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**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

RESIDENTIAL TENANCIES AMENDMENT BILL 2005

EXPLANATORY STATEMENT

Circulated with the authority of
Mr Jon Stanhope MLA
Attorney General

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Overview of Bill

The Residential Tenancies Amendment Bill 2005 (the Bill) makes a series of amendments to the *Residential Tenancies Act 1997* (the Act).

The Bill includes provisions for residential tenancy agreements by prescribed crisis accommodation providers. Crisis accommodation sits uneasily in the Act at present because service providers wish to impose a condition on a tenancy to the effect that it is conditional on the tenant continuing to use a particular service or on a comparative assessment of needs of others in the community for the services. The effect of this condition is that a tenant may be evicted (eg, if they no longer require therapy) with four weeks notice. To include such a provision in a residential tenancies agreement currently the provider must seek endorsement of the condition on a case-by-case basis by the Residential Tenancies Tribunal.

The Bill provides for the Minister to declare crisis accommodation providers only if they provide emergency accommodation for people in crisis and if they provide information to people in the accommodation about alternative accommodation and services. The Bill provides that declared accommodation providers can terminate a tenancy with four weeks notice if the premises are needed for crisis accommodation for someone other than the tenant and if the tenant has been given information about alternative accommodation. This amendment will reduce the need for crisis accommodation providers to seek endorsement of each tenancy agreement before the Residential Tenancies Tribunal. The Bill does not effect short-term crisis accommodation where there is no residential tenancy agreement in place.

The Bill also includes provisions relating to tenancy databases. Tenancy databases collect information on the tenancy history of tenants. This information is used by property managers to screen prospective tenants, and during a tenancy, to minimise the risk of a tenant defaulting. The majority of tenancy databases are operated for the real estate industry, with private lessors unable to access information directly. However, there are at least two major national databases for the use of private lessors.

The Bill mitigates the privacy issues remaining in the current operation of tenancy databases, including:

- consumers not being aware they have been listed;
- limited opportunities for tenants to access, correct or update information concerning their rental history;
- substantial costs to tenants to query information held on databases;
- tenants remaining listed for unacceptably long periods
- tenants being required to give wide consents regarding the use of databases; and
- potential adverse impacts on disadvantaged tenants' ability to access housing in private rental market.

The Bill also permits the Commissioner for Housing to rent premises at a rate that initially reflects the additional cost of a past debt and allows the Residential Tenancies Tribunal to endorse these arrangements. Further the Bill allows the tribunal to make orders where a tenancy agreement with the Commissioner for Housing passes under testamentary law.

The Bill also includes a series of other amendments. Such as permitting the Residential Tenancies Tribunal to adjust a tenancy agreement to take into account a court order and clarifying that a tenant is not required to notify the lessor of minor maintenance that an ordinary tenant would be expected to do, such as changing a light globe or a fuse.

Clause Notes

Clause 1 Name of Act – states the title of the Act, which is the Residential Tenancies Amendment Act 2005.

Clause 2 Commencement – states that the Act commences on a day fixed by the Minister by written notice.

Clause 3 Legislation amended – states that the legislation being amended is the *Residential Tenancies Act 1997*.

Clause 4 Standard residential tenancy terms Section 8 – amends section 8 of the Act to allow for a new section 8(aa) to be included.

Clause 5 New section 8(aa) – inserts a new section 8(aa) into the Act. This section provides that the lessor and tenant may by agreement include a fair clause for posted people in their residential tenancy agreement. The clause would allow for termination of the tenancy on either a lessor being posted back to Canberra or a tenant being posted from Canberra. The tenancy would be terminated following four weeks notice or a longer period if specified in the notice. The Act currently provides that a posting clause can only be included in a residential tenancy agreement if endorsed by the Residential Tenancies Tribunal.

Clause 6 Section 8 – provides that the paragraphs in section 8 of the Act will be renumbered when the Act is next republished.

Clause 7 New section 8(2) – sets out the fair clause for posted people which is referred to in new section 8(aa).

Clause 8 Lessor's obligations Section 12(3)(c) – provides for inclusion of a new section 12(3)(d). New section 12(3)(d) recognises tenancies by prescribed crisis accommodation providers. Crisis accommodation sits uneasily in the Act at present because service providers wish to impose a condition on a tenancy to the effect that it is conditional on the tenant continuing to use a particular service or on a comparative assessment of needs of others in the community for the services. The effect of this condition is that a tenant may be evicted (eg, if they no longer require therapy or care) with four weeks notice. To include such a provision in a residential tenancies agreement currently the provider must seek endorsement of the condition on a case-by-case basis by the Residential Tenancies Tribunal.

The amendments provide for the Minister to declare crisis accommodation providers only if they provide emergency accommodation for people in crisis and if they provide information to people in the accommodation about alternative accommodation and services. The amendments provide that declared accommodation providers can terminate a tenancy with four weeks notice if the premises are needed for crisis accommodation for someone other than the tenant and if the tenant has been given information about alternative accommodation. This amendment will reduce the

need for crisis accommodation providers to seek endorsement of each tenancy agreement before the Residential Tenancies Tribunal.

