

# **HOMESWEST'S BANKRUPTCY POLICY:** Legal and social implications

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for Shelter WA

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## INTRODUCTION

The impact of Homeswest's bankruptcy policy has been raised in a number of contexts in recent years. In particular, community workers have consistently argued that the policy contravenes the Bankruptcy Act, 1966 and the Residential Tenancy Act, 1987 and acts to deny access to housing for some of the most disadvantaged people in society.

As a result of persistent lobbying a working group was established to review the Homeswest bankruptcy policy. The working group was formed through the Rental Sector Standing Committee which was established to inform the Housing Advisory Committee on issues affecting public and private renters. The working group has representation from the Ministry of Housing along with a range of community groups being: the Tenants Advice Service; Shelter WA; the Financial Counsellors Association of WA; the Women's Refuge Group; and Ian Macdonald who is a practicing solicitor.

At the working group's first meeting on 15<sup>th</sup> August, 2000, the following issues were identified:

- Given Homeswest's position that the policy was implemented in the early 1990s to manage a crisis, its ongoing relevancy needs to be reviewed
- Concerns that the policy is inconsistent with the concept and legal effect of bankruptcy which is to provide a fresh start
- Concerns about the ramifications of excluding bankruptees from public housing and the broader social implications of such a policy.

Terms of Reference were subsequently developed and agreed to as follows:

- a) To develop a profile of bankrupt applicants/tenants including data on the number of bankrupt applicants, amount of debt, proportion with debt only to Homeswest, and impact of bankruptcy on access to housing
- b) To consider the procedures and decisions relating to the introduction of the Bankruptcy Policy and its ongoing use
- c) To consider the legal interpretation of the Bankruptcy Policy from Ministry of Housing and non-government sector
- d) To consider information being provided to potential bankrupts by Financial Counselling services and other appropriate agencies
- e) To develop an alternative policy that is consistent with the Residential Tenancy Act.

A survey was developed to elicit further information with regards to the first term of reference (refer to attachment 1). The survey is discussed in more detail at a later stage.

A discussion of any housing policy and/or practice must be undertaken in the broader context of housing. To this end, the first part of this report deals with:

- Housing as a fundamental human right
- Recent trends in housing assistance in Australia

- The housing situation in Western Australia.

The report then details the methodology adopted for the survey and the survey results. This is followed by a discussion of the application of bankruptcy policy and legislation both in Australia and specifically within Western Australia. Finally, the report provides recommendations regarding the continuing application of the Homeswest bankruptcy policy.

## **BACKGROUND**

The link between adequate housing and a range of other social, economic and cultural outcomes has been explored in a range of literature. The Human Rights and Equal Opportunity Commission (as cited in TAS, 2000) states that “without housing, an individual’s education, economic and socio-cultural development are severely curtailed.” Further, the Australian Institute of Health and Welfare (as cited in Shelter WA, 2001) refers to a strong correlation between inadequate housing and a range of poor social outcomes including poor health status, poverty and generally low living standards.

### **Housing as a Right**

Australia has been party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) since 1976, which amongst other things, lists adequate housing as a basic human right.

Ninyette (1995) argues that the effects of ICESCR are twofold. Firstly,

“... it places a moral obligation on the Australian government – at both federal and state levels, to work towards ensuring that all Australians have a right to adequate housing and that this right is freely exercised.”

Secondly,

“... the Covenant can also be used to interpret Commonwealth legislation as the Commonwealth has the power to incorporate Australia’s international obligations into domestic law. For example, the Housing Agreement Act, 1990 requires Homeswest, as an agency of the crown, to provide secure, adequate and appropriate housing. Using ICESCR, the Commonwealth statute could be interpreted as an instrument which, among other things, enshrines a basic right to adequate housing” (Ninyette, 1995:23).

While the emphasis of the Commonwealth/State Housing Agreement has shifted over time, the 1999-2003 agreement clearly states that “the aim of this Agreement is therefore to provide appropriate, affordable and secure housing assistance for those who most need it, for the duration of their need”. There is therefore nothing

to suggest that Australia has moved away from its commitment to providing access to housing as a basic human right.

## Housing Assistance

Housing Assistance in Australia is provided through two main programs – the Commonwealth/State Housing Agreement (CSHA) and the Commonwealth Rent Assistance Program.

