

31st October 2018

Committee Clerk
Standing Committee on Legislation
Parliament House, 4 Harvest Terrace
West Perth WA 6005

Dear Committee Members,

The Residential Tenancies Legislation Amendment (Family Violence) Bill 2018

We are writing to make a submission to the inquiry on the *Residential Tenancies Legislation Amendment (Family Violence) Bill 2018* (the Bill). In summary, our submission argues the implementation of the Bill is an important step in protecting the human rights of victims of family violence and therefore the Bill should be adopted as soon as possible.

About SCALES and the Murdoch Clinical Program

The Southern Communities Advocacy and Legal Education Service Inc. (SCALES) is a community legal centre providing free legal advice, information and representation to low income people. It has a strong track record in a human rights based approach to legal practice. This approach and the work of SCALES have been recognised in a number of awards and commendations including a National Human Rights Award. Murdoch School of Law, in collaboration with SCALES, runs a clinical education program in which students are able to work alongside legal practitioners and migration agents to assist clients and contribute to law reform.

In January this year, SCALES opened a dedicated Family Violence Unit. Since its inception, many women who have tenancy issues arising from fleeing situations of family violence have contacted this unit. It is our firm belief that we could better assist these clients if the proposed changes are made to the legislation.

Family Violence as a Human Rights Issue

Family violence is defined as 'violence, or a threat of violence, by a person towards a family member of the person; or any other behaviour by the person that coerces or controls the family member or causes the member to be fearful'.¹ Examples of such behaviour include: assault, sexual abuse, repeated derogatory taunts, intentional destruction of property, financial abuse, social isolation and deprivation of liberty.² Family violence can affect anyone, irrespective of age, gender, socio-economic status or cultural background.³

¹ The Bill adopts the definition of 'family violence' from the *Restraining Orders Act 1997* (WA) s 5A(1).

² *Restraining Orders Act 1997* (WA) s 5A(2).

³ Australasian Institute for Judicial Administration, *National Domestic and Family Violence Bench Book* (2018) [3.1].

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Barriers to women leaving an abusive relationship are well documented and include financial insecurity and homelessness.⁴ This fear of homelessness alone compels some women to remain in abusive relationships.⁵ Poverty, together with a lack of housing options, is a strong preventative for women leaving violent family situations.⁶ Despite these barriers, women leaving violent partners account for a significant amount of the recorded homeless population.⁷

The home is the primary location of individual physical existence and indispensable for human flourishing in every respect, including participation in work, education and in cultural, social and religious life.⁸ The right to adequate housing is a fundamental human right under international law.⁹ The right is contained within the *Universal Declaration of Human Rights*,¹⁰ and the *International Covenant of Economic Social and Cultural Rights* (ICESCR). These instruments recognise that human rights are derived from the inherent dignity of the human person, in doing so they articulate the right to an adequate standard of living and economic security¹¹ and emphasises the importance of housing to the wellbeing of individuals and families.

Under ICESCR the right to housing is recognised as a component to the right to an adequate standard of living.¹² This right includes the right to live somewhere in peace, security and dignity.¹³ The Committee on Economic, Social and Cultural Rights have expressed the importance of maintaining this right in order to guarantee individuals legal protection against eviction and harassment in this context.¹⁴ Lack of adequate housing, violent environments and forced evictions have a profound impact on children due to their specific needs, affecting their growth, development and enjoyment of a whole range of human rights, including the right to education, health and personal security.

Adequate housing is essential for human survival and without it, many additional rights are compromised.¹⁵ As recognised by several human rights bodies of the United Nations, the full enjoyment of many rights is indispensable for adequate housing to be realised, possessed and maintained by all groups in society. For example, the rights to privacy and a family life are articulated in the *International Covenant on Civil and Political Rights* (ICCPR)¹⁶, rights that that become

⁴ Kristin Diemer, Cathy Humphreys and Karen Crinall, 'Safe at home? Housing decisions for women leaving family violence' (2017) 52(1) *Australian Journal of Social Issues* 32, 33.

