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Submission on the draft Boarding Houses Bill 2012

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The Tenants' Union of NSW (TU) is the State's peak non-government organisation for persons living in rental housing. We are a specialist community legal centre with our own legal practice in residential tenancies law, and are the primary resource body for the State-wide network of local Tenants Advice and Advocacy Services (TAASs).

The TU has been at the forefront of the long campaign to reform the boarding house sector and other forms of marginal renting.

We were the first agency in New South Wales to identify the Australian Capital Territory's occupancy agreements legislation as an appropriate model for law reform in New South Wales, and have advocated for its adoption here since 2005.

In March 2011, we launched the Reforming Marginal Renting campaign with a four-point plan of reform, comprising occupancy agreements reform, a boarding houses register, measures for improved boarding house viability and social inclusion, and reform of the licensed residential centres (LRCs).

In our submission to the 2011 Parliamentary Inquiry into international students accommodation, we developed a registration and accreditation regime for boarding houses and other residential services.

The present submission is made on our own behalf, and on behalf of the TAAS network. The case studies presented are real cases from the network and our own practice (identifiers have been removed to maintain confidentiality).

During the consultation process, we communicated with the TAASs, other NGO stakeholders including People With Disability Australia (PWD) and, through Newtown Neighbourhood Centre, with a number of boarding house residents. These communications have helped inform the present submission. We support the submission made by PWD, particularly as it relates to Chapter 4 of the draft Bill ('residential centres for vulnerable persons'). Our own submission is focused on Chapters 1, 2 and 3 of the draft Bill.

Overview

The draft Bill is a welcome measure of long-overdue law reform for the boarding house sector in New South Wales.

The scope of the reform it seeks to achieve is, however, limited, and there are certain deficiencies in its provisions.

These limitations and deficiencies may come from the basic approach of the draft Bill, which appears to us to start from the regulation of the LRCs by NSW Ageing, Disability and Home Care (ADHC), then take a step further in the direction of the unlicensed boarding houses. The form of the draft Bill reflects this approach: it is basically a new *Youth and Community Services Act 1973* (YACS Act), with certain of the defects in that Act repaired, and new functions added on.

These repairs and new functions are important. In particular, the new boarding houses register, and the new provisions for occupancy agreements, are important advances in the regulation of unlicensed boarding houses.

However, it leaves uncovered the numerous classes of marginal renters who do not reside in 'registrable boarding houses', as defined in the draft Bill, and as a result these renters would continue to have only common law lodging licences, and no straightforward access to effective dispute resolution. Furthermore, proprietors may try to exploit the exclusions from the draft Bill to avoid coverage: there is one exclusion, in particular, that could be exploited by virtually any proprietor and, if implemented, could be fatal to the reform of the boarding house sector.

Where the draft Bill does apply, it would also leave unaddressed a number of problems: in particular, problems relating to bonds, utility charges and penalty terms are commonly encountered within unlicensed boarding houses, if not LRCs.

The approach of the draft Bill also means that it does not realise the full potential of occupancy agreements to contribute to better outcomes in the boarding house sector. In particular, the draft Bill fails to ensure that the occupancy principles it sets out are properly reflected in occupancy agreements; provides for inadequate remedies in the event of a dispute; and neglects to include any penalties or other enforcement measures. (Instead of residents asserting contractual rights, the draft Bill would rely on the issuing of 'guidelines' by a regulator as to what constitutes compliance with the occupancy principles.) The occupancy principles themselves are mostly sound and fair, though there are some aspects that should be improved.

Finally, because it so largely proceeds from ADHC's regulation of the LRCs, the draft Bill replicates a basic problem with the definition of LRCs in the provisions relating to residential centres for vulnerable persons.

Each of these limitations and deficiencies can be corrected within the current structure of the draft Bill. We make recommendations along these lines throughout the present submission. Our recommendations are directed at making the draft Bill a sound, fair and successful piece of law reform for the boarding house sector and the people who live in it.

Summary of recommendations

Of all the recommendations we make in this submission, we highlight the following five as being the most important, in terms of either addressing current problems in the marginal rental sector (1 and 2) or making the draft Bill's regulatory scheme work optimally (3, 4 and 5).

1. Wider application of Chapter 3 (Occupancy principles) to other marginal renters.

The draft Bill's occupancy principles would benefit a wide range of marginal renters who are currently excluded from residential tenancies legislation and subject to the inadequate provisions of the common law of lodging. Chapter 3 of the draft Bill (and only Chapter 3) should apply wherever a person is granted, for value, a right to occupy premises for a residential purpose for a term or period and the agreement is not otherwise subject to residential tenancies legislation.

2. An occupancy principle about bonds and other security deposits.

Boarding house residents often pay significant amounts of money in bonds and other security deposits, and often have problems getting their money back. There should be an occupancy principle that limits the total amount of security that may be required to two weeks' occupation fee, and requires that all bonds and security deposits be lodged with the Rental Bond Board.

3. Provisions to make occupancy agreements effective.

Occupancy agreements should give effect to the occupancy principles, and in the event of a breach residents should have the usual contractual remedies, including compensation for any loss suffered. Some of the occupancy principles should also be backed up by penalties.

4. Close the residential tenancy agreement loophole.

The definitions of both Tier 1 and Tier 2 boarding houses excludes premises subject to a residential tenancy agreement. This is a loophole that may be fatal to the draft Bill's regulatory scheme. The draft Bill should instead provide that Chapter 3 does not apply to residential tenancy agreements.

5. Consumer protection through the Boarding Houses Register.

The Register should give the name of a boarding house proprietor and details of any disciplinary action taken against them – the same level of information provided by the Government Licensing Service to consumers in relation to tradespersons and other licensees.

Listed below are summarised all of our recommendations.

Recommendations – Chapter 1

- *Clause 4*. In the definition of 'premises', specify that premises may include a complex of related dwellings.

- *Clause 4.* In the definition of 'boarding premises', delete the qualification '(but not the whole of the house, hostel or other premises)' and insert instead '(but where the proprietor provides attendance or services which require the proprietor or the proprietor's employees to exercise access to and use of the premises)'.