In recent years, there has been increasing emphasis on providing government assistance to those people renting in the private rental market. At the same time, there has been a tightening of public, community and crisis housing assistance both through a decline in overall funding and the implementation of a number of reforms. The result has been an increasing reliance on the private rental market to meet the housing needs of low-income people and a shift to providing assistance to those *most in need*. This is highlighted by changes to the objectives and principles of Commonwealth/State Housing Agreements and changes to levels of funding for the CSHA and Rent Assistance.

It should be noted that community groups have consistently argued that there is a gap between the objective of the CSHA to and Homeswest's policies and practices which is further discussed under public housing on the following page.

Specifically, the 1996-99 agreement refers to providing *housing assistance to persons on low incomes and other persons who are unable to access or maintain adequate and appropriate housing*. Core objectives of the 1996-99 agreement were to:

- achieve outcomes for consumers that are affordable, secure and appropriate to their needs
- provide access to an adequate supply of well maintained crisis accommodation as well as access to appropriate longer term housing
- provide rental housing that:
  - is located to give access to necessary services, facilities and employment opportunities in accordance with life cycle needs
  - adequate in size and amenity for the household
  - provides for security of housing tenure.

The principles of the 1999-2003 agreement are stated as follows:

- the purpose of funding is to assist those whose needs for appropriate housing cannot be met by the private rental market and the duration of housing assistance provided should be based on those needs
- housing assistance arrangements should be sufficiently flexible to reflect the diversity of situations that currently exist in the States and to assist in micro-economic reform.

Not only has there been a shift away from providing affordable, secure and appropriate housing to assisting those whose needs cannot be met by the private

rental market, the commitment to security of tenure has been replaced by the statement to provide assistance for the duration of the need.

The application of a 1% efficiency dividend and a lack of indexation has resulted in a decline in direct housing assistance through the CSHA. Specifically, there has been a decrease of more than \$93 million over the past 10 years with funding for 1995/96 being \$1.023 billion which will have reduced to \$929.18 million in 2002/03. At the same time there has been a four-fold increase in Rent Assistance in real terms over a 10 year period with funding being \$1.6 billion in 1996 (Yates and Wulff, 2000 as cited in Shelter WA, 2001).

## **Housing in Western Australia**

Western Australia mirrors the national trend towards an increasing reliance on the private market to meet the needs of low-income people both through private rental and an increased emphasis on home ownership. At the same time, public housing is being delivered in an environment of a more stringent application of eligibility criteria and more rigorous debt management practices. Given the focus of this report, this section provides detail on public housing, the private rental market, Indigenous housing and homelessness in Western Australia.

### **Public Housing**

Western Australia is characterised by increasing numbers of people who are unable to access public housing evidenced by a range of statistics and anecdotal evidence of the impact of Homeswest policy and practices.

While Homeswest stock levels have fluctuated over the last 10 years, in 1999/00 the total number of stock (35,187) represents an increase of only 52 dwellings since the 1990/91 level (35,135). At the same time, Homeswest's presence as a proportion of total housing stock has also been in decline from 6% in 1991 to 5.2% in 1996 with no figures available since 1996. However, in the same period, the overall number of dwellings in Western Australia has increased by more than 15% (Homeswest, 1996 as cited in Shelter WA, 2000). In addition, the Homeswest waiting list was 12,879 in 1999/00 (Homeswest, 2000 as cited in Shelter WA, 2000). It should be noted that there are many people in social housing who do not apply since they do not expect to be housed (Shelter WA, 2000). This statement that is supported by anecdotal evidence from housing assistance workers who also cite an increasing number of people who do not apply because they are ineligible.

In addition to the abovementioned statistics, there has been increasing concern about the impact of Homeswest policy and practices, particularly those relating to evictions and debt management. In particular:

- Homeswest's more stringent approach to debt management which requires applicants to repay 100% of their debt prior to being allocated a property (Shelter WA, 2000). While there is a debt discount policy, the requirement for a lump sum payment is unrealistic for many people.

