

<sup>375</sup> Section 35, Magistrates Court (CP) Act.

### ***Stamfords' Recommendation 141***

*That DOCEP further research and consult to:*

- *develop detailed recommendations regarding the organisational structure, operations and membership of the tribunal; and*
- *address any concerns arising from the additional consultation process, including the ability for a tribunal to adequately service regional areas of the State.*

### **Background Discussion**

Support for resolving residential tenancy matters by means of an informal dispute resolution mechanism is inherent within the RT Act itself, given:

- the requirement that, in general, parties are to represent themselves;<sup>376</sup>
- the discouragement of legal representation except in certain circumstances;<sup>377</sup>
- the provision that magistrates not be bound by rules of evidence; and <sup>378</sup>
- the provision specifically allowing magistrates to attempt conciliation.<sup>379</sup>

In other Australian jurisdictions residential tenancy matters are dealt with by tribunals. The Australian Capital Territory and South Australia both have Residential Tenancies Tribunals.<sup>380</sup> New South Wales has the Consumer, Trader and Tenancy Tribunal. In Victoria, the civil matters section of the Civil and Administrative Tribunal deals with residential tenancy matters. In Queensland and the Northern Territory Small Claims Tribunals deal with residential tenancy matters.

There are two key issues to be considered in determining whether a residential tenancies tribunal should be established as the primary dispute resolution mechanism for residential tenancy matters. Firstly, considerable funding would be required to establish and maintain a tribunal. Currently, the Department of the Attorney General receives funding from the RAF to adjudicate residential tenancy matters in the court system. That funding could be redirected to fund the operations of a tribunal, however, it is unlikely that the current level of spending would be enough to establish and maintain an independent tribunal.

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<sup>376</sup> Section 22(1), RT Act (WA).

<sup>377</sup> Section 22(3), RT Act (WA).

<sup>378</sup> Section 21, RT Act (WA).

<sup>379</sup> Section 23, RT Act (WA).

<sup>380</sup> For example, the South Australian Residential Tenancies Tribunal is an independent judicial body enabled by the *Residential Tenancies Act 1995 (SA)* to make legally binding orders in matters relating to the relationship between landlords and tenants under residential tenancy agreements. The Tribunal endeavours to hear disputes quickly and inexpensively in an informal manner, and encourages parties to represent themselves. The Tribunal provides information on how to prepare for the hearing and about the hearing process itself, and provides parties with written decisions after the hearing. The Tribunal has been operating for more than a decade and would provide a good example for study.

Furthermore, it could be argued that establishing another dispute resolution system in addition to the court system and the State Administrative Tribunal (SAT) is an inefficient use of resources and public monies.

The second issue is whether a residential tenancies tribunal would necessarily overcome the problem of access by owners and tenants in regional areas of Western Australia. Were a tribunal to be established it would be situated in the Perth metropolitan area. It could be uneconomical to establish regional tribunals, thus the tribunal would operate through the existing network of courts, with the local magistrate and registrar appointed as members. The outcome of this and/or the establishment of a tribunal circuit (based on the regional court circuit) may therefore duplicate the problems already associated with scheduling hearings under the current system.

### **Summary of Responses**

Many respondents to the Review supported the establishment of a residential tenancies tribunal to replace the current dispute resolution system. Both owners and tenants contended that a tribunal would enable experts in residential tenancy matters to effectively adjudicate disputes and promote a more conciliatory approach to dispute resolution, and both groups suggested that tenants would be more likely to attend a tribunal than a formal court.

Opposition to the transfer of residential tenancy matters to the SAT came from REIWA and the then Department of Justice. REIWA advised that it saw no need to transfer the current dispute resolution process, but conceded that the current system did require refining.<sup>381</sup> The Executive Director of Court Services supported the recommendation contained in the Western Australian Civil and Administrative Review Tribunal Taskforce Report that jurisdiction for residential tenancy matters not be transferred to the SAT, for the following reasons:

- “because these types of matters involve the enforcement of existing rights, they are better dealt with in a court-like setting – though a modified one, and in particular one which utilises informal dispute resolution;
- these types of matters frequently require resolution in country and regional parts of the State where magistrates currently reside; and
- upon the coming into operation of the new Magistrates Court, the procedures and powers available to that court will enable it to deal appropriately and consistently throughout the State with this jurisdiction”.<sup>382</sup>

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<sup>381</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002. p. 34.

<sup>382</sup> Department of Justice, *Submission to the Review of the RT Act*, Nov 2002.

## **Policy Position**

An aim of the SAT initiative was to consolidate the number of government boards, committees and tribunals that currently exist, thereby reducing the amount of government funding spent on financing those entities, and creating a “one stop shop for Western Australians to appeal against decisions made by Government and industry boards”.<sup>383</sup> Therefore, the creation of a residential tenancies tribunal may not be entirely consistent with current Government policy.

Although the SAT will have jurisdiction over some areas of private dispute, the SAT is primarily designed to deal with appeals against government administrative decisions, rather than private disputes such as those between property owners and tenants. Furthermore, Cabinet has already rejected a proposal to include residential tenancy matters under the SAT’s jurisdiction. As the SAT is to be situated in the Perth metropolitan area, there will also be problems of regional access. Thus, in relation to residential tenancy matters, it appears that the SAT would still have some of the same problems that exist with the current dispute resolution system.

There may be ways to use the new legislation establishing the Magistrates Court to address regional access issues. As previously mentioned, the reforms to the lower court system enable the temporary appointment of acting magistrates and permit the use of video conferencing. Additionally, the MC Act allows the Magistrates Court to be constituted by one, two or more Justices of the Peace (JP).<sup>384</sup>

Section 12(1) of the RT Act currently requires that residential tenancy disputes be heard and determined by a magistrate (and in certain circumstances, by a registrar).<sup>385</sup> However, amending the RT Act to enable the Magistrates Court constituted with two JP’s to hear and determine residential tenancy matters, or to hear and make interim orders pending scheduling of matters before a circuit magistrate, could help address timeliness and access issues in regional areas. It would be preferable if the JP’s authorised to hear residential tenancy matters were familiar with the RT Act and knowledgeable in tenancy issues, which may require some extra training on the part of those JP’s.

There is potential within the lower courts reform legislation to address many of the criticisms of the handling of residential tenancy matters by the local court system. The lack of informality in proceedings and the pace at which matters are resolved due to scheduling arrangements are the primary concerns, both of which should be addressed by the court reforms.

The Review is monitoring the performance of the Magistrates Court and subsequently may further consider the need for a separate residential tenancies tribunal. The Review also proposes investigating the possibility of empowering a number of JP’s throughout the State to hear and determine residential tenancy matters, with a view to amending the RT Act to enable a Magistrates Court, constituted by two authorised JP’s, to hear and determine residential tenancy matters.

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<sup>383</sup> Hon. Jim McGinty MLA, *State Administrative Tribunal Ready To Go*, Media statement issued by the WA Branch of the Australian Labor Party, 24 Dec 2004.

<sup>384</sup> Section 7(2), Magistrates Court Act.

