RESIDENTIAL PARKS (LONG-STAY TENANTS) AMENDMENT BILL 2018

Committee

Resumed from 21 May. The Deputy Chair of Committees (Hon Adele Farina) in the chair; Hon Alannah MacTiernan (Minister for Regional Development) in charge of the bill.

Clause 5: Section 5 replaced —

Progress was reported on the following amendment moved by Hon Nick Goiran —

Page 10, line 9 — To delete the line.

The DEPUTY CHAIR: We are at clause 5 of the bill and we are dealing with the amendment moved by Hon Nick Goiran at 35/5. The question is that the words to be deleted be deleted. I understand that when we were last dealing with this matter, Hon Nick Goiran had moved his amendment and made his argument, and we were waiting for a response from the minister.

Hon ALANNAH MacTIERNAN: We do not support this amendment. We recognise that the Standing Committee on Legislation made a recommendation that I, as the representative of the Minister for Commerce, explain to the Legislative Council why proposed section 5(2)(d), which is the power to exclude an agreement, in clause 5, which defines a long-stay agreement, should not be deleted. We believe that a certain amount of flexibility is required to ensure that the act operates in an appropriate manner. The next amendment on the supplementary notice paper, which is 20/5, is the amendment that we propose to move should the amendment moved by Hon Nick Goiran be negatived. Our view is that Hon Nick Goiran's amendment would prevent us from responding flexibly to new circumstances that might emerge. We know that legislation often has unintended consequences and it is best if the government has some capacity by way of regulation to deal with those. An example is that the current definition of a long-stay agreement leaves the application of the act to an agreement of a fixed term of three months or longer. That created an unintended loophole in the legislation and we saw tenants being offered a series of 89-day leases in order to avoid the application of the act. Because there was no ability to amend that by way of regulation, that problem endured for quite some time. We have been able to remove that and replace it with the concept of the principal place of residence. Likewise, in determining this broader definition we acknowledge that it may unintentionally capture agreements that the legislation was not intended to regulate, so we are proposing that we have that power of regulation but, understanding the recommendation of the committee and its desire for this power to be in some way circumscribed, we have proposed that we add to the existing definition that an agreement or class of agreement cannot be prescribed unless the agreement or class of agreement to be prescribed is sufficiently regulated by another act—it comes within another piece of legislation—or the accommodation provided under the agreement is not accommodation that should be regulated by the act. New arrangements emerge very often, such as individual arrangements or small subsets of arrangements, and people have new ways of determining an accommodation arrangement. We want to make sure that we have the capacity in this legislation to make regulations so that we will not capture things that we do not mean to capture. We are trying to deal with the issue of unintended consequences by broadening the definition, but we are conscious that there may be arrangements that either do not exist at the moment or that exist but we are unaware of them that will unintentionally be caught up in this broader definition.

The government urges members not to support the current amendment, but to support the subsequent amendment that we will move in order to deal with the issue raised by the committee.

Hon NICK GOIRAN: The last time we considered clause 5 and this matter was on Thursday, 21 May this year. At that time the minister gave a response that was similar to what has just been provided. In essence, the government's response to finding 5 and recommendation 3 by the Standing Committee on Legislation is the amendment that is currently foreshadowed on the supplementary notice paper at 20/5.

By way of further explanation to members, the purpose of the amendment that stands in my name at 35/5 and is currently before the Committee of the Whole House is simply to give effect to finding 5 of the thirty-ninth report of the Standing Committee on Legislation, which is set out at page 17 of that report. It states —

Clause 5, proposed section 5(2)(d) constitutes an inappropriate delegation of legislative power.

Essentially, the question that members now need to consider is whether the government's response in the amendment at 20/5 adequately addresses finding 5 and recommendation 3 of the Standing Committee on Legislation's report. If it does, they should not support the amendment that is currently before the chamber and, in lieu of that, they should support the government's proposed amendment at 20/5. If, however, they are of the view that the government's response as set out at 20/5 is not adequate to address the unanimous concerns of the Standing Committee on Legislation, particularly those at finding 5, then the amendment that is currently before the chamber should be supported.