The opportunity was also taken in this section to redraft the existing section 12(3)(c).

Clause 9 New section 12(4) – defines the term ‘declared crisis accommodation provider’. A ‘declared crisis accommodation provider’ is a provider declared under section 126A.

Clause 10 New Section 15(5) – provides that this Act does not prevent the Commissioner for Housing from requiring a tenant to pay an outstanding amount owed in relation to a previous tenancy. To avoid any possibility of inappropriate amounts being requested, the section provides that the Residential Tenancies Tribunal must endorse such arrangements. Such agreements must also be consistent with the *Housing Assistance Act 1987* and any policies under that Act.

Clause 11 Section 23 – provides an offence for lessors and agents who fail to lodge a bond within the required timeframes.

These are strict liability offences. Section 23 of the Criminal Code provides that if a law that creates an offence provides that the offence is one of strict liability, there are no fault elements for any of the physical elements of the offence. Essentially this means that conduct alone is sufficient to make the defendant culpable.

However, under the Criminal Code, the defence of mistake of fact is available where the person considered whether or not facts existed and was under a mistaken but reasonable belief about the facts. Other defences, such as intervening conduct or event (section 39), are also available.

The offences have been included as there are a number of private lessors who habitually delay in lodging rental bonds. While most if not all bonds are eventually lodged, the delay occasions enforcement costs which cannot be recovered, and the delay also slightly reduces the interest yield on the rental bond corpus (which is used to pay for tenant advice services, the management of bonds and the operation of the Residential Tenancies Tribunal).

Clause 12 New Section 29(6) – clarifies that condition reports, which are written prior to the beginning of a tenancy, can contain a list of items at the premises.

Clause 13 Section 36(j)(iii) – amends section 36 of the Act to specify the circumstances under which a residential tenancy agreement for crisis accommodation can be terminated. The agreement can be terminated by four weeks notice, provided the lessor needs to use the premises as crisis accommodation for someone other than the tenant and the tenant has been given information about alternative accommodation.

Clause 14 Section 40 – provides that a warrant for eviction may authorise the police to take appropriate action to evict a named person or a named person and everyone else of the premises. In addition, unless there are exceptional circumstances, the police must give the named person not less than two days notice of the proposed

eviction. An example of exceptional circumstances may be where the named person is threatening to damage the property or is damaging the property.

The Regulations set out what is appropriate action. The Regulations set out that it is appropriate action to evict a tenant between the hours of 8:00am and 6:00pm Monday to Thursday (except for Public Holidays). In exceptional circumstances, a warrant may authorise an eviction at a different time

Clause 15 Section 42 – inserts new sections 42, 42A and 42B into the Act dealing with conditional orders. The current legislation allows a warrant of eviction to be issued by the registrar on the untested assertions of the lessor about a condition precedent having been met. While the legislation attempts to avoid this result (a tenant having received a notice from the registrar may apply to the tribunal for a stay and both parties then have an opportunity to be heard), it remains the case that the current legislation permits the tribunal to effectively delegate a core function to the registrar. Having regard to the general functions of the registrar (s117) and the manner in which functions are subject to direction (s118) this delegation is undesirable. For this reason, this clause changes the procedure for eviction following a conditional order.

New section 42 – provides that termination and possession orders that are subject to an ‘enforcement condition’ expire on the date specified in the order, but that unless there are exceptional circumstances, the period shall not be longer than one year after the order is made.

New section 42A – changes the procedures for dealing with a failure to comply with a conditional termination and possession order. In the new procedures the Residential Tenancies Tribunal, rather than the Registrar will consider the issue of whether the enforcement condition has been met.

New section 42B – sets out the procedure for the Residential Tenancies Tribunal hearing an application for eviction following an enforcement condition being met. The tribunal may dismiss an application or allow an application and direct the registrar to issue a warrant for eviction.

Clause 16 Damage, injury or intention to damage or injure Section 51(b) – inserts new section 51(c) into the Act, which provides that the Residential Tenancies Tribunal may evict a tenant who is seriously or continuously interfering with a neighbour’s quiet enjoyment of their property. This is consistent with the existing prescribed clause 70 which states that a “tenant shall not interfere, or permit interference, with the quiet enjoyment of the occupiers of nearby premises”.

Clause 17 New section 107A – inserts new section 107A into the Act. New section 107A permits the Residential Tenancies Tribunal to adjust a residential tenancy agreement to take into account a court order. This may occur where a domestic violence order excludes one of the parties from accessing a residential property. It is appropriate, in these circumstances, to amend the tenancy agreement to give full effect to the court order.

This section provides that if an application relates to premises leased under a housing assistance program then the Residential Tenancies Tribunal must not make an order that is inconsistent with the eligibility criteria for the program.