- *Clause 5(2).* Delete and insert instead 'Boarding premises are a Tier 1 boarding house if the premises provide accommodation, for a fee or reward, where two or more residents are to share a bedroom (any one of whom occupies by a separate agreement with the proprietor), or where the premises may be occupied by five or more residents (any one of whom occupies by a separate agreement with the proprietor)'.

- *Clause 5(3)(b)*. Delete subclause (3)(b). Insert instead in Chapter 3 a provision to the effect that the provisions relating to occupancy principles do not apply to agreements that are subject to the *Residential Tenancies Act 2010* or the *Landlord and Tenant (Amendment) Act 1948*.

Recommendations – Chapter 2

- *Chapter 2*. Insert a new clause, providing for a power of entry to 'authorised service providers', per cl 76, in relation to all registrable boarding houses.

- *Clause 14(1)(a)*. At the beginning of subclause (1)(a), insert 'the name of the proprietor'.

- *Clause 14(1)*. Insert after (1)(b) a new subclause (1)(c), 'whether any disciplinary action or successful prosecution has been taken against the proprietor', and renumber existing subclause (1)(c).

- *Clause 19*. Delete cl 19(3)(a) and insert a new subclause (1)(a), 'Subsection (1) does not require notice to be given to a proprietor or manager if entry to the premises is made with the consent of the proprietor or manager.'

- *Clause 19*. Insert a new subclause, 'Before a person authorised to enter premises under this Part does so, the council must take reasonable steps to inform the residents of the premises of the intention to enter the premises. Reasonable steps include leaving a written notice with a resident at the premises, or in residents' mailboxes.'

Recommendations – Chapter 3

- *Part 1*. Insert a new clause, 'This Chapter applies where a person is granted, for value, a right to occupy premises for a residential purpose for a term or period and the agreement is not otherwise subject to the *Residential Tenancies Act 2010*, the *Residential Parks Act 1998*, the *Retirement Villages Act 1999* or the *Landlord and Tenant (Amendment) Act 1948*.'

- *Clause 28(1).* Insert a subclause, 'The Commissioner may approve more than one standard form of occupancy agreement, and may specify that a standard form of occupancy agreement applies in relation to a specified class of premises or persons.'

- *Clause 28(3).* Delete and insert instead 'Where a standard form of occupancy agreement is approved, it must be used and will be taken to be used (but not where it is specified to apply to another class of premises or persons).'

- *Clause 29(2).* Insert after 'any such agreement', 'must give effect to, and will be taken to give effect to, the occupancy principles, and'….

- *Clause 29(2)*. Insert at the end of the subclause, 'Maximum penalty: 20 penalty units'.

- *Clause 30(4)*. Delete the words 'if his or her residency continues for longer than 6 weeks'. Insert at the end of the subclause, 'Maximum penalty: 20 penalty units.'

- *Clause 30(5)*. Insert at the end of the subclause, 'Maximum penalty: 50 penalty units.'

- *Clause 30(6)*. Insert after 'purposes', 'upon giving the resident reasonable notice (although no notice is required in the event of an emergency)'.

- *Clause 30(7)*. Insert after 'premises', 'and for the increase to be not excessive to the general market level of fees for similar premises.

- *Clause 30(9)*. Insert at the end of the subclause, 'Maximum penalty: 50 penalty units.'

- *Clause 30(11)*. Insert at the end of the subclause, 'Maximum penalty: 20 penalty units.'

- *Clause 30*. Insert a new subclause, 'A proprietor may require payment of a bond or other security deposit, provided the total amount of the security does

not exceed two weeks' occupation fee, and the amount is lodged with the Rental Bond Board.' Insert at the end of the subclause, 'Maximum penalty: 20 penalty units.'

- *Clause 30*. Insert new subclause, 'A proprietor is entitled to charge for use of a utility, provided that the resident knows before entering the agreement that charges are payable, and the amount charged is determined according to the cost to the proprietor of providing the utility and a reasonable measure or estimate of the resident's use of the utility.'

- *Clause 30*. Insert new subclause, 'A resident is not liable to pay a penalty or fee for breach of any term of the agreement or any of the rules of the premises.'

- *Clause 31(5)*. Delete the subclause.

Recommendations – Chapter 4

- *Clause 33*. Insert '***personal care service*** means a service addressed to the support needs of a vulnerable person, and includes the administration of medication to a resident, the management of a resident's finances, and such other services as may be prescribed.

- *Clause 35(1)(a)*. Delete and insert instead 'boarding premises that provide accommodation and a personal care service, for a fee or reward, to two or more residents'.

- *Clause 35(2)(a)*. Delete the subclause.

- *In other respects*, the TU support the submission of PWD in relation to Chapter 4 of the draft Bill.

Recommendations – Chapter 5

- *Schedule 2*. Insert a clause amending s 157 of the Residential Tenancies Act 2010:
    - ***Landlord*** … and includes a proprietor under the Boarding Houses Act;
    - ***Residential premises*** … and includes a registrable boarding house under the Boarding Houses Act;
    - ***Residential tenancy agreement*** … and includes an occupancy agreement under the Boarding Houses Act;
    - ***Tenant*** … and includes an occupant or proposed occupant within the meaning of the Boarding Houses Act.

- *Schedule 2*. Insert a clause amending s 159(1) of the Residential Tenancies Act 2010, and insert after '4 weeks rent', '(or, in the case of a resident of a registrable boarding house, an amount not exceeding 2 weeks occupation fee)'.

- *Schedule 2*. Insert a clause amending s 209 of the Residential Tenancies Act:
    - ***Landlord*** … and includes a proprietor under the Boarding Houses Act;

- ***Residential premises*** … and includes a registrable boarding house under the Boarding Houses Act;
- ***Residential tenancy agreement*** … and includes an occupancy agreement under the Boarding Houses Act;
- ***Tenant*** … and includes an occupant or proposed occupant within the meaning of the Boarding Houses Act.

Chapter 1 – Definitions and coverage

The draft Bill would establish a two-tier regulatory scheme for 'registrable boarding houses' (cl 5): a 'Tier 1 boarding house' being an unlicensed boarding houses that provides accommodation for five persons or more; and a 'Tier 2 boarding house' being a 'residential centre for vulnerable persons.' The definition of 'registrable boarding houses proceeds from definitions, also provided in the draft Bill, of 'premises' and 'boarding premises' (cl 4).

