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RENTAL HOUSING AMENDMENT BILL, 2013

SUBMISSION TO THE PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS

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1. INTRODUCTION AND CONTEXT

INTRODUCTION

1. Many South Africans, especially those who would not be able to afford housing otherwise, rely on rental housing to fulfil their constitutional right to adequate housing. We also note government's commitment to increase access to affordable, decent rental housing and the need for an improved legislative framework to achieve this. We therefore commend the Portfolio Committee for its decision to comprehensively review the current legislative framework for the rental housing sector, the Rental Housing Act 50 of 1999 (the Act).
2. The Rental Housing Amendment Bill, 2013 (the Bill), includes many positive steps towards ensuring decent, affordable housing for South Africans who rent their accommodation. The following submission seeks to highlight positive aspects of the bill while also drawing the Committee's attention to sections that may need to be reconsidered.
3. Given the limited time provided for commenting on this Bill, as well as the unique process followed by the Committee and the Department in drafting this Bill, we may not fully address all relevant issues in this submission. We therefore seek the Committee's permission to make oral submissions to the Committee on the Bill.

LRC

4. The Legal Resources Centre (LRC) is a non-profit law clinic. The LRC provides free legal services to use the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances.
5. The LRC has been involved in numerous cases relating to tenure security, evictions, housing and planning, and related issues. It is in this context, and based on this experience; that the LRC makes this submission on the Rental Housing Amendment Bill, 2013.

2. RENTAL HOUSING TRIBUNALS

ESTABLISHING MANDATORY TRIBUNALS AND EFFECTIVE APPEAL BODIES

1. Where they have been established, provincial Rental Housing Tribunals have provided large numbers of people with an accessible dispute resolution mechanism. The Committee's report on the previous Bill notes that the Gauteng Rental Housing Tribunal received over 10 000 complaints between 2001 and 2010. Of these complaints, almost 80% were solved in pre-mediation or mediation proceedings. The majority of complaints that went to a hearing were resolved by way of settlement.¹ In 2011/12, Gauteng faced a record 2 199 complaints, more than double the annual average number of complaints from 2001-2010.² From 2001-2010, the Western Cape received over 9 500 complaints, and had a record 3 053 in the 2012/13 financial year (its call centre received over 14 000 calls over this period).³
2. These figures establish that there is high demand for the services that Rental Housing Tribunals can provide and that these Tribunals have proven effective in resolving disputes. We therefore support the Bill's proposal to amend section 7 of Act to require MECs in each province to establish Rental Housing Tribunals within a year of the commencement of the Act.
3. Given the vital role that Tribunals are beginning to perform, we encourage the Committee to consider steps to ensure that Tribunals are independent from Provincial departments. This is especially important as the landlord will often be a public institution, leading to potential perceptions of bias. This will partly entail ensuring that Tribunals are not dependent on departments for facilities. This shift may require progressive implementation as Tribunals are currently reliant upon departments.
4. We note that currently, section 17 of the Act only allows for appeals of Tribunal decisions by bringing decisions under review before the High Court

¹ Committee Report at p 4

² <http://www.dlgh.gpg.gov.za/Documents/GDLH%20Annual%20Report%202012.pdf> at p 58.

³ http://www.westerncape.gov.za/assets/departments/human-settlements/docs/rental-tribunal/rht_annual_report_12-13.pdf at p 11, 14

within its area of jurisdiction. Given the prohibitive costs of such a review, this provision renders justice inaccessible for many.

5. We therefore support the Bill's creation of a dedicated, easily accessible and low-cost body to hear appeals. We have concerns, however, with current proposed design of the appeal body. We also suggest that the establishment of this appeals body should lead to a redesign of the required composition of the Tribunal.

TRIBUNAL COMPOSITION

6. Section 9 of the Act currently requires that a Tribunal consist of not less than three and not more than five members. The Bill changes this to four to seven members and allows the Tribunal to function as two committees with at least three members each.
7. As illustrated above, the use of the Rental Housing Tribunals has experienced tremendous growth in recent years. Given the clear articulation of the rights and obligations for landlords and tenants contained in the Bill, we anticipate an ever increasing number of complaints will be brought before existing Tribunals. This growth will likely place great strain upon the current structure, which may soon be unable to address complaints timeously and will face increasing backlogs.
8. We would therefore encourage the Committee to consider reconfiguring the minimum requirements to reduce the number of members required for the Tribunal to function. We submit that, with the introduction of the protections of the accessible appeals process, there will be cases that will only require one member to hear the complaint. More complex cases may require a greater number of members.
9. We encourage the Committee to empower Tribunal chairpersons to allocate complaints to one to three members based on the complexity of the matter in question. More recently appointed members may also be allocated cases together with more experienced members to gain experience.
10. We are also concerned that requiring Tribunals to sit with three or more members is not an efficient use of resources given that a single member should be capable of hearing many complaints. This is particularly true

since the vast majority of cases are solved before a hearing through mediation or through settlements.