- A lack of emergency accommodation (Shelter WA, 2000).
- Increased barriers to re-entering public housing with tighter eligibility requirements including the need to demonstrate a good previous tenancy history (Shelter WA, 2000).
- The continuing use of 'anti-social behaviour' and 'standards' as reasons for eviction which are policies that primarily affect Indigenous people (Shelter WA, 2000).
- Difficulties complying, particularly for Indigenous people, with Homeswest's requirement to 'maintain the house and garden to an acceptable standard', 'maintain the rental account in good order' and 'maintain good neighbour relations'. Specific issues for Indigenous people include:
  - The 'acceptable' standard of housekeeping is based on white middle-class notions and is determined arbitrarily by Homeswest officers;
  - Due to overcrowding in Indigenous tenancies, the families find it difficult to satisfy Homeswest standards;
  - Extra wear and tear due to overcrowding;
  - Due to the extreme economic disadvantage experienced by Indigenous families they struggle to: pay for additional cleaning products, lawn mowing and garden products; and meet costs associated with removal of cars that are in need of repair to comply with Homeswest policy that prohibits having an un-roadworthy car on the property;
  - Indigenous families are often the subject of complaints by intolerant non-Indigenous neighbours that can result in Homeswest asserting that the Indigenous family is not able to get on with their neighbours;
  - Incidents of domestic violence being responded to on the basis that the household has been causing a nuisance to the neighbourhood (Tenants Advice Service, 2000).

## **Private Rental**

The private rental market was once considered a tenure of transition with people moving on to home ownership. However, it has increasingly become a tenure of preferred choice for high income earners and a tenure of last resort for low-income people who are increasingly unable to access public housing (Shelter WA, 2001).

At the same time, there is significant research that indicates that private renters are in fact the most disadvantaged group in the rental market with the major issues being:

- Lack of affordability evidenced by national figures that show that more than 70% of low-income renters are in housing cost burden (paying in excess of 30% of their income on rent), with only 42% of home purchasers in housing cost burden (AHURI as cited in Shelter WA, 2000). Further Yates and Wulff (2000) report that in 1996 there was an overall increase in rents of 7% but a 14% increase in the lowest quartile (ie. the cheapest 25% of properties) with the upper quartile having the lowest increase (Yates and Wulff, 2000 as cited in Burke, 2000). In WA, affordability is further exacerbated by: regional variations such as areas that experience boom and bust cycles that can result in a small private rental market with high demand; and the charging of a letting fee for

managing the property, equivalent to one week's rent which places a further economic burden on low-income people (Shelter WA, 2000).

- Lack of protection against unfair rent increases with no limit on how often or by how much rent may be increased and the only requirement being that the tenant be provided with 60 days notice.
- Lack of adequate minimum standards for rental housing.
- Lack of protection for tenants under privacy legislation which has allowed the development of 'bad' tenant databases. Tenants do not have protection about the reasons they may be listed, they do not have the right to know they have been listed and they are not able to correct wrong or inaccurate information.
- Discrimination by landlords including denial of access to housing, variations to the terms and conditions of the tenancy agreement, offering sub-standard housing and eviction. Groups that are particularly vulnerable to discrimination include Indigenous people, people with a disability, newly arrived migrants and renters with children (particularly single mothers). While discrimination remains difficult to prove and quantify, the National Housing Strategy reported that 11% of respondents had been refused rental accommodation for non-financial reasons and the Department of Social Security reported that 5.3% of its clients were rejected for housing due to age, parental status, lack of references (San Pedro, 2000 as cited in Shelter WA, 2000).
- A lack of supply of low-income rental housing evidenced by national research that indicates that low cost rental housing fell by 28% while there was an increase of 70% of low-income private renters (Yates and Wulff, 2000 as cited in Shelter WA, 2000).
- Lack of legislative protection for people living in boarding and lodging houses.
- Lack of security of tenure with landlords able to evict with the only requirement to provide 60 days notice.

## **Indigenous Housing**

The disadvantage experienced by Indigenous Australians across various social, economic and cultural aspects of society is well documented. While this report does not attempt to address issues of Indigenous disadvantage in this broader context, there are some housing specific issues that need to be highlighted.