Hon RICK MAZZA: I will not be supporting the amendment at 35/5. I feel there must be flexibility to provide for classes of accommodation not to be captured by this legislation. This legislation is actually quite onerous on those who will be subject to it, particularly park owners. If there are classes of accommodation that I feel should not fall under this legislation, there has to be flexibility for regulations to be made to exclude them. We have heard a lot tonight about Henry VIII clauses and regulations. They do have a place; I do not see this specifically as a Henry VIII clause, but regulations have a place, and if a regulation came to the chamber that excluded a class of accommodation that the Parliament felt was not relevant, it could be disallowed. I will not support the amendment at 35/5. I have looked at the amendment at 20/5, and that covers off a little more, but still has the same effect in that the government can issue regulations to exclude certain classes of accommodation. With that, I will not be supporting this amendment.

Amendment put and negatived.

Hon ALANNAH MacTIERNAN: I move —

Page 10, after line 20 — To insert —

(3A) An agreement or class of agreement cannot be prescribed under subsection (2)(d) unless the Minister is satisfied that —

(a) the agreement or class of agreement to be prescribed is sufficiently regulated by another Act; or

(b) the accommodation provided under the agreement is not accommodation that should be regulated by the Act.

I think the issues have been adequately canvassed in the previous discussion.

Hon AARON STONEHOUSE: I generally agree that we want to have a regulation-making power here, notwithstanding concerns about delegating too much legislative power to the executive in these instances. I am wondering about the intention behind proposed section 5(3A)(a)—that the minister needs to be satisfied that the agreement or class of agreement to be prescribed is sufficiently regulated by another act. If I understand it, that means that the exemptions to the classes of agreements can only be prescribed if the minister in this case is satisfied that those types of agreements are regulated elsewhere in an act. I am wondering if the minister can talk to that a little more, because it creates a scenario in which exemptions can only be granted if a type of arrangement is regulated elsewhere. Is that necessarily appropriate? I note that proposed paragraph (b) is an "or", so I suppose that gets the minister out of it. I am wondering whether the intention is perhaps to ensure that it is regulated either under this legislation or another act, and whether the minister foresees possibilities of where there are types of agreements that do not need to be regulated under an act at all, but can be regulated somewhere else under common law or perhaps, just by their nature, do not need to be regulated? I suppose proposed paragraph (b) does that, but perhaps the minister can clarify that for me.

Hon ALANNAH MacTIERNAN: The member is exactly right. We sought to respond to a concern raised by the Standing Committee on Legislation to put some descriptor on it. We wanted to say, "If it's covered by another piece of legislation, that would be an appropriate way of dealing with it". We also recognised that there may well be other sorts of arrangements that we might not want to cover at all and that do not need to be covered under this legislation. Some of the other such arrangements could include an agreement for the casual occupation of a caravan park, or an agreement giving the right of occupancy in a motel. We do anticipate that there may well be certain arrangements; perhaps largely casual arrangements, or else the very nature of the accommodation might suggest that it is not appropriate to be legislated. We understand the member's concern. He has, with the help of Hon Rick Mazza, noted the "or", and I think that is significant because it covers off both those things.

Amendment put and passed.

Hon NICK GOIRAN: What is the length of time rent must be unpaid to activate proposed new section 5A(a) to determine a premises as abandoned?

Hon Alannah MacTiernan: Member, are you talking about clause 5 or clause 5A?

Hon Nick Goiran: It is clause 5, but proposed section 5A—not to be confused with proposed new clause 5A.

Hon ALANNAH MacTIERNAN: The terms of the legislation indicate that it is as determined by the agreement. Presumably, it would vary with the period for the payment of rent that was enshrined in the agreement. For example, if rent were to be paid every quarter, of course it would not apply for a period under a quarter. The determination of what are reasonable grounds will depend to a very considerable extent on the nature of the period for the payment of rent. The bill states, "The tenant has failed to pay rent in accordance with the long-stay agreement." If it was a monthly rent payment but rent had not been paid for three months, that would probably be reasonable grounds. It is the payment of rent, and the bill outlines the other sorts of factors that can be taken into account in determining

whether the premises have been abandoned. The rental period will depend on the length of the periodic nature of the rent payment under the terms of the agreement.