<sup>385</sup> Section 13A(2), RT Act (WA).

### **Proposal 128**

That the Review investigate the need for a separate residential tenancy tribunal, while also considering the possibility of empowering a number of Justices of the Peace throughout the state to constitute a Magistrates Court to hear and determine residential tenancy matters.

## **9.5 Representation**

### **9.5.1 Representation in Court**

#### ***Stamfords' Recommendation 136***

*That the Act be amended to require a court, upon the written authorisation of a party, to permit the party to be represented by an agent, without regard for the party's ability to appear personally or conduct the proceedings themselves.*

#### ***Stamfords' Recommendation 137***

*That the Act be amended to require that, where a court permits one party to be represented by an agent, the other party is automatically afforded the same right.*

#### ***Stamfords' Recommendation 138***

*That the Act be amended to require that, where an applicant is to be represented by an agent:*

- *the applicant provide the required authorisation at the time of the application; and*
- *the court notify the respondent at the time the court notifies the respondent of the matter itself.*

#### ***Stamfords' Recommendation 139***

*That section 22(3) of the Act, which prohibits a party to be legally represented except in certain circumstances, be retained.*

## **Background Discussion**

Currently the RT Act requires parties to dispute proceedings to represent themselves in the Magistrates Court rather than allowing them to engage an agent to act on their behalf. However, a magistrate may allow a party to be represented by an agent (someone other than a legally qualified person) if the party is unable to appear in person or is incapable of conducting the proceedings properly himself/herself, providing that the other party to the dispute will not be unfairly disadvantaged because of the representation.<sup>386</sup>

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<sup>386</sup> Section 22, RT Act (WA).

While aiming to ensure that no party is unfairly advantaged because they have engaged professional representation, this provision often prohibits the most appropriate person from representing a party. For example, an owner who has had no direct involvement with the rental of the property is currently required to present the case in court themselves despite the fact that it is the property manager who has the knowledge pertinent to the matter being heard. Subsequently, during the hearing, the owner usually calls the property manager as a witness to present the owner's case, effectively circumventing the RT Act's intentions of self-representation.

Similarly, the RT Act currently prohibits a tenant from making use of a suitable person who may be available to represent them, for example a knowledgeable relative or friend, or an advocate.

As mentioned previously, the Magistrates Court does have the discretion to allow parties to be represented by an agent if deemed appropriate. This can be problematic, however. A respondent to Phase 1 of the Review indicated that private owners may feel intimidated by the formality of courtroom procedure and at a disadvantage if faced with a professional advocate representing a tenant.<sup>387</sup> Other respondents reported instances in which the court permitted an owner to be represented by a real estate agent while the tenant had been required to represent himself/herself. One tenant advocacy group argued that professional representation occurs routinely in the case of Homeswest tenancy disputes where Homeswest is represented by specially trained Recovery Officers.<sup>388</sup>

The RT Act does enable parties to a dispute to be represented in court by legal practitioners if:

- both parties agree and the magistrate is satisfied that any party not so represented will not be unfairly disadvantaged;
- one of the parties to the dispute is a legally qualified person;
- one of the parties is a body corporate and any other party elects to be so represented;
- the magistrate is satisfied that one of the parties is unable to appear personally or conduct the proceedings properly themselves; or
- the proceedings are instituted or defended, or the conduct thereof has been assumed, by the Commissioner for Consumer Protection.<sup>389</sup>

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<sup>387</sup> Private submission to the Review of the RT Act (WA).

<sup>388</sup> TAS, *Submission to the Review of the RT Act*, Apr 2002, p. 88.

<sup>389</sup> Section 22(3), RT Act (WA).

## **Summary of Responses**

There was general support for the Stamfords' recommendation that representation be allowed irrespective of the ability of the parties to represent themselves. Objection from the POA was based on the view that advocates from TAS would routinely represent tenants, and thus private owners would be disadvantaged as they have no advocate representative body to appear on their behalf.<sup>390</sup> REIWA supported the right to representation by an agent for both parties. REIWA also proposed that the term 'agent' be defined as a person registered under the *Real Estate and Business Agents Act 1978* (WA).<sup>391</sup>

The majority of respondents to the Review were supportive of the current provisions in the RT Act that restrict the participation of legal representatives in court proceedings. Such provisions are contained in equivalent legislation in other Australian jurisdictions.

## **Policy Position**

To ensure equal opportunity for representation for all parties the Review proposes to amend the RT Act to ensure that both parties to a dispute have the option to engage a (non-legally trained) agent to represent them in proceedings.

Section 22(3) of the RT Act, which prohibits a party from being legally represented except in certain circumstances, will be retained. However, it is proposed to amend the Act to require that, where one party is intending to engage an agent or lawyer to represent them in court, the other party should be notified of this by the Magistrates Court as soon as possible, in order to give that party sufficient time to engage representation should they wish to do so. This will require an amendment to the Magistrates Court forms associated with disputes (see Proposal 10.10 in chapter 10.9), particulars of the representation engaged by the other party.

### **Proposal 129**

That the RT Act be amended to require the Magistrates Court to, upon written authorisation by the party, permit that party to be represented by an agent without regard for the party's ability to appear personally or conduct the proceedings themselves.

### **Proposal 130**

That the RT Act be amended to require that where the Magistrates Court permits one party to be represented by an agent, the other party is automatically afforded the same right.

### **Proposal 131**

That the RT Act be amended to require that, when one party is to be represented by an agent or legal practitioner:

- if that party is the applicant they are to provide the required authorisation at the time of the application to the Magistrates Court;

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<sup>390</sup> POA, *Submission to the Review of the RT Act*, Dec 2002, p. 4.

<sup>391</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 34.

- if that party is the respondent they are to provide the required authorisation at the time they submit a notice of intention to the dispute.

#### **Proposal 132**

That the RT Act be amended to require that, when one party is to be represented by an agent or legal practitioner, the Magistrates Court notify the other party to the dispute of the intended use of representation as soon as possible following receipt of authorisation/notice.

#### **Proposal 133**

That the relevant Magistrates Court forms be amended to reflect the changes in the proposals concerning representation of parties.

### **9.5.2 Tenant Advocacy Services**

#### **Background Discussion**

Owners are more likely than tenants to engage an agent or lawyer to represent them in legal proceedings. They are usually better placed financially to cover such agent/legal costs and are able to claim litigation costs as a tax deduction. At present there are few tenant advocacy groups operating in Western Australia. The demand for the services of TAS, the primary source of tenant advocates, currently exceeds capacity. Given the involvement of specialised DHW staff and property managers in tenancy disputes, there may be a need to investigate the feasibility of making funds available from the RAF to pay for the services of an advocate for a tenant-respondent when an owner-applicant has retained the services of an agent/lawyer for court proceedings. The funding from the RAF for advocates to assist tenant-respondents may go some way to address the concerns of tenant advocacy groups about RAF funds being used to finance the dispute resolution system (discussed in chapter 4 of this Paper).