The Community Organisations' Report on Housing in Western Australia to the United Nations Committee on Economic, Social and Cultural rights notes the following:

- In its report to the Committee on the Elimination of Racial Discrimination, the Australian government acknowledged that 20% of Indigenous families live in dwellings that are in need of repair or do not have basic amenities such as toilets, bathrooms and running water.
- The Homeswest complaints procedures and the Equal Opportunity Tribunal are inaccessible, complex and alienating.
- There has been an increased requirement for Homeswest applicants to demonstrate that they are unable to access housing in the private rental market.
- Evidence of Indigenous people being provided with poor quality housing.

- The lack of consideration for Indigenous culture both in terms of the type of stock and the impact of cultural obligations on people's housing circumstances (Whelligan and Ballard as cited in Shelter WA, 2000).

Another report of note is *Housing for All – a (sub)urban myth* by the Tenants Advice Service (WA) which provides an overview of the disadvantage experienced by Indigenous people including:

- Discriminatory practices.
- The impact of Homeswest policies and practices that are resulting in more Indigenous people being precluded from public housing (refer to comments under public housing policies and practices above).
- The serious impact of evictions that often results in families being homeless for extended periods of time in which they move between other families' tenancies and are often split up as they struggle to secure shelter on a daily basis. It is argued that this results in poor school attendance, deteriorating health, a growing sense of alienation, children being removed from their families and the creation and/or compounding of mental health problems.
- A lack of consideration of cultural needs and obligations (TAS, 2000).

## Homelessness

While homelessness has been defined in a number of different ways, a lack of affordable accommodation has consistently been identified as a fundamental cause of homelessness (Shelter WA, 2000). While it remains difficult to quantify homelessness, there are a number of associated socio-economic costs that impact on the entire community.

Youth and Indigenous people have been identified as being most at risk of homelessness with contributing factors for Indigenous people including:

- Displacement associated with European settlements and subsequent policies of segregation and assimilation
- Difficulties accessing housing due to low incomes
- Discrimination
- Lack of housing stock (AIHW, 1999:296).

An Australian Bureau of Statistics report titled *Counting the Homeless* identified that there were 12,252 homeless people in Western Australia (Chamberlain, 1999). Another recent report by the WA Association of Mental Health (WAAMH) titled *Purchasing Services-Working Paper 1d* states that there are a minimum of 3,500 Western Australians currently living with mental illness and are homeless or are at risk of homelessness (WAAMH, 2000 as cited in Shelter WA, 2001). With regards to Indigenous homelessness, there were 1,063 homeless Indigenous families (based on families living in impoverished dwellings and living with other families) in 1996 compared to 940 families in 1991, representing a 13% increase (Dane, 1999 as cited in Shelter, 2000).

## **Bankruptcy and Housing Assistance**

### **Homeswest's Bankruptcy Policy**

In a letter dated 28 July 2000, Homeswest states that:

“... it introduced its Bankruptcy Policy in October 1991 in response to an increasing trend by its clients to declare bankruptcy in order to avoid repaying their debts to Homeswest. The policy was developed to encourage clients to repay their debt rather than declaring bankruptcy, thus ensuring the ongoing financial viability of public housing.”

This view is reiterated by the then Hon. Minister Hames in correspondence dated 31<sup>st</sup> July 2000 that states that:

“... the policy was formulated recognising that there are genuine cases where clients have no option other than to pursue bankruptcy. On this basis, there is scope under this policy for Regional Managers to review the reasons for bankruptcy and not require repayment of the debt if avoidance of the Homeswest debt was not the major reason for the bankruptcy application.”

There are three key interrelated Homeswest policies regarding bankrupt applicants: Eligibility Relating to a Bankrupt Applicant; Eligibility Relating to Applicants with a Debt to Homeswest; and Eligibility Relating to an Applicant with a Poor Tenancy History with Homeswest – such as debt, anti social behaviour, poor property standards.

#### ***Eligibility Relating to a Bankrupt Applicant***

The policy acknowledges that Homeswest “cannot take action to recover a debt incorporated in an application for bankruptcy through the legal process”. However, the policy goes on to state that “should the bankrupt make application for further assistance subsequent to the bankruptcy ... Homeswest will exercise its commercial right to choose the terms of any such transaction”.

A critical qualifying statement is that if “Homeswest believes that the application was made to avoid the repayment of a debt to Homeswest, the policy relating to further assistance for applicants with a debt to Homeswest will apply”. Equally, if “Homeswest believes that the application for bankruptcy was made for reasons other than the avoidance of a debt to Homeswest, the debt will be written off and the applicant will be regarded as having no monies to pay and may be admitted to any Homeswest scheme or program”.