Hon NICK GOIRAN: I guess what I want to know, minister, is whether this will apply if the tenant has failed to pay rent by one day in accordance with the long-stay agreement. Let us say, for example, that rent is to be paid fortnightly and the tenant has failed to pay rent, in accordance with the long-stay agreement, to the extent of one day. Is that sufficient to trigger proposed section 5A(a), fully acknowledging that, of course, a person would still need to comply with at least one of the conditions under subsection (b)? I am interested in the time period for proposed section 5A(a).

Hon ALANNAH MacTIERNAN: As a highly skilled legal officer, the member would be aware that the whole concept of "reasonable" is part of the genius of the common law in that every single factor is not precisely predetermined. In determining whether there are reasonable grounds, the court or a tribunal will take into account a multiplicity of factors. For example, a tenant might be only a short period over non-payment of rent but they may have discontinued the gas, electricity and telephone services. That combination would give rise to a reasonable assertion. A tenant may not have done that latter thing but has three months of accumulated mail in the letterbox. It is not possible, nor is it desirable under our system, to exactly set out some sort of Gantt chart or matrix. These are all factors that a tribunal will take into account in determining what is reasonable. They will look at the length of time that the rent is unpaid. They will look at the other factors and, after bringing them all together, will make a determination about what is reasonable.

Hon NICK GOIRAN: I totally disagree with that because the common law definition of "reasonableness" is irrelevant at this point. The reason it is irrelevant is that Parliament is going out of its way to prescribe what will be determined as "reasonable grounds". The government's proposed statute before us states at proposed section 5A —

> … there are ***reasonable grounds*** for suspecting that a long-stay tenant has abandoned the agreed premises if —

It then asks for two things to be done. We cannot have proposed paragraph (a) without proposed paragraph (b). Proposed section 5A(a) is the foundation and then we must have the supplementary condition found in proposed paragraph (b). Proposed paragraph (a) states —

> the tenant has failed to pay rent in accordance with the long-stay agreement; and

All I am seeking to establish is: is failure to pay rent by one day enough to substantiate proposed section 5A(a)? If it is, that is fine, and we move on to the next question. I do not think that the common law definition of "reasonableness" has anything to do with this particular scenario. I want confirmation from the government that a failure to pay rent by one day would be enough to satisfy proposed section 5A(a), fully acknowledging that they would still have to comply with one of the provisions under proposed section 5A(b).

Hon ALANNAH MacTIERNAN: I suppose theoretically a case could be brought on the basis that there has been a failure to pay rent by one day, but at the end of the day I think these things will be considered in a holistic way. Of course a tenant would obviously have had to at least failed to pay the rent on time—that would be the very limit. That would be a very necessary precursor. For example, all the other factors could apply—uncollected mail and all those other things could apply—but the tenant has continued to pay rent. Presumably, on that basis, the tenant would not satisfy that arrangement. Whether or not a person would be successful in making a case at the tribunal—if the tenant is one day late in their payment and these other factors are perhaps not so clearly established—is open to interpretation. Quite clearly, a tenant must have at least been late in paying their rent. One day late at one level would precipitate a person's right to take this action, but I put to the member that a mere one-day failure to pay rent, plus non-collection of mail, may not, in the eyes of the tribunal, constitute reasonable grounds.

I also point out that this reflects the arrangements that are made in the Residential Tenancies Act, so it is the same principle. The member is right in the sense that a tenant has to have at least been one day late in paying their rent, but whether one day late in paying rent, with weak evidence in relation to these other matters, will be enough to trigger a finding of abandonment is a matter of question. That whole concept of reasonable grounds is certainly a minimum threshold, but then, having passed that threshold, whether or not a tenant is considered to have abandoned the property will come down to the determination of the tribunal of what is reasonable in the circumstances.