Tenant advocates could be useful in assisting tenant-respondents with court procedure. Despite the intention of the RT Act to keep proceedings relatively informal, hearings involve official practices and procedures with which the parties to the dispute are unlikely to be familiar or adept at, for example, formally presenting evidence, case summation, and cross-examining witnesses and the other party. Failure to cross-examine effectively could result in evidence being unchallenged and automatically accepted as accurate. Court processes require a familiarity with the legislation and a sense of authority that tenants are unlikely to have,<sup>392</sup> in contrast to property managers who deal with tenancy issues in the course of their occupation.

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<sup>392</sup>Law Society of Western Australia, 2002, *Submission to the Review of the RT Act (WA)*, p2:17; and Private submission to the Review of the RT Act (WA).

In relation to the provision of public housing, reports by the Equal Opportunity Commission,<sup>393</sup> the *Indigenous Law Bulletin*,<sup>394</sup> and research carried out by DOCEP, indicate that Aboriginal people are over-represented in statistics relating to the issue of notices to terminate a tenancy agreement. It has been reported that only a very small percentage of the notices are defended as many Aboriginal people find the formal notice of termination difficult to comprehend and vacate the property without challenging it.<sup>395</sup> Furthermore, Aboriginal people and, indeed other groups for whom English is a second language, find the procedures of the formal court system intimidating, possibly culturally inappropriate, and difficult to negotiate.<sup>396</sup>

### **Policy Position**

The Review acknowledges that the current formal dispute resolution system is under-utilised by tenants, largely because the formal court system can be difficult to negotiate. It is anticipated that the relatively new Magistrates Court will address this to an extent, however the Review will investigate the potential for allocating funding to tenant advocacy services from the RAF. Any such funding for tenant advocacy services will be contingent upon there being a surplus in the RAF, after current yearly funding obligations are met.

#### **Proposal 134**

That the RT Act be amended to make it clear that funding can be allocated to tenant advocacy services from any surplus in the Rental Accommodation Fund.

## **9.6 Written Records of Decisions from Dispute Hearings**

#### ***Stamfords' Recommendation 142***

*That the Act be amended to require that reasons for decisions of the tribunal (or the court, if the current process is retained) be provided in cases that the tribunal (or the court) considers to be of legal or social significance.*

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<sup>393</sup> Equal Opportunity Commission, 2004, *Finding a Place; An Inquiry into the Existence of Discriminatory Practices in Relation to the Provision of Public Housing and Related Services to Aboriginal People in Western Australia*, Perth, Western Australia.

<sup>394</sup> Walsh, Joanne, 2003, *Suburban Oppression*, *Indigenous Law Bulletin*, Volume 5, Issue 22, Jan – Feb 2003.

<sup>395</sup> *ibid.*

<sup>396</sup> Johnston, Elliot, Commissioner, QC, 1991, *Royal Commission into Aboriginal Deaths in Custody*, Australian Government Publishing Service, Canberra, Vol 3, Part D, section 22.4.

## **Background Discussion**

The lack of consistency in magistrates' decisions in relation to residential tenancy disputes was raised by many respondents to the Review as problematic. Lack of clarity about such things as the definitions of the terms 'reasonable' and 'fair wear and tear' create confusion for parties in regard to their rights and obligations under the RT Act.

Many respondents supported the recommendation to require magistrates to provide written reasons for their decisions, and to make such records public. It was argued that this would facilitate the establishment of general standards of interpretation for terms and provisions in the RT Act, and be of assistance to parties in determining the possible outcomes of disputes without having to take the matter to court.

## **Summary of Responses**

Respondents to the Review were highly supportive of a recommendation to provide public access to documented court decisions. It was suggested that inconsistencies in the interpretation of some of the more ambiguous terms used in the RT Act are a recurring problem that could be addressed by such a requirement.

Requiring magistrates to provide written reasons for decisions could have a significant impact on the operation of the residential tenancies dispute resolution process. As such, the view of the Chief Magistrate was sought in relation to this proposal.

The Chief Magistrate indicated that such an undertaking was possible, however, the actual value of collecting magistrates' decisions may be somewhat less than the perceived value. In the Magistrates Court, magistrates are not bound by the decisions of another magistrate, thus the publication of decisions may not produce greater consistency and may further frustrate parties.

Furthermore, residential tenancy matters are heard under the Minor Case procedure of the MCCP Act, which prescribes that all proceedings are to be held in private.<sup>397</sup> The publication of written decisions would be contrary to this.

The Chief Magistrate further advised that the requirement to provide written decisions would slow the finalisation rate of residential tenancy disputes because of the extra time out of court needed by magistrates to prepare the decisions.<sup>398</sup>

## **Policy Position**

The Review acknowledges the frustrations that arise due to a lack of clarity surrounding terms such as 'fair wear and tear' and 'reasonable', however, it appears unlikely that the publication of written reasons for decisions will remedy this. Additionally, the length of time it takes to resolve a dispute through the courts already attracts criticism; adding to the duties of the magistrates will prolong the waiting time further.

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<sup>397</sup> Section 29(1), of the *Magistrates Court (Civil Proceedings) Act 2004* (WA).

<sup>398</sup> Letter dated 19 Aug 2005 from Mr Steven Heath, Chief Magistrate.

The Review recognises that there is merit in the idea of having established references for the somewhat more ambiguous aspects of the RT Act. The Review believes, however, that requiring magistrates to provide written reasons for residential tenancy dispute decisions will not address the lack of clarity and consistency around such things as ‘fair wear and tear’ and may, in fact, compound other problems associated with the dispute resolution process. The Review, therefore, does not support the Stamfords’ recommendation.

## 9.7 Timeframes for Hearings

### 9.7.1 Scheduling of Hearings

#### ***Stamfords’ Recommendation 143***

*That the relevant Government authority investigate methods to reduce the delay between making an application to the court (or tribunal) and hearing the matter to:*

- *approximately seven days for non-urgent matters; and*
- *within the timeframe prescribed for urgent hearings (see Rec. 145).*

### **Background Discussion**

The length of time it takes to settle a dispute through the judicial system is a common criticism of the court system in general. The RT Act currently requires that, wherever practicable, matters be dealt with within 14 days of being instituted, or as expeditiously as possible.<sup>399</sup>

### **Summary of Responses**

Support for reducing delays in hearing tenancy matters was unanimous.

### **Policy Position**

While it is recognised that delays in settling disputes can be frustrating, a sufficient time period must be allowed in scheduling hearings to enable respondents to seek legal advice and/or engage the services of an advocate or lawyer if necessary. If the scheduling period was reduced to less than 14 days, respondents may have difficulty accessing assistance or representation. Tenant advocacy services and community legal centres in particular are constrained by resource limitations, thus representation may not be available immediately.

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<sup>399</sup> Section 14, RT Act (WA).

Furthermore, the listing of matters is highly dependent upon the resources and the workload of the Magistrates Court. The Magistrates Court Act enables the electronic lodgement and service of court documents, which should increase time efficiencies, and the appointment of temporary acting magistrates should reduce the backlog of cases to be heard.<sup>400</sup>

Legislation that requires matters to be dealt with in a shorter timeframe will not address delays arising due to a lack of resources experienced by the court system. Thus the Review believes that it would be more effective to focus on reducing the waiting period for the hearing of urgent matters.

