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File Reference:NAC/4/2010

THE COMMITTEE SECRETARY
PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS

Per email: **kpasiya@parliament.gov.za**

For attention: Ms Koliswa Pasiya

COMMENTS ON RENTAL HOUSING AMENDMENT BILL [B21-2011]

We refer to the above and hereby submit collated comments on the Rental Housing Amendment Bill, 2011 [B21-2011] ("the Bill") and the Rental Housing Act, 1999 (Act 150 of 1999) ("the principal Act").

PART A: GENERAL COMMENTS

1. We note that the terms "dwelling", "home", "property" and "rental housing property" have in certain instances been used interchangeably in various clauses of the Bill. This creates confusion.

2. The terms "dwelling" and "rental housing property" have been defined in section 1 of the principal Act. It is proposed that one of these terms be used instead, where appropriate.

3. We also note that certain terms, which have been defined, such as "Tribunal" are sometimes written in lowercase i.e "tribunal", while other terms that have not been defined, such as "province", are in certain instances written in uppercase and in other instances, in lowercase. It is suggested that the terms should be used as defined, or if not defined, in a consistent manner.

4. Care should be taken to ensure that the language used in the legislation is gender sensitive. Clause 18, for example implies that a MEC is a male.

5. The following clauses are regarded as unfunded mandates. Certain of these clauses will be discussed in more detail below:

a) Clause 3: "Provincial Government must financially assist local municipalities not yet on level three accreditation, in establishing Rental Housing Information Offices as contemplated in section 14"

b) Clause 9: "7. **[The]** Every MEC **[may]** must within the first financial year following on the commencement of the Rental Housing Amendment Act, 2012, by notice in the Gazette establish a tribunal in the Province to be known as the Rental Housing Tribunal."

c) Clause 10(b): "(1) The Tribunal consists of **[not less than three and not more than five]** seven members, who are fit and proper persons appointed by the MEC..."

6. The following two clauses also implies additional cost to the Western Cape Government ("WCG"), although it is not drafted as being obligatory:

a) Clause 10(e): "(3) The MEC may appoint **[two]** up to six persons to serve as alternate members of the Tribunal in the absence of any member referred to in paragraph (b) of subsection (1) ..."

b) Clause 18: "(3) The MEC may appoint an Advocate or Attorney of the High Court of South Africa, whether internal or external to the Department, to consider the appeal and make a recommendation to him."

7. Section 35 of the Public Finance Management Act, 1999 (Act 1 of 1999) stipulates the following regarding unfunded mandates:

"35 Unfunded mandates

Draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province."

8. Since the Bill places certain additional functions and imposes obligations on the WCG, a projection of the financial implications of these functions or obligations should have been set out in a memorandum that had to be introduced in Parliament with the Bill.

PART B: SPECIFIC COMMENTS

Clause 1

9. In the definition of "arbitrary eviction", the words "refers to" have been repeated. The repeated term should be deleted.

10. In the Bill, it is proposed that the definition of the term "prescribed" be amended as follows:

"prescribed means prescribed by regulation **[by the MEC, by notice in the Gazette]**"

11. The rationale for the proposed amendment is not set out in the Memorandum on the objects of the Bill.

12. The term "prescribed" has been defined in the principal Act as "prescribed by regulation by the MEC, by notice in the *Gazette*".

13. The term "regulation" is defined in the principal Act as "*a regulation made in terms of section 15*".

14. Section 15 of the principal Act provides that the National Minister may make regulations relating to the matters listed in that section, which includes *inter alia*

anything which may or must be prescribed under Chapter 4 and anything which is necessary to be prescribed in order to achieve the purposes of the principal Act.

15. Section 1 of the principal Act defines "unfair practice" as *inter alia* "a practice prescribed as a practice unreasonably prejudicing the rights or interest of a tenant or landlord."

16. Chapter 4 of the principal Act provides for other matters that may be prescribed by the MEC such as the following:

- the manner in which a person may obtain copies of minutes of the Tribunal's meetings (section 10(12));

- the fee that must be paid to obtain the copies of the aforesaid minutes (section 10(12));

- the details that must be contained in the Tribunal's register of complaints received and complaints resolved (section 13(8)); and

- the format of the list of complaints received and complaints resolved that must be provided to the local municipalities in whose jurisdictions dwellings are situated in respect of which complaints have been received (section 13 (8)).

17. The Minister may however also make regulations relating to anything which may or must be prescribed by the MEC.

18. The proposed amendment would however remove the MEC's legislative competence to prescribe on the matters that he could have prescribed on in terms of the principal Act.

19. It is suggested that the definition of "prescribed" should not be amended in a manner that would remove the MEC's legislative competency to prescribe on certain matters, as provided for in the principal Act.

Clause 2

20. The Bill proposes that a new subsection 5 be inserted in section 2 of the principal Act, in terms whereof the Minister must *inter alia* monitor and assess the impact of the Act on poor and vulnerable tenants. The Minister must further take such action as he or she deems fit to alleviate hardships that may be suffered by such tenants.

21. It is our view that landlords should be included in these provisions.

22. In order for the Minister to make informed decisions and policy based on accurate and relevant information, it is suggested that the Bill includes a monitoring and evaluation mechanism for Rental Housing Information Offices and Tribunals.

23. The reports received as part of this monitoring and evaluation process should inform the policy framework referred to in section 2(3) of the principal Act.

Clause 3

24. The proposed section 3(6) provides the following:

> "(3) Provincial Government must financially assist local municipalities not yet on level three accreditation, in establishing Rental Housing Information Offices as contemplated in section 14."