Hon RICK MAZZA: Thanks for that, minister. I must say that I do find this clause somewhat arbitrary. The minister talked about the tenant failing to pay the rent. Let us say the tenant did not pay their rent for a month; I would not have thought that was unusual. Sometimes people get caught up for a month. But then they need only one of the following—not all of the following—which could be that there is uncollected mail and newspapers. If the tenant has gone away to visit a sick person who is 200 or 300 kilometres away and has not been able to get home, it seems to me that it would be a bit of a long bow to say that that premises is abandoned. I know that this reflects the Residential Tenancies Act—maybe that needs to be looked at—but I would have thought that it would be fairly harsh, if someone was a little behind in paying their rent and had not collected their mail, that the premises would be considered abandoned.

Hon ALANNAH MacTIERNAN: That is why I am coming back to the way in which, as a practicable matter, the tribunal looks at these things. Although a non-payment by one day could theoretically trigger an application, I would imagine that a tribunal would look at the weight of that evidence in order to be satisfied. It would look at how long, for example, the rent was overdue, how long the mail had been uncollected and whether there was any other evidence from another tenant that the person had abandoned the premises. I am not sure whether there is any case law on this. This is only a trigger to begin the abandonment process. I understand the member's point, but I am just getting on top of how this works. These trigger points enable the lessor to start a process. It does not end the tenancy, it gives them the right to go in, inspect the premises, secure the premise and find evidence during that inspection that the person has indeed abandoned the premises. Sorry; I am beginning to clearly understand how this works. These circumstances trigger the right to inspect and to secure. They do not give the lessor the right to end the tenancy. It gives them the right to go in, inspect and secure. The lessor is then required to give written notice that they believe that the premises has been abandoned. This is set out in proposed section 44A, and the lessor needs to give a tenant a certain period of time to respond to it. It is not saying that this constitutes the end of their tenancy, but this constitutes circumstances under which a landlord can go in, inspect and secure the premises. I understand that there is no clarity in the existing arrangement for park homes, but we have such a provision in the Residential Tenancies Act. We are trying to import the same process for these residential park long-stay tenants as we have with tenants under the Residential Tenancies Act.

Hon RICK MAZZA: Thanks for that, minister; that was quite a lengthy reply. I know that this is trying to reflect the Residential Tenancies Act. With the Residential Tenancies Act and what I will call a normal rental, the tenant does not own the premises that sits on the land or anything else. They cannot pay the rent, and then abandon the premises. Even if they leave some goods behind, which could be just rubbish really—a suitcase and a couple of side tables or whatever the case may be—there is quite a lengthy process for dealing with abandoned goods. They have to advertise them, store them; all sorts of things may go on. Sometimes, the cost of that far exceeds the abandoned goods that have been left. The reason I am interested in this is that if the tenant abandons this, they actually abandon a dwelling sitting on the land. I do not think too many people will want to abandon a $100 000 dwelling sitting on land that they are renting. It intrigues me a little that reasonable grounds to suspect it is abandoned only requires these few tests, when what we are talking about being abandoned is not just a few bits of furniture, it is the whole dwelling itself.

Hon ALANNAH MacTIERNAN: We need to bear in mind that this legislation is covering circumstances such as the approximately 10 per cent of cases in which the dwelling itself is not owned by the tenant, but by the landlord, and the entire package is leased. Those are the circumstances under which we are likely to see this particular provision invoked.

Hon NICK GOIRAN: This is an important dialogue for us to have because, as the minister has foreshadowed, no clarity is currently provided. The clarity that will now be provided, at least to park owners, will be the legislation we are passing now. The debate that we are having at the moment will further provide guidance to those park owners. The minister has kindly assisted by confirming that a park owner would be able to commence the process by way of giving notice to the tenant, the resident, and that they would then have a 24-hour period in which to respond. In order to start that process, by way of giving notice, the first thing that needs to happen is the tenant has to have failed to pay rent. That could be as short as one day, albeit I think we are of the same mind that that would be over the top, nevertheless permitted under this particular provision.