### 9.7.2 Urgent Hearings

#### ***Stamfords' Recommendation 145***

*That the Act make specific provision for urgent hearings (and state a timeframe within which an application must be heard) for the following:*

- *application by a tenant for urgent repairs or reconnection of utilities; and*
- *application by an owner for order for possession where the tenant is causing serious damage or injury.*

#### ***Stamfords' Recommendation 146***

*That further research be conducted to determine whether the proposed provision for urgent hearings should be expanded to allow application for other matters.*

### **Background Discussion**

Disputes involving matters such as the need for emergency repairs, the reconnection of utilities, or damage to a property being caused by a tenant require urgent hearing by a court. The RT Act does not specifically provide for urgent hearings although the Magistrates Court endeavours to schedule urgent matters as soon as possible, usually within two to seven days.<sup>401</sup>

The Victorian RT Act requires the VCAT to hear an application in regard to urgent repairs within two business days of receiving the application.<sup>402</sup> The South Australian RT Act does not specifically provide for urgent hearings, however the South Australian Residential Tenancies Tribunal does have the authority to sit at any time, including on a Sunday.<sup>403</sup>

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<sup>400</sup> Hon. Jim McGinty MLA, 2003, Second Reading Speech – *Magistrates Court Act 2003*, Hansard, pp. 14275 - 14277.

<sup>401</sup> Meeting of 30 July 2004 at Central Law Courts, Perth, WA, with Officers of the then Department of Justice.

<sup>402</sup> Section 73(2), RT Act 1997 (Vic).

<sup>403</sup> Section 20(1), RT Act 1995 (SA).

## **Summary of Responses**

Support for the recommendations was unanimous.

## **Policy Position**

The Review is supportive of matters that require expeditious resolution being scheduled for hearing within two business days, however, recognises that at times the Magistrates Court may not have the capacity to do this. The ability to make interim orders in regard to these matters may offer a solution to this problem.

Section 16 of the MCCP Act enables the Magistrates Court to order parties to appear before the Magistrates Court before trial to deal with interlocutory and pre-trial issues. Interlocutory matters are “*matters of urgent relief for which orders are made by the court before the conclusion of the matter.*”<sup>404</sup> Thus, it appears that the Magistrates Court already has the ability to schedule matters for the purpose of issuing interim orders prior to dealing with the matter in full. This ability could be used to address the need for urgency in certain cases.

While dealing with disputes in this manner is not specifically contemplated by the RT Act, as the Magistrates Court exercises jurisdiction over residential tenancy matters the MCCP Act applies. Thus, the Review proposes to amend the RT Act to draw attention to this ability in the MCCP Act by encouraging the Magistrates Court to schedule urgent matters (to be prescribed by way of regulation) within two business days of receipt of the complaint.

Aside from those matters listed in Stamfords’ recommendation, there may be other matters that require urgent hearing by a court, for example termination of a tenancy agreement for reasons of undue hardship. Therefore, the Review proposes that DOCEP conduct further research into the nature of applications for urgent hearing by the Magistrates Court, with a view to expanding the proposed provision for urgent hearings to allow for other matters appropriate to this category to be addressed.

### **Proposal 135**

That the RT Act be amended to require that wherever practicable, urgent matters (the nature of which will be prescribed by regulation) be heard by the Magistrates Court within two business days of receipt of the application by the Magistrates Court or such other period as is prescribed.

### **Proposal 136**

That the RT Act be amended so that in instances where matters require urgent hearing the Magistrates Court may convene for the purposes of issuing interim orders where applicable.

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<sup>404</sup> Butterworths Encyclopaedic Australian Legal Dictionary, see [www.butterworthsonline.com](http://www.butterworthsonline.com)

### **Proposal 137**

That research be conducted by DOCEP to determine the nature of matters to be prescribed in the Regulations as requiring to be heard by the Magistrates Court as urgent matters within two business days.

## **9.8 Joining a Third Party**

### **Background Discussion**

In its submission to the Review, the Law Society of Western Australia (the Law Society) noted that the RT Act does not permit joining a third party as a respondent to an action.<sup>405</sup> Section 15 of the RT Act enables an owner or a tenant, or a party to an agreement for an option to enter into a residential tenancy agreement, to apply to a magistrate for relief in response to an alleged breach of the agreement. However, it does not enable a tenant or owner to seek compensation from a third person in connection with a breach of a tenancy agreement.

For example, a situation could arise where a tenant may seek to have a breach rectified by an owner that may be out of the control of the owner. In its submission the Law Society gave an example of a case that occurred in Victoria where a tenant renting a strata titled property was allocated a parking space in the garage situated under a piece of machinery related to the air-conditioning system that serviced the entire strata unit block. Fluid from the air-conditioning system leaked onto the tenant's car causing significant damage. Despite requests to the owner of the property to remedy the situation, the problem was one that needed to be addressed by the strata company. Typically, matters to be addressed by a strata company are not dealt with quickly, and the delay increased the damage to the car.

In Western Australia, the only recourse for the tenant would be to obtain an order from the Magistrates Court against the owner. The owner would then have found themselves in breach of a court order (which attracts a \$2000 penalty) until the strata company had rectified the problem.<sup>406</sup>

The VCAT, which has jurisdiction over residential tenancy matters in Victoria, has the discretion to join a party to a proceeding before it.<sup>407</sup> The *State Administrative Tribunal Act 2004* (WA) has a provision similar to that in the VCAT Act.<sup>408</sup>

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<sup>405</sup> Law Society of WA, *Submission to the Review of the RT Act (WA)*, 2002, p. 3:10.

<sup>406</sup> Section 16(1), RT Act (WA).

<sup>407</sup> Section 60, *Victorian Civil and Administrative Tribunal Act 1998* (Vic)

<sup>408</sup> Section 38, *State Administrative Tribunal Act 2004* (WA).

## **Policy Position**

In recognition that a similar provision in the Western Australian RT Act would assist owners and tenants to seek compensation or redress from third parties, the Review proposes to amend the RT Act to reflect this.

The Review acknowledges the failure of the RT Act to allow third parties to be joined to tenancy proceedings and accepts that this failure prevents the making of orders that could produce a more just outcome in certain circumstances. Accordingly, the Review proposes to amend the RT Act to allow third parties to be joined to tenancy disputes.

### **Proposal 138**

That the RT Act be amended to include a provision enabling the joining of a third party to residential tenancy disputes.

## **9.9 Co-tenants in Shared Tenancies**

### ***Stamfords' Recommendation 16***

*That the Act be amended to allow a co-tenant to make application to a court in respect of a dispute with another co-tenant, provided that:*

- *the dispute is likely to significantly disadvantage one co-tenant over the other due to their joint and several liability;*
- *any such application does not as a matter of course require the involvement of the owner of the premises or their agent; and*
- *any such application does not disadvantage the owner by delaying or reducing the payment of any amount owed to them by the tenants.*

## **Background Discussion**

The RT Act does not provide for the resolution of disputes between co-tenants. However, disputes between co-tenants can have the potential to jeopardise the continuation of a tenancy agreement or considerably disadvantage one co-tenant over the other(s) because of the co-tenants' joint and several liability.