We discuss the definitions of 'premises', 'boarding premises' and 'Tier 1 boarding house' below; the definition of a Tier 2 boarding house we discuss in our comments on Chapter 4 – 'residential centres for vulnerable persons'.

Before that, however, we make this submission about the general scheme of the draft Bill: the provisions relating to occupancy principles (Chapter 3 of the draft Bill) should not apply only to registrable boarding houses. We submit that Chapter 3 should have wider coverage, and instead apply wherever a person is granted, for value, a right to occupy premises for a residential purpose for a term or period and the agreement is not otherwise subject to the *Residential Tenancies Act 2010* (the RT Act), the *Residential Parks Act 1998* (the RP Act), the *Retirement Villages Act 1999* (the RV Act) or the *Landlord and Tenant (Amendment) Act 1948* (the LTA Act).

This would mean that lodgers in private residences, residents of shared households (where excluded from the RT Act by s 10 of that Act), residents of refuges and crisis accommodation, students in residential colleges and halls of residence, and other marginal renters would have occupancy agreements subject to the occupancy principles, and have access to dispute resolution by the Consumer, Trader and Tenancy Tribunal, as provided by Chapter 3 of the draft Bill. The other provisions of the draft Bill would not apply to them, and the premises they live in would not be registrable boarding houses for the purposes of the other provisions of the draft Bill.

We discuss the need for a wider application of the draft Bill's occupancy principles, with reference to case studies from the TAASs, in our comments on Chapter 3.

All of our discussion of, and recommendations about, the definitions relating to registrable boarding houses are made subject to this submission about the application of Chapter 3 of the draft Bill.

'Premises' and 'boarding premises'

The definition of 'premises' at cl 4 is inclusive and appropriately broad. We submit that it may be useful to specify that premises may include a complex of related buildings: we are aware of one boarding house currently operating as an LRC that comprises a number of small buildings.

Recommendation

- *Clause 4*. In the definition of 'premises', specify that premises may include a complex of related dwellings.

The definition of 'boarding premises' states that these are premises 'at which residents are entitled to occupy one or more rooms (but not the whole of the house, hostel or other premises) as their principal place of residence'. This definition does not exactly reflect the relevant common law definition, under which it is possible to have premises let in lodgings where each occupant is entitled to occupy all of the rooms: for example, premises with a dormitory-style bedroom and shared kitchen, bath and laundry rooms.

We submit that the definition of 'boarding premises' should reflect the common law definition of a lodger, as stated in *Commissioner for Fair Trading v Voulon & Ors* [2005] WASC 229 (27 October 2005). There the Supreme Court of Western Australia, drawing on earlier definitions by the Supreme Court of South Australia and the British House of Lords, held that an 'occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises' (*Commissioner for Fair Trading v Voulon & Ors* [2005] WASC 229 (27 October 2005); see also *Noblett & Mansfield v Manley* [1952] SASR 155 and *Street v Mountford* [1985] 2 AC 809). Accordingly, we submit that the qualification in parenthesis be replaced with '(but where the proprietor provides attendance or services which require the proprietor or the proprietor's employees to exercise access to and use of the premises)'.

Recommendation

- *Clause 4.* In the definition of 'boarding premises', delete the qualification '(but not the whole of the house, hostel or other premises)' and insert instead '(but where the proprietor provides attendance or services which require the proprietor or the proprietor's employees to exercise access to and use of the premises)'.

Tier 1 boarding houses

In relation to Tier 1 boarding houses, we have concerns about the exclusion of premises that provide beds for use by fewer than five residents (cl 5(2)), and about one of the specific exclusions at cl 5(3).

The Position Paper states that the intention of the five-resident threshold is to target operations where there may be a degree of risk or disadvantage to residents, particularly where they share a bedroom, while avoiding 'family type operations or very small operators'. These small operators may still present a risk to residents: see, for example, our case study below, or the case currently proceeding in the District Court, in which a couple are accused of unlawfully detaining and assaulting two boarders[1].

Case study: small boarding premises

M is a student who lodges in a house owned and occupied by the landlord and his family. Another lodger, N, who is a pensioner, also lives in house.

When the landlord asked M to pay electricity and water charges, M declined, because neither charge was provided for in the written agreement drafted by the landlord. The landlord then taped over the power points in the lodgers' part of the premises, and disconnected the washing machine from the water. Late at night the landlord attended M's room and threatened to kick him out, then called the police to evict M.

We submit that the five-resident threshold, by itself, is not the best way of targeting risky operations. We agree that the sharing of bedrooms by residents who are not related is an indicator that the residents are at risk of disadvantage or exploitation. Where this occurs, each resident typically occupies under a separate agreement or separate grant by the proprietor. We submit that this should be reflected expressly in the definition of Tier 1 boarding house.

We are also concerned that some proprietors may be tempted to avoid coverage by attempting to contrive arrangements to get their premises below the threshold: for example, by claiming that each storey in a multistorey building, or each small building in a complex of buildings, is separate 'premises'. We note also that the proviso that residents who are 'managers' are not counted towards the threshold might also tempt some proprietors to contrive to avoid coverage (by nominally appointing a resident a manager and giving them day-to-day tasks); so might the use in the definition of the term 'beds'. While these contrivances would probably not be successful as a matter of law, the mere attempt could put residents at a disadvantage and be burdensome for regulators to dispute or prosecute.

We submit that the definition at cl 5(2) should provide that boarding premises are a Tier 1 boarding house if the premises provide accommodation, for a fee or reward, where three or more residents are to share a bedroom (any one of whom occupies by a separate agreement with the proprietor), or where the premises may be occupied by five or more residents (any one of whom occupies by a separate agreement with the proprietor).

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[1] http://www.smh.com.au/nsw/couple-kept-boarders-as-slaves-court-told-20120802-23han.html

Recommendation

- *Clause 5(2).* Delete and insert instead 'Boarding premises are a Tier 1 boarding house if the premises provide accommodation, for a fee or reward, where two or more residents are to share a bedroom (any one of whom has a separate agreement with the proprietor), or where the premises may be occupied by five or more residents (any one of whom has a separate agreement with the proprietor)'.