11. We encourage the Committee to cost the financial consequences of requiring Tribunals to have three or more members versus allowing a single member in some cases to consider whether this is a meaningful concern.
12. In this regard, we encourage the Committee to consider the model of the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA empowers a single Commissioner to hear labour disputes, including terminations, and to make binding rulings on these disputes. These rulings may then be appealed at the Labour Court under established circumstances.
13. It is submitted that the disputes heard by CCMA commissioners are of similar gravity, and often outweigh, the issues heard by Rental Housing Tribunals. We therefore submit that single members should be allowed to hear and rule on complaints made to the Rental Housing Tribunal. With the large workload Tribunals are currently facing, together with the likelihood of further growth after the Bill is enacted, following the CCMA's example of allowing individuals to adjudicate matters would be advisable.
14. We also submit, given the large workloads Tribunals should expect, that Tribunals should seek to appoint full-time members. We encourage the Committee to consider making this a requirement for appointment to Tribunals.
15. We encourage the Committee to reconsider the manner in which it prescribes the expertise that persons on each Tribunal must possess. We note the Bills proposal in clause 9 to mandate at least one member, but not more than two, with expertise in the following areas:
 - 15.1. Rental housing property management or housing development matters;
 - 15.2. Consumer matters pertaining to rental housing or housing development matters; and,
 - 15.3. Legal qualifications and legal expertise.
16. While each of the above qualifications would serve members well, it is submitted that MECs should be allowed the discretion to select any

candidate who has one of these qualifications. Dictating the minimum and maximum number of members with the above qualifications may prove overly burdensome for MECs and may inhibit their ability to select the best possible candidates for the Tribunals.

APPEAL BODY

17. As stated above, we support the establishment of a dedicated body to hear appeals emanating from Rental Housing Tribunals. Given our submissions regarding reducing the number of members required for Tribunals to convene hearings, it is important that the body that is established is seen to be credible.
18. We are concerned, therefore, that the proposed appointment process for the new appeal body may not meet this standard. The Bill proposes that the secretariat of the Tribunal "must appoint a panel of adjudicators who possess legal qualifications and expertise in rental housing matters or consumer matters pertaining to rental housing matters."
19. It is submitted that this would entail the Tribunal appointing the persons who will hear the appeals against its decisions.
20. This is in contrast to the requirements for appointment to the Tribunal itself. Tribunal members must be 'fit and proper persons' and are appointed by the relevant MEC, a political figure accountable for the decision.
21. It is submitted that the Committee should require members of the appeal body be 'fit and proper persons'. The Committee should also consider an appointment process for appeal body members that matches, or is more rigorous, than that of Tribunal members. This would entail appointment by the MEC or a similarly accountable figure.
22. We also suggest that the Committee establish that this appeal body be constituted by a minimum of three members. It is submitted that allowing a single adjudicator to overturn the decision of a full sitting of a Tribunal would not be in the interests of justice, especially if the adjudicator is appointed by the secretariat.
23. Given our suggestion above that Tribunal sittings may be presided over by a single member, an appeal body of three members would match more

established judicial appeal processes and provide a greater degree of certainty and prestige for the appeal body.

24. We also note that the proposed section 17A requires the establishment of an appeal body, as well as the promulgation by the Minister of guidelines under which an application for appeal may be submitted, but are concerned by the lack of a deadline for either of these actions to occur.
25. We suggest that a deadline be imposed given the failure of the previous Minister to promulgate regulations mandated by the Act over the 13 years that the Act has been in force. In this regard, we also note the delays in establishing Rental Housing Tribunals in every province.
26. We therefore encourage the Committee to require the Minister to publish the appeal guidelines for public comment and to promulgate them within 12 months of the commencement of the Rental Housing Amendment Act, 2013, similarly to the Bill's requirement that the Minister publish the regulations required by section 15 within 12 months of commencement.
27. We also encourage the Committee to require provinces with existing Tribunals to establish appeal bodies within 12 months of the commencement of the Bill. Provinces that are establishing Tribunals for the first time should be required to establish appeal bodies at the same time they establish the Tribunals.

3. RIGHTS & OBLIGATIONS AND NORMS & STANDARDS

RIGHTS AND OBLIGATIONS

1. We commend the Bill's detailed articulation of the rights and obligations of both tenants and landlords in terms of the Act. The proposed sections 4A and 4B will render the law more accessible.
2. We also support the proposal to require landlords to "reduce (a) lease entered into between himself or herself and the tenant to writing." We would encourage the Committee to consider articulating the specific consequences of non-compliance with this requirement. We make this suggestion because we do not want leases rendered invalid based on this provision. We are concerned, however, that it may not be enforced effectively if there are not serious consequences for failure to comply with this requirement.
3. We therefore encourage the Committee to consider making a landlord's failure to reduce a lease to writing an offence in terms of section 16 of the Act.