However, a dispute solely between co-tenants that has escalated to a stage that requires resolving by the Magistrates Court should not, if possible, impact upon the primary owner-tenant agreement. Therefore, neither the owner nor the property manager should, as a matter of course, be required to be involved in the dispute resolution process. Furthermore, neither the dispute itself nor the resolution process should disadvantage the owner by delaying or reducing the payment of any amount owed to them by the tenants.

## **Summary of Responses**

Respondents to the Review were supportive of this recommendation.

DHW raised concerns about procedures to deal with the acceptance and disposal of security bonds when a new tenant is joining a tenancy or only one of the co-tenants is vacating a property.<sup>409</sup>

## **Policy Position**

The Review proposes to amend the RT Act to enable co-tenants to make application to the Magistrates Court for the resolution of certain disputes. In response to DHW's concerns about the management of security bonds in shared tenancies, DOCEP's Bond Administrator advises that if existing co-tenants are vacating and/or new co-tenants are joining a property, then:

- if the full amount of the bond is to remain with the Bond Administrator, a Form 9 'Notice of Variation of Security Bond' must be lodged; and
- if part of the bond is to be refunded, and a new bond lodged with the Bond Administrator, Form 4 'Joint Application for Disposal of Security Bond' and combined Form 1 and 8 'Lodgement of Security Bond Money' must be lodged.

### **Proposal 139**

That the RT Act be amended to include a definition for the term 'co-tenant'.

### **Proposal 140**

That the RT Act be amended to allow a co-tenant to make application to the Magistrates Court in respect of a dispute with another co-tenant, provided that:

- the dispute is likely to significantly disadvantage one co-tenant over the other due to their joint and several liability;
- any such application does not as a matter of course require the involvement of the owner or their property manager; and
- any such application does not disadvantage the owner by delaying or reducing the payment of any amount owed to him/her by the tenants.

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<sup>409</sup> DHW, *Submission to the Review of the RT Act*, Dec 2002, pp. 4-5.

## 9.10 Place of Proceedings

### ***Stamfords' Recommendation 147***

*That the relevant court forms be amended to inform parties of the ability of the court to alter the place of proceedings where it considers it fair to do so.*

### **Background Discussion**

Currently, the RT Act requires proceedings to be held in the Registry of the Magistrates Court nearest to the location of the rental property.<sup>410</sup> If both parties to the dispute agree the hearing may be relocated to another Registry of the Magistrates Court. As such, it is possible for one party to refuse to allow the physical relocation of the proceedings without good reason, potentially causing undue hardship for the other party.

The MCCP Act allows a magistrate or registrar of the Magistrates Court to change the place of proceedings if they are of the opinion that it would be fair or convenient to hear the matter elsewhere.<sup>411</sup> However, section 13A(3) of the RT Act over-rides this provision of the MCCP Act.

### **Summary of Responses**

In its submission to the Review, REIWA proposed that the applicant be able to choose the location of the court in which the proceedings are instituted.<sup>412</sup> One of the reasons for offering this proposal was that it is easier for a real estate agent with large rent rolls to instigate all legal actions in the Perth Central Law Courts. REIWA suggested that if the respondent (tenant) objected to the place of hearing chosen by the applicant (owner/agent) then they could apply to the Magistrates Court to decide where it was most appropriate to hold the hearing. All other respondents to the Review supported the ability to change the location of a hearing.

### **Policy Position**

In recognition that relations between the parties to a dispute may be acrimonious and, therefore, could hinder agreement on a fair and reasonable venue for proceedings, the Review proposes to amend the RT Act to enable the Magistrates Court to alter the venue of the proceedings if it deems it fair to do so.

### **Proposal 141**

That the RT Act be amended to enable a magistrate or a registrar of the Magistrates Court to alter the venue of proceedings where it is deemed fair and reasonable to do so.

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<sup>410</sup> Section 13A(3), RT Act (WA).

<sup>411</sup> Section 22, *Magistrates Courts (Civil Proceedings) Act 2004* (WA).

<sup>412</sup> REIWA, *Submission to the Review of the RT Act 1987 (WA)*, 2002, p. 36.

## 9.11 Service of Documents

### 9.11.1 Advertising

#### **Background Discussion**

Section 85(3) of the RT Act provides that where notice is required to be given to a person whose address is unknown, service is deemed to have occurred if a copy of the notice is printed in a daily newspaper circulating throughout the State. In his submission to the Review, the Chief Stipendiary Magistrate advised that this section neglects to consider respondents who may be residing interstate.<sup>413</sup>

#### **Policy Proposal**

The Review proposes to amend section 85 of the RT Act to enable the Magistrates Court to order publication of a notice in an alternative newspaper if there are grounds to believe that the respondent is residing interstate. In conjunction with this authorisation, the Magistrates Court shall have the ability to direct a longer period for filing of a notice of dispute (instead of the current seven day response period) if it is believed that circumstances require it.

#### **Proposal 142**

That section 85 of the RT Act be amended to enable the Magistrates Court to order publication of a notice in an alternative newspaper if there are grounds to believe that the respondent is residing interstate.

#### **Proposal 143**

That the RT Act be amended to enable the Magistrates Court to extend the response periods associated with filing of dispute notices, in situations where the Court believes it is warranted.

### 9.11.2 Restrictions on Service

#### **Background Discussion**

Section 85(1)(b) of the RT Act restricts service of notice to a person's "last known place of residence, employment or business." In his submission to the Review, the Chief Stipendiary Magistrate advised that this section is restrictive and suggests that the section be amended to enable service to be made at "*any other address where mail may be directed.*"<sup>414</sup>

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<sup>413</sup> Chief Stipendiary Magistrate, *Submission to the Review of the RT Act*, Apr 2002, pp. 6-7.

<sup>414</sup> *ibid*, pp. 7-8.

### **Policy Proposal**

The Review proposes to amend the RT Act to broaden the scope in which notices may be served to a person.

#### **Proposal 144**

That section 85(1)(b) of the RT Act be amended to enable the service of notices to also be made at any other address where mail may be directed.

## 10. COMPENSATION AND PENALTY PROVISIONS

### 10.1 Previous Breaches of Agreement by Owner

#### **Stamfords' Recommendation 173**

*That section 15(4) of the Act be amended to require the court, upon application with respect to the breach of an agreement, to take into account all previous breaches of the agreement by the owner and the tenant.*

#### **Background Discussion**

The RT Act enables the Magistrates Court to award compensation to tenants and owners in instances of loss or injury (excluding personal injury) resulting from a breach of a tenancy agreement, and to a tenant as reimbursement for paying the costs of urgent repairs (subject to certain provisions).<sup>415</sup>

Upon an application with respect to the breach of an agreement, section 15(4) of the RT Act states that a magistrate shall take any previous breaches of the tenancy agreement by the tenant into account. Many respondents to Phase 1 of the Review viewed this as inequitable, arguing that any previous breaches by the owner should also be taken into account. The recommendation that breaches by both tenants and owners be taken into account provides greater equity in consideration of applications for compensation.