The exclusion at cl 5(3)(b) is a potentially fatal defect in the draft Bill's regulatory scheme. Many premises let in lodgings to international students are subject to a residential tenancy agreement between the owner of the premises and a head-tenant (and it is the head-tenant who lets the premises in lodgings, often without the knowledge of the owner). Clause 5(3)(b) would exclude these premises from the provisions of the draft Bill. We understand from the State Government's response to the Parliamentary Inquiry into international students accommodation that it intends that such premises should be covered by the draft Bill.

The exclusion could also be exploited by boarding house proprietors to avoid coverage by the provisions of the draft Bill. A proprietor could grant a residential tenancy agreement for the premises to an associated person or company, or transfer ownership of the premises to a company that then grants a residential tenancy agreement to the proprietor, who then lets the premises in lodgings to residents. Such an arrangement would make the premises subject to a residential tenancy agreement and hence excluded from coverage by the draft Bill.

Finally, we note that there are some boarding houses where some residents (as opposed to a head-tenant) have agreements under the RT Act, or even the LTA Act. We submit that there is no good reason why these boarding houses should not be registered, inspected and otherwise subject to the regulatory regime of the draft Bill. The status of residents' agreements under those other Acts could be maintained by providing in the draft Bill that the provisions relating to occupancy principles (Chapter 3) do not apply to agreements that are subject to either the RT Act or the LTA Act.

We submit that clause 5(3)(b) should be deleted, and a provision inserted in Chapter 3 to the effect that Chapter 3 does not apply to agreements under the RT Act or the LTA Act.

Recommendation

- *Clause 5(3)(b)*. Delete subclause (3)(b). Insert instead in Chapter 3 a provision to the effect that the provisions relating to occupancy principles do not apply to agreements that are subject to the *Residential Tenancies Act 2010* or the *Landlord and Tenant (Amendment) Act 1948*.

Chapter 2 – The Register of Boarding Houses

The draft Bill would establish a new Register of Boarding Houses, to be maintained by NSW Fair Trading. All registrable boarding houses would be required to register, and the register would be publicly accessible. This would enable a person – whether they be a prospective resident, or a concerned neighbour – to check if premises are registered as a boarding house, and thereby gain an indication as to the lawfulness or otherwise of the business. Registration would also initiate a compliance investigation by the local council.

The Register

We strongly support the establishment of the Register. It would afford a measure of consumer protection to prospective residents, be useful to concerned neighbours, and help inform the State Government about the boarding house sector for the better development of policy. We submit that the administration of the Register could also be developed into an information point or 'one-stop shop' for boarding house proprietors about other programs of the State Government that may be of benefit to them, such as the land tax exemption administered by the Office of State Revenue and the Boarding House Financial Assistance Program administered by the Centre for Affordable Housing.

We submit that the consumer protection function of the Register should be strengthened by providing, at cl 14(1), for the publication of certain further information. In its present terms, cl 14(1) does not require the publication of the name of the proprietor; we submit that it should. It should also require the publication of any disciplinary actions or successful prosecutions taken against the proprietor.

This would mean that the Register would make available to members of the public the same sort of information as the Government Licensing Service makes available about various licence holders, such as tradespersons, and so offer a similar level of consumer protection.

Recommendations

- *Clause 14(1)(a)*. At the beginning of subclause (1)(a), insert 'the name of the proprietor'.
- *Clause 14(1)*. Insert after (1)(b) a new subclause (1)(c), 'whether any disciplinary action or successful prosecution has been taken against the proprietor', and renumber existing subclause (1)(c).

Inspections

We generally support the powers and obligations given by the draft Bill to local councils for the conduct of inspections of boarding houses. We submit, however, that the requirement that the inspector give notice to the proprietor or manager should be extended to require that the inspector also notify the residents of the boarding house. It should not be assumed that a proprietor or manager will always notify residents of a pending inspection by the local council. A separate notice to residents will help avoid alarm and possible conflict as inspectors enter residents' rooms.

Recommendations

- *Clause 19*. Delete cl 19(3)(a) and insert a new subclause (1)(a), 'Subsection (1) does not require notice to be given to a proprietor or manager if entry to the premises is made with the consent of the proprietor or manager.'
- *Clause 19*. Insert a new subclause, 'Before a person authorised to enter premises under this Part does so, the council must take reasonable steps to inform the residents of the premises of the intention to enter the premises. Reasonable steps include leaving a written notice with a resident at the premises, or in residents' mailboxes.'

Finally, we submit that provision should be made in Chapter 2 for giving a power of entry to 'authorised service providers', per cl 76, in relation to all registrable boarding houses (not Tier 2 boarding houses only, as the draft Bill currently provides). This is to recognise the fact that vulnerable persons currently do live in unlicensed boarding houses – and will continue to do so, under the draft Bill's regulatory regime. The draft Bill should ensure that these residents can find out about and avail themselves of support from outside agencies. We discuss this issue in more detail in our comments on Chapter 4.

Recommendation

- *Chapter 2*. Insert a new clause, providing for a power of entry to 'authorised service providers', per cl 76, in relation to all registrable boarding houses.

Chapter 3 – Occupancy Principles

The TU is a strong proponent of the occupancy agreements model of law reform for boarding houses and other forms of marginal rental accommodation.

It may be useful to set out here the fundamental difference between the occupancy agreements model, and what might be called the residential tenancy agreements model (as represented by the RT Act – and indeed the RP Act – and the Residential Tenancies Acts of each of the other States and Territories).

Under the residential tenancy agreements model, almost all of the details of tenancy agreements are prescribed: terms, notice periods for rent increases and terminations, and grounds for termination. As a result, tenancy agreements are – except for the rent charged – much the same as one another.

By contrast, under the occupancy agreements model, occupancy agreements may be quite different from one another. This is because relatively few details are prescribed; instead, occupancy agreements legislation sets out broader principles – 'occupancy principles' – with which agreements must comply. This means proprietors have more flexibility when they draft their agreements, and can set terms, notice periods and other details that are appropriate to the type of accommodation they offer.