NORMS AND STANDARDS

4. Thirteen years after the commencement of the Rental Housing Act, the Minister has still failed to comply with the Act's provision in section 15 that the 'the Minister must...make regulations relating to' the procedures of the tribunal, forms and certificates to be used, unfair practices, and other issues. We therefore welcome the Bill's requirement that the Minister issue regulations contemplated in sections 15(1)(b, f & fA) within 12 months of the commencement of the Rental Housing Amendment Act, 2013.
5. We also commend the Bill's insertion of section 15 (1)(fB) into the Act. This section mandates norms and standards regarding terms and conditions of the lease, safety, health and hygiene, basic living conditions, size, overcrowding and affordability. We note that the Minister must consult before issuing these norms and standards and ask that the Committee ensure a thorough public consultation process before the regulations are finalised.

6. We also note the insertion of section 15 (1)(fB) into the Act. The section provides for the Minister to issue regulations regarding the "calculation method for escalation of rental amounts and the maximum rate of deposits which may be payable in respect of a dwelling."
7. This is a welcome addition. Historically, the majority of South Africans were excluded from the protections of the rent control system. This exclusionary system was dismantled in the early 1990s with the promise of a progressive, comprehensive rent control system. We therefore applaud the Bill's (belated) reintroduction of a system of rent control.
8. We are deeply concerned, however, that the Bill appears to give the Minister the discretion to not issue regulations in terms of section 15 (1)(fB). This is because section 15 (1)(fB) is not subject to the requirement, supported above, that regulations be issued within 12 months of commencement. Given the above-mentioned failure of the Minister to issue regulations under section 15 for 13 years, we encourage the Committee to also require the Minister to issue the regulations contemplated in section 15 (1)(fB) within a period of time prescribed by the Committee.

4. ARBITRARY EVICTIONS

1. We suggest that there is no need for the definition of arbitrary evictions proposed by the Bill and urge the Committee to reject this addition.
2. Section 26(3) of the Constitution provides that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.” It goes on to provide that “no legislation may permit **arbitrary evictions**.” It is therefore clear that the protection against legislation that permits arbitrary evictions is an important constitutional right.
3. Section 13(14) of the Act provides that the “Tribunal does not have jurisdiction to hear applications for eviction orders.” As the Tribunals will never order an eviction, we question why a definition of arbitrary evictions has been included in the Bill. While the Act does mention arbitrary evictions in its preamble, the preamble has no binding legal effect and should merely serve to guide the interpretation of the Act. Such interpretation does not require a precise definition of arbitrary evictions.
4. In addition to its irrelevance to the Act, we are concerned with the inclusion of this definition as there is no other piece of legislation that defines arbitrary evictions. It is therefore possible that other pieces of legislation, and potentially even litigants, will rely on this definition despite it not being in a piece of legislation that deals with evictions.
5. Finally, the definition as proposed in the Bill is misleading. It defines an arbitrary eviction as including “depriving a tenant of occupation of a dwelling, without an order of court made after considering all of the relevant circumstances.” This definition could include tenants who are deprived “of occupation of a dwelling without an order of court” even where the tenant has departed after a lawful, agreed termination of lease.
6. Given the varying potential interpretations of the definition, as well as the fact that the Act does not deal with evictions at all, we encourage the Committee to remove this definition from the Bill.

5. REGULATIONS

1. We note that the current Bill removes an earlier proposal contained in clause two of an earlier draft of the Rental Housing Amendment Bill [B 21B – 2011] that would have required the Minister to monitor the impact of this Act on landlords and tenants, especially poor and vulnerable tenants, and to develop relief measures necessary to alleviate hardships suffered by tenants. It also required the Minister to report to the National Assembly annually on the promotion of rental housing property envisaged in the Act.
2. Given the vulnerability of tenants in South Africa, we consider the removal of direct ministerial monitoring of the impact of the Act on the poor and vulnerable to be a retrogressive step.
3. We therefore encourage the Committee to re-insert clause 2(b) of B 21B – 2011 into the current Bill. The section reads:
 - 3.1. *The Minister must –*
 - 3.1.1. *Monitor and assess –*
 - 3.1.1.1. *The impact of the application of this Act on landlords and tenants, and more specifically the impact on poor and vulnerable tenants; and*
 - 3.1.1.2. *The performance of Tribunals and Rental Housing Information Offices;*
 - 3.1.2. *Develop such relief measures and other social programmes as part of the policy framework on rental housing referred to in subsection 2(3), as he or she deems necessary to alleviate hardships that may be suffered by tenants;*
 - 3.1.3. *Develop programmes, directives and guidelines or amend or augment the policy framework on rental housing referred to in subsection (3), in such a manner as he or she sees fit, to facilitate effective performance by Tribunals and Rental Housing Information Offices; and*
 - 3.1.4. *Annually report to the National Assembly on the promotion of rental housing property envisaged in this section and section 3 as well as on the implementation of the Act.*