#### **Summary of Responses**

There were no objections from stakeholders to this recommendation.

#### **Policy Position**

The Review supports the recommendation to address the imbalance in the RT Act concerning the information that a court shall consider in breach-related applications.

#### **Proposal 145**

That section 15(4) of the RT Act be amended to require the Magistrates Court, upon application with respect to a breach of an agreement, to take into account all previous breaches of the agreement by the owner and the tenant.

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<sup>415</sup> Section 15 & 43, RT Act (WA).

## 10.2 Award for Non-Economic Loss

### **Stamfords' Recommendation 174**

*That section 15(2)(c) of the Act be amended to clearly state that a court may not make an order of compensation for non-economic loss.*

### **Background Discussion**

While not stated expressly in the RT Act, section 15(2)(c) implies that compensation may be awarded by the Magistrates Court for instances of non-economic loss caused by a breach of the tenancy agreement. The reasoning behind Stamford's recommendation to prohibit the awarding of compensation for non-economic loss includes the view that quantifying compensation for non-economic loss is very difficult, and a concern that if the availability to claim for non-economic loss was stated expressly in the RT Act, there would be a significant increase in the number of disputes between parties and in the number of applications made to the Magistrates Court.<sup>416</sup>

No other Australian jurisdiction prohibits the ability for a court/tribunal to award compensation for non-economic loss in the context of residential tenancy disputes.

### **Summary of Responses**

Tenant advocates opposed this recommendation, arguing that the losses suffered by tenants as a result of an owner breaching a tenancy agreement were more likely to be non-economic and thus, prohibiting the Magistrates Court from awarding compensation for non-economic loss would disadvantage tenants disproportionately.

In response to Stamford's opinion that determining the appropriate compensation to be awarded for non-economic loss would be extremely difficult, tenant advocate groups argued that magistrates adjudicating in the general division of the courts currently determine appropriate compensation for non-economic loss and so should have no difficulty in transferring that ability to the residential tenancies jurisdiction.

### **Policy Position**

The Review is not persuaded that the Magistrates Court's discretion to award compensation for non-economic loss should be limited by amending section 15(2)(c) of the RT Act to exclude the ability to award compensation for instances of non-economic loss.

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<sup>416</sup> Stamford's Report, p. 225.

### 10.3 Referral for Investigation

#### **Stamfords' Recommendation 175**

*That the Act be amended to state that a court (or tribunal) may, upon hearing an application made by a party under the Act, refer the case to DOCEP for investigation of a possible breach of the Act, if the court (or tribunal) is of the opinion that it is appropriate to do so.*

#### **Background Discussion**

The Stamfords' Report noted that while referrals have been made in the past, the RT Act does not require a court to refer matters concerning a possible breach of the Act to DOCEP for investigation. The Report considers it appropriate that the Act be amended to encourage courts to refer possible breaches to DOCEP, thus codifying current practice.

#### **Summary of Responses**

There were no objections to this recommendation.

#### **Policy Position**

The Review supports the recommendation to formalise current practice and proposes to amend the RT Act accordingly.

#### **Proposal 146**

That the RT Act be amended to state that a court may, separate to the determination by the court of a residential tenancy matter, refer the matter to the Commissioner for Consumer Protection for investigation of any possible breach of the RT Act.

### 10.4 Signing an Incomplete Form 4 (Joint Application for Disposal of Security Bond)

#### **Stamfords' Recommendation 176**

*That the Act prohibit, with an appropriate penalty for breach, a party to an agreement from requesting that another party sign an incomplete Form 4 (Joint Application for Disposal of Security Bond), and that Form 4 be amended to state that such a penalty applies.*

## **Background Discussion**

For many reasons, signing incomplete documents is ill advised. Signing an incomplete Form 4 (Joint Application for Disposal of Security Bond) reduces a party's ability to negotiate the return of bond money that may be owing to them and increases the opportunity for one party to dupe the other party out of the security bond. Currently there is no penalty in the RT Act for requesting that another party sign an incomplete Form 4.

## **Summary of Responses**

The only objection to this recommendation came from an industry participant. Consultation with the Building and Tenancy Industries Branch of DOCEP indicates that DOCEP has received a number of complaints from tenants about property managers requiring tenants to sign incomplete forms upon commencement of a tenancy agreement.

## **Policy Position**

The Review supports this recommendation and proposes to amend the RT Act to make it an offence for a party to request another party to sign a Joint Application for Disposal of Security Bond that is incomplete.

### **Proposal 147**

That the RT Act be amended to prohibit and make it an offence for a party to request another party to sign an incomplete Joint Application for Disposal of Security Bond, and that this prohibition be stated on the prescribed Form 4.

## **10.5 Infringement Notices**

### **Stamfords' Recommendation 177**

*That DOCEP introduce a system of infringement notices for enforcing breaches of the Act.*

## **Background Discussion**

An infringement notice system applies to minor breaches of legislation. It is an efficient and cost-effective alternative to promote compliance that retains the ability to have a matter heard in court. An infringement notice system was introduced under the RT Act in September 2006 by including the Act in a schedule of prescribed Acts in the Criminal Procedure Regulations 2005. Under the Criminal Procedure Regulations 2005, an infringement notice must be served within 21 days after the day on which the alleged offence is believed to have been committed. DOCEP's Building and Tenancy Industries Branch has expressed concern about the 21-day threshold for issuing infringement notices because it often takes several days before the Branch becomes aware of alleged breaches of the RT Act.

## **Summary of Responses**

Opposition to an infringement notice system came from tenant advocacy groups, which assumed erroneously that infringement notices issued under the RT Act would be enforceable under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (FPINE Act). It was argued that the existing penalty regime applicable under the FPINE Act is inappropriate, unduly harsh and impacts disproportionately on low socio-economic groups.

## **Policy Position**

The penalties in the RT Act operate to ensure compliance by both owners and tenants. The Review believes that an infringement notice system under the RT Act has had a positive effect on compliance by both parties to a tenancy agreement, and contributes to a more effective dispute resolution process. The one issue is the 21-day period within which infringement notices must be issued, as it seems to be too brief to be operationally practical.

Consistent with other Consumer Protection Acts like the *Motor Vehicle Dealers Act 1973* and the *Motor Vehicle Repairers Act 2003*, the Review proposes extending to six months the period within which an infringement notice can be issued after the day on which the alleged offence is believed to have been committed.

The Review also believes that a general appraisal of existing penalties under the RT Act is appropriate. Currently, the penalty levels are set for breaches committed by individuals. However, under section 40 of the *Sentencing Act 1995* (WA) a body corporate may be fined up to five times the amount set for an individual. As it is becoming more common for bodies corporate to be owners of rental properties, the Review believes it would be prudent to articulate the penalties for bodies corporate in the RT Act.

### **Proposal 148**

That the RT Act be amended to extend to six months the period within which an infringement notice can be issued after the day on which the alleged offence is believed to have been committed.