25. We propose that the word "financially" be deleted in the proposed section.

26. Where will the funding to support this function come from? From Provincial Treasury's perspective, it is impossible for the WCG to fund local municipalities to establish Rental Housing Information Offices based on historical national allocations to the WCG and the WCG's own revenue streams.

27. Provincial governments cannot be expected to fund municipalities as they are a sphere of government in their own right.

28. Furthermore, funding to municipalities is determined by sections 214, 227 and 229 of the Constitution, implying only two sources of funding, either from own revenue raised, or from national transfers out of the national fiscus.

29. If municipalities, not yet on level three accreditation wish to establish Rental Housing Information Offices, they need to fund it themselves or national government must provide the costs therefore or contribute to such costs.

30. There would however be no in principle objection if this function is to be funded from one of the national transfers to municipalities, e.g. from the Human Settlements Grant.

31. Alternatively, the word "Provincial" in the clause must be replaced with the word "National", so that it reads "National Government must financially assist local municipalities not yet on level three accreditation, in establishing Rental Housing Information Offices..."

Clause 6

32. The proposed section 4B(5)(a) refers to subsection (4)(a). It appears that subsection (3)(a) should have been referred to instead.

33. We suggest that the word "giving" be inserted between the words "after" and "reasonable" in the proposed section 4B(8).

34. The proposed section 4B(9)(e) provides that a landlord has the right to claim compensation for damage to the dwelling or improvements on the land on which the dwelling is situated, if any. We understand why the landlord would be entitled to compensation for damage. Any improvements on the land on which the dwelling is situated is however to the benefit of the landlord. The tenant should not be paying compensation for something that is to the benefit of the landlord. It is therefore suggested that the words "or any other improvements on the land on which the dwelling is situated, if any" be deleted.

Clause 7

35. In terms of the proposed section 5(1), a landlord must reduce a lease to writing. The proposed amendment to section 16 of the principal Act states that a person who fails to comply with *inter alia* section 5(1) of the principal Act will be guilty of an offence.

36. It is suggested that this provision should contain a mechanism, which will assist illiterate landlords.

37. We further suggest that the words "as contemplated" in subsection (2) be deleted in the proposed section 5(7).

Clause 10

38. In terms of this proposed amendment, a Tribunal should consist of seven members. In terms of section 9(1) of the principal Act, the Tribunal consists of not less than three and not more than five members.

39. We suggest that a MEC should retain his/her discretion regarding the number of Tribunal members that he/she wishes to appoint, depending on the needs of the particular province.

40. It may be necessary to have a Tribunal, consisting of seven members in certain provinces but not in others. It is suggested that the provision allows a MEC to appoint up to a maximum of seven members on a Tribunal instead of making it peremptory to appoint seven members on the Tribunal.

41. We further suggest that the word "shall" in the proposed section 9(1C) be replaced with the word "may" so that the Tribunal may function as two committees should it wish to do so. The compulsory dividing of the Tribunal into two committees may result in increased expenses and a bigger administrative burden. A Tribunal's workload may also not justify the need for two committees.

42. Two committees may have different interpretations of the principal Act, which may water down the integrity of a Tribunal.

Clause 12

43. It is suggested that the proposed section (12B) be redrafted as it is unclear.

Clause 13

44. We suggest that the words "within such local municipality" be inserted after the word "office" in paragraph (a),

Clause 15

45. There is a missing word between the words "section" and "from".

Clause 18 (as well as clauses 14 and 17 insofar as it relates to appeals)

46. We do not support the creation of an appeal process to the MEC for the reasons set out below.

47. Experience has shown that relationships between landlords and tenants become very emotional, personalised and principled. In many instances the issue is not the, sometimes small amounts of money involved, but the principle of who is right and who is wrong. An opportunity to appeal will aggravate situations such as the above.

48. The principal Act contains a very useful provision in that cases must be finalised within 90 days. An appeal process will further delay finality and certainty and many landlords and/or tenants will appeal just to frustrate the other party.

49. The MEC is technically a landlord in certain instances and may therefore be a party in a matter. It is untenable that a person can be a party and the "judge" in the same case.

50. The members of the Tribunal are appointed by the MEC and a right of appeal to him/her may impact on the autonomy and independence of the Tribunal.

51. The Tribunal renders a service to the public very similar to the small claims court. In that forum there is no right of appeal.

52. An appeal process will further lead to increased expenses for the WCG in that:

    a) The MEC will have to ask the Tribunal for the reasons for its decision with the result that its members would have to be paid for their extra time;

    b) The MEC may have to appoint an internal or external attorney or advocate and pay such person to consider the appeal and make a recommendation to the MEC;

    c) Where the matter is returned back to the Tribunal, its members will have to be remunerated for the extra time that they are spending, dealing with the matter.

53. The Tribunal has between 3 and 5 members presiding over a matter. The chances of making a wrong decision, is therefore very small.

54. Once this right has been given and it proves to be problematic, it will be very difficult to take away.

Section 12 of the principal Act

55. The principal Act requires the Tribunal to provide the relevant MEC with an annual report on their activities, but it does not provide any guidelines as to the information that should be contained in such report.

56. In the absence of such guidance, it is not clear to what extent the information in the "annual report" should be audited/externally verified.

57. It is recommended that the Bill or regulations, as the case may be, stipulate the minimum information required in such annual report. It is also important that the annual reports contain credible and reliable information.

Conclusion

58. The Western Cape Rental Housing Tribunal Chairperson has requested to address the Portfolio Committee on the contents of the Bill.

59. We trust that the above input will be of value in the deliberations leading up to the enactment of the Amendment to the Rental Housing Act, 1999.

Kind Regards

ADV BRENT GERBER
DIRECTOR-GENERAL
PROVINCIAL GOVERNMENT: WESTERN CAPE

DATE: 5/4/2012