⁵ Office of the United Nations High Commissioner for Human Rights, 'The Right to Adequate Housing' (Fact Sheet No 21/Rev. 1, The United Nations, November 2009) 18.

⁶ Radhika Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective*, UN ESCOR, 56th sess, Agenda item 12(a), UN Doc E/CN.4/2000/68/Add.5 (24 February 2000).

⁷ Australian Institute of Health and Welfare, 'Family, domestic and sexual violence in Australia' (Report, Australian Institute of Health and Welfare, 2018) 11.

⁸ Kevin Bell, 'Protecting public housing tenants in Australia from forced eviction: The fundamental importance of the human right to adequate housing and home' (2013) 39(1) *Monash University Law Review* 1, 9.

⁹ Scott Leckie, 'From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing under International Human Rights Law' (Report, International Institute for Environment and Development, 1992) 1.

¹⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25.

¹² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art

¹³ United CESCR, General Comment 4: The Right to Adequate Housing, UN Doc HRI/GEN/1/Rev.5 (2001) 22.

¹⁴ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)* UN ESCOR, 6th sess UN Doc E/1992/23 (13 December 1991).

¹⁵ Chris Sidoti, 'Housing as a human' (Speech delivered at the National Conference on Homelessness, 4 September 1996) 1.

¹⁶ Article 17, *International Covenant of Civil and Political Rights*, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

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unattainable without access to stable housing. This relationship between human rights and the right to adequate housing shows clearly the centrality of the notions of indivisibility and interdependence to the full enjoyment of all rights.¹⁷

Lack of protection in current legislative framework

The current operation of the *Residential Tenancies Act 1987* and its inability to recognise the rights of family violence victims has resulted in cumulative and multifaceted disadvantage.¹⁸

At present, there is no regulation for early termination of fixed-term leases on the grounds of family violence. In situations where it is not practical or safe to stay in the family home, and a victim wants to end the relationship, immediate financial burdens arise, such as obtaining alternative housing, furniture and a bond.¹⁹ Women fleeing a rental property at short notice will generally be required to pay rent at their former premises until either a new tenant is found, or their agreement expires. As a result, victims of abuse bear the financial burden of multiple leases for indeterminate amounts of time.²⁰

If a victim is relying on the perpetrator for financial resources, this becomes even more difficult. Further complications arise when debt is owed in their name, such as utilities, loans and unpaid rent.²¹ There are some alternative options available to victims, such as seeking a court order to have the lease terminated under 'undue hardship'. However, undue hardship is a high standard and requires proof of serious medical or safety issues being present. Some family violence cases may meet these criteria. However, even in these cases compensation is ordered for the breaking of the lease.²²

Current law upholds the principle that all co-tenants to a residential tenancy agreement are either jointly liable or jointly and severally liable for any damages and rent owing to the lessor.²³ Placing liability on a victim tenant for damages and unpaid rent due to family violence leads to further disadvantage and diminishes perpetrator accountability.²⁴ Significant property damage and non-compliance with compensation orders may also result in victims being blacklisted on residential tenancy databases, making it very difficult to rent in the future.²⁵

The right to housing confers a lengthy and complex series of obligations on States.²⁶ Not only do States have an obligation to uphold the right to adequate housing, but they have a positive obligation to give effect to the right.²⁷ As signatories to the international framework outlined above, the Australian government and each state and territory government has obligations to ensure that there

¹⁷ <https://www.un.org/ruleoflaw/files/FactSheet21en.pdf>

¹⁸ Law Council of Australia, 'The Justice Project: People are Homeless' (Final Report, Law Council of Australia, 2018) 4.

¹⁹ Regional Alliance West, Submission No 94.

²⁰ *Residential Tenancies Act 1987* (WA), ss 70A(4), 78.

²¹ Regional Alliance West, Submission No 94.

²² Tenancy WA Fact Sheet 2016, 1.

²³ Explanatory Memorandum, *The Residential Tenancies Legislation Amendment (Family Violence) Bill 2018* (WA) 3.