These details are left up to proprietors – but they have to be consistent with the occupancy principles. Also, to be clear: these are details that proprietors *must* come up with when they draft their agreements. An occupancy agreement should not merely repeat, verbatim, the occupancy principles; in fact, it is difficult to see how some of the principles, without any further detail added, could actually work as contractual terms. For example, it would make little sense to have as a contractual term, 'the resident is entitled to know the rules of the premises before moving in to the premises' (cl 30(3)) without anything further: the agreement should instead actually set out the rules. Similarly, 'the resident is entitled to know why and how the occupancy may be terminated, including how much notice will be given before eviction' (cl 30(8)) makes little sense as a contractual term without anything further: the agreement should instead set out the circumstances in which it may be terminated (the 'why' and 'how' of termination), and the relevant notice periods.

The occupancy agreements model, therefore, would require boarding house proprietors to do what they say they need to be able to do – set the details of their agreements themselves – within the broad confines of some basic occupancy principles.

We envisage that in doing so, boarding house proprietors might collaborate with one another, and with other stakeholders, to draft agreements that are consistent with the occupancy principles; and further, out of this collaboration, there might develop a sense of 'best practice' that could be reflected in a standard form of agreement prescribed by a Regulation.

Coverage

As we stated in our discussion of Chapter 1 of the draft Bill, we submit that the provisions relating to occupancy principles should not apply to registrable boarding houses only.

As discussed above, the distinguishing feature of the occupancy agreements model of law reform is the broad, non-prescriptive nature of the occupancy principles, which can be applied flexibly to a range of different types of accommodation services. This is the case in the Australian Capital Territory, where the occupancy principles apply to agreements in boarding houses, lodgings in private residences, supported accommodation, residential parks, student accommodation and other forms of rental accommodation not otherwise covered by residential tenancies legislation there.

We submit that Chapter 3 (and only Chapter 3) of the draft Bill should apply wherever a person is granted, for value, a right to occupy premises for a residential purpose for a term or period and the agreement is not otherwise subject to the RT Act, the RP Act, the RV Act or the LTA Act.

We submit that there should be a provision inserted at the start of Chapter 3 to this effect. We therefore also submit that the meaning of 'occupancy agreement' at cl 27(1) should be amended to provide that an occupancy agreement is a written or unwritten agreement under which the proprietor of premises (whether or not registrable boarding premises), or a person acting on behalf of the proprietor, grants for value to a resident, or a person acting on behalf of a resident, the right to occupy the premises for a residential purpose for a term or period and the agreement is not otherwise subject to the RT Act, the RP Act, the RV Act or the LTA Act.

Case study: small lodging houses

W is an international student who lived in a lodging house with three other students. On being asked to leave by the owner, W requested the return of his $300 bond. The owner demanded first that W pay $105 for an electricity bill. W did so, though he disputed that he was liable to pay it; the owner did not give him a receipt, nor did he return the bond.

W applies to the Tribunal for an order for the return of his bond and the electricity charge, but the Tribunal find that W is a lodger and dismisses W's application.

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Case study: share housing

R lives in a share house with three other persons, one of whom, S, is the head-tenant under a residential tenancy agreement with the owner of the premises. Neither R nor the other two occupants have a written agreement with S, so they are excluded from the RT Act.

R and the other occupants have each paid a bond of four weeks' rent, and has paid rent as due to S. Unfortunately, S has spent their rent money on his recent holiday in Queensland and is now in arrears. R makes a rent payment directly to the owner's agent; S, upset, tells R that he has to leave. Now a termination notice arrives for S from the owner, who wants vacant possession of the premises.

R cannot prevent the termination of the head-tenancy, and if he wants to get his overpaid rent and bond returned, he must go to the Local Court. This is impractical; he has effectively lost his money.

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Case study: hotels and motels

Hunter TAAS has numerous clients who reside at a hotel in Newcastle. Some are long-term residents; other are there under temporary accommodation arrangements made by Housing NSW. The hotel appears to serve very few travelers or holiday-makers; it is really a boarding house by another name.

Residents pay rent weekly; if they are late they are locked out of their rooms. Because the premises are a hotel, they are excluded from the RT Act.

Recommendation

- *Part 1*. Insert a new clause, 'This Chapter applies where a person is granted, for value, a right to occupy premises for a residential purpose for a term or period and the agreement is not otherwise subject to the *Residential Tenancies Act 2010*, the *Residential Parks Act 1998*, the *Retirement Villages Act 1999* or the *Landlord and Tenant (Amendment) Act 1948*.'

Standard form of occupancy agreement

We support making provision for a prescribed standard form of occupancy agreement. Standard forms of agreement help make rights and obligations clear, for the benefit of both parties. Currently, some boarding house residents do not get a written agreement at all; some others may get an overly complicated agreement (see, for example, the nine-page Agreement 3 in the Appendix).

However, we submit that there should be provision for more than one prescribed standard form of occupancy agreement, such that different types of accommodation may be subject to different and specific standard forms of occupancy agreement. There might be, for example, a standard form of occupancy agreement for Tier 1 boarding houses, another for Tier 2 boarding houses and, if the draft Bill is amended as recommended to give Chapter 3 wider coverage, yet another standard form of occupancy agreement for refuges or crisis accommodation.

Recommendation

- *Clause 28(1).* Insert a subclause, 'The Commissioner may approve standard forms of occupancy agreements, and may specify that a standard form of occupancy agreement applies in relation to a specified class of premises or persons.'

We submit that standard forms of occupancy agreement should be developed in consultation with proprietors, residents and residents' advocates and be 'road-tested' prior to prescription by regulation. Once prescribed, use of the standard form of occupancy agreement should be mandatory, and provision should be made such that an agreement not in the standard form of occupancy agreement for the relevant type of accommodation is taken to have the effect of the standard form.

Recommendation

- *Clause 28(3).* Delete and insert instead 'Where a standard form of occupancy agreement is approved, it must be used and will be taken to be used (but not where it is specified to apply to another class of premises or persons).'