Clause 18 New part 6A – inserts new Part 6A into the Act. New Part 6A deals with tenancy databases. Tenancy databases collect information on the tenancy history of tenants. This information is used by property managers to screen prospective tenants, and during a tenancy, to minimise the risk of a tenant defaulting. The majority of tenancy databases are operated for the real estate industry, with private lessors unable to access information directly. However, databases for the use of lessors only are beginning to emerge.

There are significant privacy issues remaining in the current operation of tenancy databases, including:

- consumers not being aware they have been listed;
- limited opportunities for tenants to access, correct or update information concerning their rental history;
- substantial costs to tenants to query information held on databases;
- tenants remaining listed for unacceptably long periods
- tenants being required to give wide consents regarding the use of databases; and
- potential adverse impacts on disadvantaged tenants' ability to access housing in private rental market.

The Bill removes these concerns by providing restrictions on public databases which list personal information about previous tenants and allows an individual to apply to the Residential Tenancies Tribunal to have their personal information on a database omitted or corrected. The provisions in the Bill are based on the provisions in Queensland.

New section 107B – defines terms for part 6A. The terms defined are 'personal information' and 'tenancy database'.

New section 107C – provides that this part does not apply to tenancy databases that are solely for the use on an entity or its employees.

New section 107D – provides that a person must not include personal information about an ex-tenant in a tenancy database unless:

- the ex-tenant was a tenant in a residential tenancy agreement; and
- the agreement has ended; and
- there is a reason prescribed in the regulations for including the ex-tenant on the database; and
- the period for listing information prescribed by the regulation has not ended; and
- the ex-tenant has been given written notice of the information to be included on the database or other steps have been taken to disclose to the ex-tenant the information to be included; and
- the ex-tenant has been given a reasonable opportunity to review the information to be included on the database.

New section 107E – provides that a person may apply to the Residential Tenancies Tribunal where information is included on a database in contravention of section

107D. The tribunal may make an order that the person take steps to remedy the contravention or can make any other order appropriate in the circumstances.

New section 107E- provides that a person may apply to the Residential Tenancies Tribunal to have personal information on a tenancy database corrected or removed, as it is unjust or misleading.

New section 107G- provides that a person may apply to the Residential Tenancies Tribunal for an order that a person not include information on a tenancy database or requiring a person to alter information to be included on a tenancy database.

New section 107H- provides that the Residential Tenancies Tribunal may order a person to pay compensation to a person who has suffered loss or damage by personal information being included on a tenancy database. Compensation may only be ordered if the tribunal makes an order under section 107E, 107F or 107G. The amount of compensation cannot exceed \$5,000 or if another amount is prescribed in the regulations, that amount.

Clause 19 Division 6.6, heading – changes the heading for Division 6.6 to Part 6B to reflect the insertion of new Part 6A before this division. New Part 6B dealing with enforcement of Residential Tenancies Tribunal orders applies to all orders issued by the tribunal, including orders under part 6A.

Clause 20 Referees Section 116(5) to (7) – amends section 116 to change references to Division 6.6 to refer to new Part 6B. The opportunity was also taken in this section to redraft the existing section 116(5) to (7).

Clause 21 New section 126 – provides that the Minister may declare an entity to be a crisis accommodation provider in relation to stated accommodation. A declaration can only be made where the Minister is satisfied that the entity provides or intends to provide accommodation for people in crisis and provides or intends to provide to people in the accommodation information about alternative accommodation and, if appropriate, other services.

A declaration made under section 126 is a notifiable instrument.

Clause 22 New section 127A – inserts a new section 127A into the Act. The new section provides that, in relation to new public housing tenancies, that the residential tenancy agreement may provide that the tenancy may not pass to a non-occupant on the death of a tenant. The section also provides that the Commissioner for Housing may seek an order from the Residential Tenancies Tribunal where a new tenant takes possession of social housing under testamentary law. The order may terminate the tenancy or adjust the rent for the premises having regard to the relevant housing assistance programs under the *Housing Assistance Act 1987*. This section is necessary where the rent may prior to death have been substantially below market rate.

Clause 23 Regulation-making power New section 136(2)(d) – provides that regulations may be made regarding tenancy databases.

Clause 24 Standard residential tenancy terms Schedule 1, clause 23 – amends the prescribed terms to clarify that a lessor must keep a condition report for not less than 12 months after the end of a tenancy.

Clause 25 Schedule 1, new clause 55(3) – makes a minor amendment to the prescribed terms for residential tenancies agreements. The amendment clarifies that a tenant is not required to notify the lessor of minor maintenance that an ordinary tenant would be expected to do, such as changing a light globe or a fuse.

Clause 26 Dictionary, new definitions – inserts new definitions into the dictionary. This clause includes definitions for ‘crisis accommodation’ and ‘enforcement condition’.

Clause 27 Residential Tenancies Regulation 1998, new section 4A – inserts new section 4A into the *Residential Tenancies Regulation 1998*. New section 4A set out that it is appropriate action to evict a tenant between the hours of 8:00am and 6:00pm Monday to Thursday (except for Public Holidays). In exceptional circumstances, a warrant may authorise an eviction at a different time.