I turn to the next part of the provision, proposed section 5A(b), which sets out four other criteria that must also apply in order for the statutory definition of reasonable grounds to be met. In particular, I want to draw to the minister's attention two points, first of all under 5A(b)(i), which states —

> there is uncollected mail, newspapers or other material at the agreed premises;

Will any guidance be provided to park owners about what is intended by that provision? Uncollected mail, again, to bring it to its most extreme interpretation, could mean one piece of mail. In theory, we could have a situation in which a tenant has not paid rent for one day and there is one piece of mail sitting in the person's mail box. Under proposed section 5A, that would be considered to meet the statutory definition of reasonable grounds and it would trigger the right of the park owner to give a notice to the tenant. I think we are of one mind that that is ridiculous, over the top, unreasonable and not what we are intending, and that is why I am asking whether the department or the government intends to provide any guidance, maybe some guidelines, maybe some other type of paraphernalia, that will be provided to park owners, so that they can better understand what is reasonably intended by proposed section 5A?

Hon ALANNAH MacTIERNAN: Although this may not have been contemplated before—whether one would need to give guidance under that—the officers tell me that this is certainly something that they could give guidance on. I undertake to ensure that we raise the matter with the Minister for Commerce to see whether we can get an undertaking that some guidance will be provided on that.

Hon NICK GOIRAN: I thank the minister for that explanation. I am grateful that the government will take that up. I draw the minister's attention to proposed section 5A(b)(ii). One of the other criteria that could trigger this statutory definition of "reasonable grounds" is that another long-stay tenant, not the one who failed to pay the rent, of the residential park or indeed what is perhaps even more troubling is the next phrase "or another person"—just any old person—has told the park owner that the tenant has abandoned the agreed premises. I am looking at the ways that this can be abused and the mischief that can be created. Some troublemakers might come along; they might even be family members. There could be disputes between family members or someone who is aggrieved because of something else that has happened. We do not want a scenario in which any old person can come along to the park operator and say, "Joe Bloggs has abandoned the agreed premises. He hasn't paid his rent for one day" and off we go and we start this process. I know that is not what is intended by the government; and it is not at the heart of the legislation or the statutory review process that triggered all this. It is probably more of a comment than a question that is part of what I am saying should be clarified.

Hon ALANNAH MacTIERNAN: I have sympathy for what the member is saying. Although this does not lead directly to the termination of the agreement, nevertheless it does enable a lessor or landlord to go into the premises. Perhaps it might have been more desirable if we had had "two or more of the following" to provide a bit of rigour in the circumstances. I will take that up with the Minister for Commerce as well.

Clause, as amended, put and passed.

New clause 5A —

Hon ALANNAH MacTIERNAN: I move —

Page 11, after line 20 — To insert —

5A. Section 5B inserted

Before section 6 insert:

5B. Residential parks

(1) A ***residential park*** is a place, including a caravan park, where there are —

(a) sites on which relocatable homes may be parked, assembled or erected in accordance with a tenancy; and

(b) shared premises for the use of long-stay tenants in accordance with a tenancy.

(2) However, a ***residential park*** is not one of the following —

(a) a place established as a retirement village under the *Retirement Villages Act 1992*;

(b) a prescribed place or class of place.

(3) A place or class of place cannot be prescribed under subsection (2)(b) unless the Minister is satisfied that —

(a) the place or class of place to be prescribed is sufficiently regulated by another Act; or

(b) it is not appropriate for the Act to regulate the accommodation provided by the place or class of place.

This amendment is in response to a finding by the Standing Committee on Legislation, which was concerned that this may have constituted an inappropriate delegation of legislative power and just as with the prior clause, it was asked that I explain to the Council why the subclause should not be deleted. Once again, it is a question of ensuring that we have flexibility. We are seeking in the definition of "residential park" the ability to exclude classes that are determined that we may not wish to, or it is not appropriate to, have included in the legislation. It is really an identical argument to that which was given before in relation to the definition of "long-stay agreement". We are asking for the ability to be able to prescribe certain classes of accommodation so that they are not included in the definition of "residential park". We have sought as we did before to limit the operation of that power to address some of the concerns of the legislation committee.