Occupancy principles and occupancy agreements

We are concerned at the relation, as provided by the draft Bill, between occupancy principles and occupancy agreements. The draft Bill provides that residents are 'entitled to be provided with accommodation in compliance with the occupancy principles' (cl 29(1)); this raises the question of the legal nature of the entitlement. It appears to us that the draft Bill stops short of making the entitlement contractual, instead making it merely statutory. Clause 29(2) prevents contracting out of the occupancy principles, such that any agreement to the contrary 'has no effect to the extent of any inconsistency with the occupancy principles'; but this is not the same as requiring an agreement to positively reflect the occupancy principles.

For example, a proprietor could draft an occupancy agreement in the barest terms of a common law lodging licence: 'John Jones has a right to occupy 10 Smith Street as lodgings for $100 per week.' Such an agreement includes no terms relating to the cleanliness, state of repair or security of the premises (cl 30(2)) or other any matters addressed by the occupancy principles – but nor does it include any terms contrary to the occupancy principles, so it is not invalid for inconsistency. John Jones would be entitled to premises in a reasonable state of repair, but not as a matter of contractual entitlement, and only as a matter of statutory entitlement. If the premises are in bad repair, there would be a breach of the occupancy principle at cl 30(2), but no breach of contract, and the resident's remedies would by those provided by the draft Bill, rather than those available at law generally for breach of contract.

This distinction is important, because the remedies afforded by the draft Bill are severely limited. Clause 31(5) expressly declines to grant the Tribunal power to make orders for damages or compensation. This is, with respect, bizarre; we note also that there is no justification given for it in the Position Paper.

By not ensuring that the occupancy principles are given effect in the terms of occupancy agreements, and by not ensuring that the remedy of compensation is available where breach results in loss, the draft Bill risks reducing the occupancy principles to mere motherhood statements.

Boarding house agreements often contain no terms that place any contractual obligations upon the proprietor, apart from giving the resident a right to occupy – see all of the agreements in the Appendix. It may be that a bare licence will have additional contractual content and remedies implied under other legislation; in particular, the implied warranties and associated remedies provided under the Australian Consumer Law (the ACL). But this only makes more unsatisfactory the provisions of the draft Bill. It would mean that to get a complete remedy, a resident might have to take action under both the provisions of the draft Bill and the provisions of the ACL; and these actions might proceed in separate forums (the Tribunal for remedies under the draft Bill, and a court for remedies under the ACL).

We submit that the draft Bill should provide that every occupancy agreement must, and will be taken to, give effect to the occupancy principles. The principles afford considerable flexibility to proprietors in precisely how they will give effect to the principles in their agreements – but there should be no question that their agreements will give effect to the principles, and that they can be held to their agreements, and that they may be liable to compensate for losses suffered as a result of breach.

Recommendations

- *Clause 29(2).* Insert after 'any such agreement', 'must give effect to, and will be taken to give effect to, the occupancy principles, and'….
- *Clause 31(5).* Delete the subclause.

The occupancy principles

We generally support the content of the occupancy principles, subject to the following recommended amendments. These include three additional principles, to deal with problems commonly experienced in unlicensed boarding houses. (We understand each is less common in relation to LRCs.)

Written agreements (cl 30(4)).

The draft Bill would provide that a resident is entitled to have their agreement in writing after six weeks of residency. We submit that residents should be entitled to a written agreement upon commencement of the agreement. This would cause no hardship to proprietors (they could keep a pile of photocopied agreements on hand), and would help ensure their compliance with the other occupancy principles (such as the principles about house rules (cl 30(3) and termination notices (cl 30(8)). It would also help ensure residents are clear as to the terms of the agreement and help avoid disputes, to the benefit of both parties.

Recommendation

- *Clause 30(4).* Delete the words 'if his or her residency continues for longer than 6 weeks'.

Entry by the proprietor (cl 30(6)).

The draft Bill would provide proprietors with a right to enter at reasonable times, on reasonable grounds and for reasonable purposes, but does not entitle residents to be notified of entry. We submit that the principle should include an entitlement for residents of 'reasonable notice', subject to the qualification that entry may be made immediately in the case of an emergency.

Recommendation

- *Clause 30(6)*. Insert after 'purposes', 'upon giving the resident reasonable notice (although no notice is required in the event of an emergency)'.

Occupation fee increases (cl 30(7)).

The draft Bill would provide that a resident is entitled to eight week's notice of an increase in the occupation fee, but makes no provision about increases that are excessive to the general market level of fees for like premises. We submit that the principle should provide for dispute resolution by the Tribunal where a resident considers that a fee increase is excessive.

Recommendation

- *Clause 30(7)*. Insert after 'premises', 'and for the increase to be not excessive to the general market level of fees for similar premises'.

Additional principle – bonds and other security deposits.

It is a common practice of proprietors of unlicensed boarding houses to require a resident to pay a security deposit, such as a bond or key deposit, as a condition of moving into premises. The amounts required to be paid may be significant.

Case studies: bonds and other security deposits

K has paid a bond of four weeks' rent for a shared room in a shared flat in Pitt Street, Sydney – an amount of $1800.

K's agreement is Agreement 1 in the Appendix.

*

F is a resident of a boarding house managed by a real estate agent. Under his agreement, F has paid a bond of four weeks' rent. The agreement also requires F to keep his rent *at least* two weeks in advance, and provides that if the amount in advance is ever two weeks or less, F is in breach and may be evicted upon 48 hours' notice. The effect is that the advance rent is another form of security, so in total F has paid an amount equivalent to six week's rent as security – or $1080.

F's agreement is Agreement 2 in the Appendix.

It is also common for residents to have problems getting their security deposits returned when they move out: the TAASs inform us that this is probably the most common type of inquiry they receive from boarding house residents.

We submit that the draft Bill should address in the occupancy principles the issue of bonds and other security deposits. We submit that the occupancy principle should provide that a proprietor is entitled to require payment of a security deposit as a condition of the occupancy, provided that the resident is required to pay a total amount equivalent to not more than two weeks' occupation fee, and the security deposit is lodged with the Rental Bond Board. Lodging security deposits with the Rental Bond Board is an appropriate safeguard for residents' monies that would make use of an existing administrative apparatus, but add minimally to its workload.

Recommendation

- *Clause 30.* Insert a new subclause, 'A proprietor may require payment of a bond or other security deposit, provided the total amount of the security does not exceed two weeks' occupation fee, and the amount is lodged with the Rental Bond Board.'