### **Proposal 149**

That the RT Act be amended to articulate the penalties applicable to bodies corporate.

### **Proposal 150**

That DOCEP undertake a general review of the level of existing penalties in the RT Act.

## 10.6 Plain English

### **Stamfords' Recommendation 178**

*That the Act be reworded in plain English.*

### **Background Discussion**

Respondents to Stamfords generally thought that the structure of the RT Act was appropriate, however, some suggested that certain provisions were difficult to understand, particularly for those that did not have a legal background. Stamfords expressed the view that rewording of the Act into plain English would improve understanding.

### **Summary of Responses**

There were no objections to this recommendation.

### **Policy Position**

The Review acknowledges the problems indicated by some respondents and supports this recommendation.

### **Proposal 151**

That, to the extent possible consistent with the drafting responsibilities of Parliamentary Counsel, the RT Act be reworded in plain English.

## 10.7 Gender Specific References

### **Stamfords' Recommendation 179**

*That the Act be amended to replace all gender specific references with gender neutral references.*

### **Background Discussion**

Currently, the RT Act contains gender-specific terms to refer to both male and female persons, however, section 10 of the *Interpretation Act 1984* (WA) states that in any written law “words denoting a gender or genders include each other gender”.

### **Summary of Responses**

There were no objections to this recommendation.

### **Policy Position**

Although the *Interpretation Act* 1984 (WA) effectively addresses the issue of gender specific references in legislation, the Review supports this recommendation and proposes that the RT Act be amended accordingly.

#### **Proposal 152**

That the RT Act be amended to replace all gender-specific references with gender-neutral references.

## **10.8 Computation of Time**

#### **Stamfords' Recommendation 180**

*That the Act be amended to simplify the computation of time in reference to notices of termination and breach.*

### **Background Discussion**

Many respondents to Phase 1 of the Review raised concern at the use of the phrases “not less than” and “not more than” in the RT Act. Confusion exists as to how the day on which a notice is delivered/received is to be counted in the timeframe. It was noted that such confusion often resulted in the dismissal of court applications because one party had failed to give sufficient notice, as required by the Act, to the other party.<sup>417</sup>

### **Summary of Responses**

There were no objections to this recommendation.

### **Policy Position**

The Review notes that in reference to the computation of time in written law, section 61(1)(f) of the *Interpretation Act* 1984 (WA) states:

“where there is a reference to a number of clear days or “at least” or “not less than” a number of days between 2 events, in calculating that number of days both the days on which the events happen shall be excluded”.

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<sup>417</sup> *ibid*, p.232.

However, the Review supports Stamfords' recommendation to simplify the computation of time and proposes to amend the RT Act accordingly.

**Proposal 153**

That the RT Act be amended to simplify the computation of time in reference to notices of termination and breach.

**10.9 Forms 1A, 1B & 1C**

**Stamfords' Recommendation 181**

*That Forms 1A, 1B and 1C be redrafted to state clearly the options available to the tenant, including the ability to make immediate application to a court to dispute the notice of termination, and the consequences of any action or inaction.*

**Background Discussion**

Forms 1A, 1B and 1C are notices of termination.<sup>418</sup> The current notices were prescribed under the RT Act in 1996. The notices advise the tenant to “*deliver up vacant possession of the premises*” on a specific date. In Phase 1 of the Review, tenant advocacy groups argued that this statement is misleading and that the forms should include information about a tenant's right to challenge the notice of termination.

**Summary of Responses**

There were no objections to this recommendation. Tenant advocacy groups, in particular, supported the recommendation to review the forms and offered to provide input into the process.

**Policy Position**

The Review supports a review of Forms 1A, 1B and 1C for the purpose of providing as much information as practicable to assist tenants and owners in their use. In addition, the recent changes to the lower courts system with the introduction of the Magistrates Court necessitates a review of Form 6 (Application for Disposal of Bond Money) and Form 12 (Application), which no longer provide sufficient information for users of the courts system.

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<sup>418</sup> Form 1A – Notice of Termination for Non-payment of Rent (with notification); form 1B – Notice of Termination for Non-payment of Rent (without notification); form 1C – Notice of Termination.

**Proposal 154**

That Forms 1A, 1B, 1C, 6 and 12 be reviewed and updated to reflect the amendments to the RT Act, to make them more comprehensible and to provide as much information as practicable to assist tenants and owners in their use.

**10.10 Notice of Intent to End a Fixed Term Tenancy**

**Stamfords' Recommendation 182**

*That a form be produced for parties to give notice of their intention to end a tenancy at the end of the fixed term, but that the Act (or the Regulations) not prescribe such a form.*

**Background Discussion**

As discussed in chapter 8.4, the RT Act does not require either the tenant or the owner to provide notice to the other party that they do not intend to continue a tenancy following the expiry of a fixed term agreement. This can result in inconvenience if one party makes an assumption that the tenancy is to automatically roll over into a periodic tenancy agreement when the other party does not intend to continue the tenancy arrangement.

As indicated in chapter 8.4, the Review proposes to amend the RT Act to require owners to give at least 30 days notice of termination of a fixed term tenancy (see Proposal 8.9).

**Summary of Responses**

There were no objections to this recommendation.

**Policy Position**

The Review supports the recommendation in relation to owners, and, in line with Proposal 8.9, proposes that DOCEP develop a form that owners may use to notify their tenants of their intention to end a tenancy agreement at the end of a fixed term period.

**Proposal 155**

That DOCEP develop a form for use by owners to notify their tenants of their intention to end the tenancy agreement at the end of a fixed term period.

## 10.11 Definition of “Agent”

### **Stamfords’ Recommendation 183**

*That the Act not be amended to provide a definition of “agent”.*

### **Background Discussion**

Owners often appoint agents, commonly called ‘property managers’, so that they do not have to deal directly with a tenant. Property managers may be responsible for such tasks as finding suitable tenants, signing tenancy agreements, issuing prescribed forms, collecting rent, carrying out property inspections, organising for maintenance or repairs to be carried out, and refunding bond money. In some situations, tenants have very little contact with owners, and communicate entirely with property managers throughout the course of a tenancy.

In the RT Act, the term ‘agent’ is defined for the purposes of section 22 (Presentation of Cases) as meaning “*any person who is not a legally qualified person*”. This definition is applicable only to section 22. The term ‘agent’ is used elsewhere in the RT Act to refer alternatively to real estate agents, persons acting on behalf of an owner, and authorised agents of the Bond Administrator. The term ‘property manager’ is not defined in the RT Act.

Property managers are often, although not always, licensed real estate agents or certificated sales representatives (with appropriate conditions on their certificates). Whether or not a property manager is required to be a real estate agent or sales representative depends upon whether they fall within the following definition of “real estate agent” under the REBA Act:

“a person whose business either alone or as part of or in connection with any other business, is to act as agent for consideration in money or money’s worth, as commission, reward or remuneration, in respect of a real estate transaction as defined by this section...”<sup>419</sup>

Real estate agents and sales representatives are also required to comply with the *Code of Conduct for Agents and Sales Representatives* (Code of Conduct). Although the REBA Act covers some property management activities, for example, leasing, letting, and the collection of rents,<sup>420</sup> the REBA Act does not expressly regulate ‘property managers’. In addition, under both the REBA Act and the Code of Conduct, there does not appear to be any provisions which regulate the conduct of real estate agents when dealing with tenants, as tenants are technically not their ‘clients’.