Hon NICK GOIRAN: The amendment moved by the minister on behalf of the government is a deferred matter from when we last considered this bill at clause 4. The legislation committee identified a problem at clause 4 and this is part of the government's solution to the problem identified by the committee. However, there is a second reason why the government is doing what it is doing here with new clause 5A; namely, the minister previously informed the chamber about the decision in the State Administrative Tribunal by the name of Henville and the City of Armadale from 19 October 2018. The government previously told us that it is very important that the statutory definition of "residential park" is in a standalone clause of the bill for one reason, and that is to enable the government

to proclaim that statutory definition of "residential park" as soon as possible. It wants to expedite that definition in response to the decision in Henville and the City of Armadale. The government has the support of the opposition in respect to that element; that is the carving out of a special section to define "residential park". However, the opposition does not support the ongoing problem that was identified by the legislation committee. I bring to member's attention finding 4 on page 16 of its report, which reads —

> Subclause (b)(ii) of the definition of 'residential park' in clause 4, proposed section 3 constitutes an inappropriate delegation of legislative power.

The government has shifted the problem that was originally identified in clause 4 into a standalone clause 5A, but the problem has not been fixed because there is still the inappropriate delegation of legislative power. However, what the government has done in creating standalone clause 5A is appropriate because it addresses the problem identified in Henville and the City of Armadale. That creates a dilemma for members, because on the one hand, we want to support what the government is doing but on the other hand, we want to support the problem that was identified by the Standing Committee on Legislation. My solution to that is to move an amendment to the government's proposed new clause. I move —

> To delete all the words after "residential park is not" and substitute —
>
> a place established as a retirement village under the *Retirement Villages Act 1992*.

Hon ALANNAH MacTIERNAN: It is not entirely correct for the member to argue that the decision in Henville was totally distinct from what we are attempting to do here. The member is correct in that taking the definition of "residential park" out of the earlier definition was in part to enable an early promulgation, but it is also because of advice that we had from the State Solicitor that when definitions become quite long and complex, it is best that they not be placed in the definition provision. Nevertheless, one of the consequences of determining that we were going to disconnect the relationship of this legislation from the caravan and camping grounds legislation was that we needed a different type of definition than the one that we previously had. We looked at the definitions that were in place in other jurisdictions, and we have used those definitions. A residential park is a place where a relocatable home is placed and the homes are occupied in accordance with a tenancy shared premise. We recognise that in doing that, this broader definition may unintentionally capture places that the legislation is not intended to regulate. The provision that is in contention now, which relates to the amendments we have moved, is in connection with that ability for us to regulate to exclude, so if we come across an arrangement that we think is inappropriate to be brought into the dragnet of this legislation, we have the ability to do that. As I understand it, under the previous thing, there were two reasons. Firstly, it might be that it is captured by another piece of legislation, or, secondly, it is not appropriate for it to be caught in this regulation.

As he thought in the previous debate, the member does not think that we have adequately addressed the concerns of the committee. We believe that we have. The committee expressly did not say that this clause should be deleted. It asked for an explanation—presumably in that it wanted us to put some boundaries around that power. Therefore, I would urge members not to support Hon Nick Goiran's amendment of our amendment, but to be consistent with the way in which they voted on a parallel provision on the arrangement of the definition of "long-stay agreement". We should do the same thing here. As a Parliament, members should give us the flexibility to determine when from time to time there are arrangements that should not be caught up in this legislation, we can prescribe that so those arrangements are not caught up in this legislation.

Hon RICK MAZZA: If this head of power for regulations was about including other classes of accommodation under the residential parks, I would have a real problem with that. We are talking about excluding them, so it is quite clear that retirement villages should not be under this act, but we have a lot of very innovative developers out there who develop new classes of accommodation all the time, and there may be many cases in which those classes of accommodation should not sit under the Residential Parks (Long-Stay Tenants) Act. Therefore, I find it very difficult to support the amendment to the amendment that has been proposed by Hon Nick Goiran. It is quite sensible to have flexibility in regulations to exclude certain classes of accommodation; that is actually quite desirable.

Amendment put and negatived.

New clause put and passed.

Progress reported and leave granted to sit again, pursuant to standing orders.