Additional principle – utility charges.

It is common for contracts in unlicensed boarding houses to include terms requiring residents to pay additional charges relating to utilities, particularly electricity. In some cases the charges bear no relation to the actual cost incurred by the proprietor and results in an exploitative profit to the proprietor.

Case study: exploitative utility charges

B and C are Chinese students attending university in regional New South Wales, and sharing a room rented from a private landlord. The landlord charges *each* of them $140 per week for the room, plus $80 for internet access and $70 for electricity, and a bond. When the landlord informs them that the rent would increase the following week by $45 each, B and C object to the increase and query the amounts they are charged for internet access and electricity. The landlord replies that 'this is the law in Australia, you better get used to it' and gives four days' notice of termination.

We submit that the draft Bill should provide, as an occupancy principle, that a proprietor may charge for use of a utility, provided that the amount charged is determined according to the cost to the proprietor of providing the utility and a reasonable measure or estimate of the resident's use of the utility, and that the resident is informed of the charging before entering the agreement.

Recommendation

- *Clause 30.* Insert new subclause, 'A proprietor is entitled to charge for use of a utility, provided that the resident knows before entering the agreement that charges are payable, and the amount charged is determined according to the cost to the proprietor of providing the utility and a reasonable measure or estimate of the resident's use of the utility.'

Additional principle – penalty terms.

It is common for contracts in unlicensed boarding houses to include terms that purport to penalise residents for certain conduct. We submit that the draft Bill should provide, as an occupancy principle, that a resident is not liable to pay any penalty or fee for breach of term any the agreement or any rule of the premises.

Case study: penalty terms

K and his partner are lodgers in a room in a flat in Pitt Street, Sydney. Numerous other persons also share rooms in the flat; the landlord lives in another flat in the same building.

K's agreement contains the following terms:

- If K has a friend stay overnight more than three times in a month, the landlord will charge K $50 per day per person.
- If K makes a 'big noise', and the other occupants complain more than twice, the landlord will charge K $50.
- 'Parties' are prohibited. If K holds a party, the landlord will charge him $500 and evict him immediately.
- If K is more than two days late in paying rent, the landlord will charge K a penalty of $50 per day.
- If K loses his key, the landlord will charge K $130.

The landlord holds a bond of $1800 from which these charges may be deducted.

K's agreement is Agreement 1 in the Appendix.

Recommendation

- *Clause 30.* Insert new subclause, 'A resident is not liable to pay a penalty or fee for breach of any term of the agreement or any of the rules of the premises.'

Enforcement

As we stated above, the effectiveness of the occupancy principles is undermined by the weak connection, in the draft Bill's current terms, between the principles and the content of occupancy agreements, and by the express exclusion of compensation as a remedy in proceedings brought under cl 31.

Effectiveness is further undermined by the absence from Chapter 3 of any penalty provisions or other mechanisms by which the State Government might enforce the principles.

We submit that there should be a penalty of 20 penalty units for breach of cl 29(2) (contracting out of any of the occupancy principles); a penalty of 20 penalty units for breach of the occupancy principles relating to written agreements (cl (30(4)), written receipts (cl 30(11)) and the recommended new occupancy principle about bonds; and a penalty of 50 penalty units for breach of the occupancy principles relating to quiet enjoyment (cl 30(5)) and eviction without reasonable notice (cl 30(9)).

Recommendations

- *Clause 29(2)*. Insert at the end of the subclause, 'Maximum penalty: 20 penalty units'.
- *Clause 30(4)*. Insert at the end of the subclause, 'Maximum penalty: 20 penalty units.'
- *Clause 30(5)*. Insert at the end of the subclause, 'Maximum penalty: 50 penalty units.'
- *Clause 30(9)*. Insert at the end of the subclause, 'Maximum penalty: 50 penalty units.'
- *Clause 30(11)*. Insert at the end of the subclause, 'Maximum penalty: 20 penalty units.'
- *Clause 30.* Insert at the end of the recommended new subclause for an occupancy principle about bonds and other security deposits, 'Maximum penalty: 20 penalty units.'

Chapter 4 – Residential centres for vulnerable persons

Chapter 4 sets out a regulatory regime for Tier 2 boarding houses, or 'residential centres for vulnerable persons.' It is essentially an improved version of the regime established by the YACS Act.

At a basic level, the TU has grave misgivings about the existence of residential centres for vulnerable persons. Like the LRCs before them, these premises would essentially be congregated accommodation for people with disability, with personal care services provided mostly by the proprietor. The history of the LRCs shows that this form of accommodation is fraught with the dangers of isolation, neglect, exploitation and abuse. The draft Bill provides for more measures to check against these dangers, but otherwise assumes that these dangerous premises will continue to exist.

In doing so, the draft Bill sets out a regime of regulation for these premises, and defines these premises by reference to their use by two or more 'vulnerable persons' (cl 35(1)(a)). This way of defining the subject premises – by reference to their use by two or more persons of a certain description – is essentially the same as that taken in the YACS Act in its definition of LRCs, though the description it uses ('handicapped persons') is different. This way of defining premises is a basic defect in the YACS Act and the draft Bill.

Strictly speaking, the definition in the draft Bill would mean that if a boarding house proprietor – who intends to provide nothing more than lodgings for persons generally, without regard to their personal characteristics – should happen to admit a second disability support pensioner into residence, the proprietor's whole operation would suddenly change into that of a residential centre for vulnerable persons. The proprietor would have to seek authorisation to operate as a residential centre for vulnerable persons (or else be guilty of an offence and liable to a penalty of up to 120 penalty units, plus 20 penalty units for each day they continue operating without authorisation (cl 39(1)(a)), and be subject to all of the provisions of Chapter 4 and the pending Boarding Houses Regulation.

We submit that there would be many unlicensed boarding houses at which two or more of the residents are 'vulnerable persons', just as there are currently many unlicensed boarding houses at which two or more of the residents fit the YACS Act's description of 'handicapped persons'; and we anticipate that the prospect of them actually being treated as residential centres for vulnerable persons is no greater than the prospect of them being treated as LRCs currently. In other words, the strict definition does not fit that of actual practice: that is, that the subject premises are for the congregated accommodation of people with disability only. The definition does, however, have the potential to cause uncertainty about the obligations of proprietors and the legitimacy of their operators.