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<sup>419</sup> Section 4, REBA Act (WA).

<sup>420</sup> *ibid.* See definition of “real estate transaction”.

Currently, apart from a small number of tenant-offences, the majority of offences under the RT Act are owner-offences. In addition, the following two offences apply to real estate agents:

- (1) the demand or receipt of a fee, charge or reward by a real estate agent for services in connection with the letting of a residential premises (other than a letting fee, the amount of which is specified), or the renewal, extension or continuation of a tenancy where a further right of occupancy is granted to the same tenant upon expiration of the term of the tenancy (section 86(1) – penalty \$500); and
- (2) the failure of a real estate agent to dispose of the security bond in the manner specified (in Schedule 1, Part C, clause 7(1)) within the period (if any) specified in the application or court order, or, where no period is specified, as soon as practicable and not later than 7 days after receipt of the application or copy of the court order (Schedule 1, Part C, clause 7(2) – penalty \$1,000).

It is understood that if an owner's agent, or property manager, does not carry out tenancy management activities in accordance with the RT Act, liability ultimately rests with the owner. A tenant may file an RT Act application at the Magistrates Court claiming that an owner has breached the tenancy agreement, or DOCEP may consider prosecuting an owner for committing an offence against the RT Act. There is potential for an owner to be found in breach of the tenancy agreement, or guilty of committing an offence, even though the conduct in question was performed by their agent/property manager without their knowledge or consent. In these cases, an owner has recourse against their agent/property manager by commencing a civil action for breach of contract (assuming that there is an agency contract between the owner and the agent). However, some owners, particularly small-scale "mum and dad" investors, may find these civil proceedings too complex, costly, and time-consuming to commence.

Feedback from DOCEP's Building and Tenancy Industries Branch indicates that a considerable number of complaints from both tenants and owners relate to the conduct of property managers, some of whom are also licensed real estate agents or registered sales representatives. Complaints from tenants about property managers range from matters such as property condition reports being filled out incorrectly; being asked to sign a blank Joint Application for Disposal of Security Bond (Form 4) (see Part 10.4 where it is proposed that this conduct constitute an offence under the RT Act); incorrectly issuing breach notices for rent arrears, when in fact the breach relates to a non-rent related issue; and to very serious matters of changing locks and taking possession of a property without a court order (in some cases, with an owner's consent, and in other cases, without an owner's knowledge).

Currently, DOCEP's Building and Tenancy Industries Branch refers matters concerning real estate agents and sales representatives to the Real Estate Branch (and ultimately REBA) for conciliation or investigation. Discussion with the Registrar of REBA, however, indicates that REBA has no jurisdiction over the conduct of these agents/representatives towards tenants, as tenants are not clients or principals of those agents/representatives.<sup>421</sup>

Therefore, REBA's ability to discipline agents/representatives is limited to offences contained in the REBA Act and Code of Conduct, which in turn do not encompass all the activities associated with tenancy management.

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<sup>421</sup> Discussion with Mr Bob Rossi, Registrar, REBA, on 10 Feb 2005.

## **Summary of Responses**

In its submission, REIWA expressed the view that an ‘agent’ was a person registered under the *Real Estate and Business Agents Act 1978*.<sup>422</sup> MIDLAS submitted that a definition of agent in the RT Act would be appropriate.<sup>423</sup> Other respondents expressed no opposition to the Stamfords recommendation not to define the term ‘agent’.

## **Policy Position**

The Stamfords Report formed a conclusion that it was not the role of the RT Act to provide a regulatory framework for agents, since this was provided by the REBA Act.<sup>424</sup> In further researching and consulting on this issue, however, the Review has become aware that there is a potential ‘loophole’ for the conduct of owners’ agents, or property managers, to avoid scrutiny or consequences. This is due to the fact that neither the RT Act, nor the REBA Act, defines ‘owner’s agent’<sup>425</sup> or ‘property manager’, or provides for a comprehensive series of offences for these entities.

Owners’ agents/property managers play a significant role in matters regulated by the RT Act, and their conduct can impact adversely upon both tenants and owners. Situations may arise where a tenant’s basic rights under the RT Act are infringed by a property manager, and the relevant conduct has occurred without the owner’s knowledge or consent. Given the significant role played by owners’ agents/property managers and the lack of comprehensive regulation of these parties, the Review proposes to amend the RT Act to formally recognise their role. Further, it is proposed to amend the RT Act so that both owners and property managers can be held separately liable for any relevant breaches of the RT Act. In circumstances where both an owner and their agent/property manager are prosecuted by DOCEP, and a court is to determine which defendant has breached the RT Act, it should be an adequate defence that one defendant did not have knowledge of, or consent to, the conduct of the other defendant.

The Review believes that these amendments are likely to assist with anticipated tenancy reform arising from the post-consultation report of the Residential Tenancy Databases Working Party (see chapter 6.2 for further discussion). Tenant advocacy groups have advised the Working Party that the listing practices of owners, owners’ agents and real estate agents have operated to the detriment of tenants. In the event that ‘owners’ agents’ and ‘property managers’ are expressly regulated in the RT Act, listing-practice offences can be linked to these entities in the RT Act.

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<sup>422</sup> REIWA, *Submission to the Review of the RT Act*, Dec 2002, p. 34.

<sup>423</sup> MIDLAS, *Submission to the Review of the RT Act*, Dec 2002, p. 16.

<sup>424</sup> Page 234.

<sup>425</sup> Apart from section 22 of the RT Act (WA) which relates only to court representation.

**Proposal 156**

That the RT Act be amended to define ‘owner’s agent’ and ‘property manager’ (or such other terms as appropriate), and to create relevant offences arising from the conduct of these entities.

**Proposal 157**

That the RT Act be amended to enable both owners and owners’ agents/property managers to be held separately liable for any relevant breaches of the RT Act.

**Proposal 158**

That the RT Act be amended to provide a defence in a joint prosecution of an owner and their agent/property manager, where one defendant did not have knowledge of, or consent to, the conduct of the other defendant giving rise to the offence.

## **11. APPENDICES**

**Appendix A: RT Act Review – Phase 2 – List of Submitters**

**Appendix B: Bibliography**





**Department of Consumer  
and Employment Protection**  
Government of Western Australia

### **Consumer Protection**

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Admin: 9282 0777

Facsimilie: 9282 0850

Email: [consumer@docep.wa.gov.au](mailto:consumer@docep.wa.gov.au)

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PO Box 10154, Kalgoorlie WA 6433

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#### **Great Southern**

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PO Box 832, Albany WA 6330

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#### **Kimberley**

Shop 24 Kununurra Shopping Centre 64 Konkerberry Dve, Kununurra

PO Box 1104, Kununurra WA 6743

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#### **North West**

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