²⁴ *Ibid.*

²⁵ Kellie McDonald, 'Tenancy and domestic violence: Proposed tenancy reforms improve rights for DV victims' 26 (2016) *Law Society of New South Wales Journal* 75, 75.

²⁶ <https://www.un.org/ruleoflaw/files/FactSheet21en.pdf> page 6

²⁷ Housing as a human right, national conference in Homelessness, Council to Homeless Persons, Address by Chris Sidoti, Human Rights Commissioner, 4 September 1996, page 2.

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is a legal framework that protects and promotes the right to adequate housing. This is particularly the case for more vulnerable individuals, such as those experiencing family and domestic violence.

Proposed Amendments by the Bill

The issue of family violence is now recognised as one of national priority for government at all levels. The nuances of family violence within residential settings require the same level of prioritisation and response.²⁸ This Bill proposes amendments which will provide solutions to the failure of current law to protect victims of family violence. The Bill takes a human rights approach to the family violence issue and seeks to empower the court and others to act in the best interests of victims and dependants in family violence situations.²⁹ The Bill as a whole instrument and each specific amendment which enacts these goals is an important step in the protection of human rights of victims of family violence in Australia.

Sections 71AB, 71AE and 17B aim to prevent or reduce the consequences of family violence while promoting perpetrator accountability.³⁰ Section 71AB amends the Act to allow a victim of family violence who is a tenant to choose to leave their premises without penalty by issuing their lessor with a notice of termination. Alternatively, if the victim tenant wishes to remain in their home, they can apply to the court to have the perpetrator's name removed from the tenancy agreement under s71AE.³¹ As a result, the perpetrator would no longer have a legal entitlement to enter the premises.³² In the making of an order under this section, the court must consider what is in the best interests of the victim and of any children ordinarily resident at the premises. Placing this consideration in primary importance demonstrates the importance given by the legislation to human rights.

Section 17B partners with the proposed provisions outlined above, addressing the additional barrier faced by victims of joint and several liability for damages. Section 17B makes specific reference to Australia's human rights obligations, stating that the court when determining rights and liabilities under this section, must have regard to family violence as a fundamental violation of human rights.³³ The provision additionally lists requirements of the court to aid in preventing further victimisation of family violence victims,³⁴ maximising the safety of victims through consideration of financial burdens³⁵ and protecting the wellbeing of children.³⁶ The Bill has been drafted to ensure that all the protections available will be available in circumstances in which a dependant of the tenant is the person at risk of family violence.³⁷

²⁸ D Simonovic, Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to Australia, 38th sess, Agenda Item 3, UN Doc A/HRC/38/47/Add.1 (17 April 2018) [8].

²⁹ Explanatory Memorandum, *The Residential Tenancies Legislation Amendment (Family Violence) Bill 2018* (WA) 1.

³⁰ Explanatory memorandum, above n 28, 1.

³¹ S 71AE.

³² Second reading speech *The Residential Tenancies Legislation Amendment (Family Violence) Bill 2018* (WA) 2.

³³ S 17B(5)(a)

³⁴ S17B(5)(b)

³⁵ S 17B(5)(c)

³⁶ S 17B(5)€

³⁷ Explanatory memorandum, above n 28, 3.

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Amendments to sections 45 and 47 allow for the changing of locks and the making of prescribed alterations in circumstances of family violence. Amendments to section 82J provide that the personal information of a tenant may be excluded or removed from residential tenancy databases in circumstances relating to family violence. These amendments provide practical assistance in the protection of victims and dependants from further abuse without being subject to any penalty for such action they may be subject to under current legislation.

SCALES submits that the Bill, if enacted, will play a vital role in the protection of the human rights of victims of family violence where they are currently not subject to protection in residential tenancies. Therefore, this Bill should be adopted as soon as possible.

SCALES would like to thank Caitlin Joensson for permission to use her research in this submission.

Thank you for your consideration of this material.

Yours sincerely

Anna Copeland
SOLICITOR

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