The TU has previously put forward a different scheme of regulation under which boarding houses and other residential services would be registered and accredited in three classes – Accommodation Services, Food Services and Personal Care Services – with services in the latter two classes required to comply with additional standards.

These classes of premises are defined by reference to *the services provided by the proprietor*, rather than their use by persons of a certain description. We submit that this is a more sound way of defining premises for the purposes of compliance with additional standards, and that it can be applied to the two-tier scheme of the draft Bill.

Accordingly, we recommend that a Tier 2 boarding house be defined as boarding premises that provide accommodation and a 'personal care service' to two or more residents. 'Personal care service' should be defined as a service that is addressed to the support needs of a vulnerable person, including the administration of medication to a resident, and the management of a resident's finances, and other prescribed services. It would be an offence to provide accommodation and personal care services without being registered and authorised, per cl 39(1).

It may be objected that such a definition would allow proprietors of LRCs to avoid regulation as Tier 2 boarding houses simply by not performing services defined as 'personal care services', and that this would result in the Government or another agency having to provide the necessary services instead. In our view, this may indeed be the result – and it would be a positive development.

As well as being a clearer and sounder definition for regulators, proprietors and other stakeholders in the boarding house sector, our recommended definition would, over the medium- to long-term, help drive genuine reform of the boarding house sector by allowing proprietors who are not interested or capable of providing a decent service to drop out, and by providing a template for new, not-for-profit models of accommodation-plus-support for people with disability.

It would also place squarely with the government the responsibility for ensuring support for people with disability, wherever they happen to live. For this reason, we submit that authorised support providers should have a power of entry, per cl 76, in relation to all registrable boarding houses, not just residential centres for vulnerable persons. (Our recommendation to this effect is included in the discussion of Chapter 2, above.) We note that even if our recommended definition is not adopted, and the draft Bill's current definition is retained, it is a fact that vulnerable persons will still reside in Tier 1 boarding houses. They should have the same opportunity to find out about and avail themselves of support services as those in residential centres for vulnerable persons.

Recommendations

- *Clause 33.* Insert '***personal care service*** means a service addressed to the support needs of a vulnerable person, and includes the administration of medication to a resident, the management of a resident's finances, and such other services as may be prescribed.
- *Clause 35(1)(a).* Delete and insert instead 'boarding premises that provide accommodation and a personal care service, for a fee or reward, to two or more residents'.

There is another defect in the definition in Tier 2 boarding houses. In our discussion of Tier 1 boarding houses, we submitted that the exclusion (at cl 5(3)(b)) of premises subject to a residential tenancy agreement under the RT Act or subject to the LTA Act was a fatal defect. Clause 35(2)(a) provides for the same exclusion in relation to Tier 2 boarding houses; it is similarly defective here. We submit that it should be deleted.

Recommendation

- *Clause 35(2)(a).* Delete the subclause.

In relation to the rest of the provisions of Chapter 4, the TU generally supports the submission by PWD.

Chapter 5 and the Schedules

We make a few specific comments on Chapter 5 and the Schedules.

Local Government (General) Regulation 2005

We support the draft Bill's amendment of the Local Government (General) Regulation 2005.

Bonds and other security deposits

In our discussion of Chapter 3 of the draft Bill, above, we submitted that there should be an occupancy principle about bonds and other security deposits. We further submit that amendments should be made to the RT Act so that the legislative machinery of the Rental Bond Board applies in relation to bonds and other security deposits in boarding houses.

In particular, we submit that this should be done by amending the definitions of 'landlord', 'residential premises', 'residential tenancy agreement' and 'tenant' at s 157 of that Act so they include, respectively, proprietors, registrable boarding houses, occupancy agreements and residents.

We note that amending those definitions, which apply only in relation to Part 8 of the RT Act, would have no other affect on the legal rights and obligations of proprietors and residents. The definitions already make similar provisions so that Part 8 applies to residential parks.

We also submit that s 159(1) of the RT Act should be amended, to reflect the different limitation that should apply to bonds and other security deposits in boarding houses.

Recommendations

- *Schedule 2*. Insert a clause amending s 157 of the Residential Tenancies Act 2010:
  - ***Landlord*** … and includes a proprietor under the Boarding Houses Act;
  - ***Residential premises*** … and includes a registrable boarding house under the Boarding Houses Act;
  - ***Residential tenancy agreement*** … and includes an occupancy agreement under the Boarding Houses Act;
  - ***Tenant*** … and includes an occupant or proposed occupant within the meaning of the Boarding Houses Act.
- *Schedule 2*. Insert a clause amending s 159(1) of the Residential Tenancies Act 2010, and insert after '4 weeks rent', '(or, in the case of a resident of a registrable boarding house, an amount not exceeding 2 weeks occupation fee)'.

Residential tenancy databases

We submit that the draft Bill should amend the RT Act so that Part 11 of that Act ('Residential tenancy databases') applies in relation to boarding houses. We are aware of boarding house proprietors who are members of the TICA residential tenancy database. We submit that boarding house residents should enjoy the same protections against unfair use of residential tenancy databases, and the same dispute resolution processes, as other renters.

In particular, we submit that this should be done by amending the definitions of 'landlord', 'residential premises', 'residential tenancy agreement' and 'tenant' at s 209 of that Act so they include, respectively, proprietors, registrable boarding houses, occupancy agreements and residents.

We note that amending those definitions, which apply only in relation to Part 11 of the RT Act, would have no other affect on the legal rights and obligations of proprietors and residents. The definitions already make similar provisions so that Part 11 applies to residential parks.

Recommendation

- *Schedule 2*. Insert a clause amending s 209 of the Residential Tenancies Act 2010:
  - ***Landlord*** … and includes a proprietor under the Boarding Houses Act;
  - ***Residential premises*** … and includes a registrable boarding house under the Boarding Houses Act;
  - ***Residential tenancy agreement*** … and includes an occupancy agreement under the Boarding Houses Act;
  - ***Tenant*** … and includes an occupant or proposed occupant within the meaning of the Boarding Houses Act.