#### ***Eligibility Relating to Applicants with a Debt to Homeswest Policy***

Under this policy, applicants (including applicants with an indebtedness to Homeswest from a bankruptcy application) are required to repay 100% of rental debt, water consumption debt, vacated debt, occupied debts, sundry debts and

50% of post occupancy debts (liability assessed after vacation). There are exceptions whereby the Homeswest officer can use discretionary powers for applicants with extenuating circumstances. However, generally speaking, an application for housing assistance can be made but the applicant will not receive a housing allocation until the debt has been fully repaid.

This policy is also supported by the debt discount scheme in which applicants or previous tenants are offered a discount to help repay outstanding money. Eligible customers pay two thirds of the debt with the remaining third being written off. In order to participate, eligible customers are required to pay a lump sum either up front or through instalments.

### ***Eligibility Relating to an Applicant with a Poor Tenancy History with Homeswest***

In this policy, Homeswest articulates its “right to refuse assistance, or place conditions on further assistance, to any applicant with substantiated breaches of the Tenancy Agreement or the Residential Tenancy Act”.

## **Legislation**

An examination of Homeswest’s bankruptcy policy must be undertaken in the context of relevant legislation, namely the Bankruptcy Act, 1996 and the Residential Tenancy Act, 1987.

### ***The Residential Tenancy Act, 1987 (RTA)***

While Homeswest is exempt from the certain sections of the RTA, it is bound by section 27 which makes it a criminal offence for a person or organisation to require a prospective tenant to pay money in relation to entering into a residential agreement other than rent or a security bond. As reported by Macdonald (2000), this section creates four exceptions to this general rule:

1. “a sum paid for an option to enter into a tenancy;
2. any amount the owner is authorized by any other provision of the RTA to receive. This is a provision which seems, from its context in the Act, to refer to the new tenancy, rather than to one which finished in the past;
3. a letting fee payable to a real estate agent, not exceeding one week’s rent;
4. payment of a prescribed class. This means payments of a type covered by regulations made under the Act” (Macdonald, 2000).

### ***The Bankruptcy Act, 1996***

A fundamental principle of bankruptcy legislation is that in going bankrupt, a person wipes all liabilities and debts and in effect has a clean slate. Specifically, section 153 of the Act states that the discharge operates to release the person from all debts (including secured debts) provable in the bankruptcy. While there are exemptions, Homeswest does not qualify under this section (TAS, 2000a).

In relation to the property of the bankrupt person, section 58(1) of the Act provides that where a debtor becomes bankrupt, the property of the bankrupt vests in the

Official Trustee. The effect is that the creditor is no longer able to pursue the person. Any claims or demands must be addressed to the Trustee, not the bankrupt person (TAS, 2000a).

As reported by Macdonald (2000), sub-section 58(3) prevents a creditor from enforcing any remedy against a bankrupt in regard to a debt which is part of the bankruptcy. Debts outstanding from a tenancy, such as unpaid rent or breaches of the rental contract, are normally part of a bankruptcy. Unless the Federal Court, the Federal Magistrate's Court or the High Court give specific permission, a creditor cannot begin or continue with action in any Court regarding a debt that is a part of the bankruptcy.

### **Other States**

The policies and practices of State Housing Authorities (SHAs) with regards to bankrupt applicants vary throughout Australia. At the time of writing this report, policies were available from New South Wales, Queensland, South Australian and Victoria.

New South Wales and Queensland State Housing Authorities (SHAs) have developed policies based on the principle that they cannot take action to recover debts accrued prior to being declared bankrupt. Specifically, the New South Wales policy states that:

“If the tenant is declared bankrupt we will write off debts accrued up to the date of bankruptcy. Any amounts that accrue after the date of bankruptcy will be pursued ... Former tenants who owe money to the Department of Housing may still be considered for assistance. However, they must first make satisfactory arrangements to repay their debt, even if the debt has previously been written off. This condition does not apply to tenants who have been declared bankrupt. The Department cannot receive any payments for debts incurred up to the date of bankruptcy was declared.”

Similarly, the relevant Queensland policy states that:

“If an existing tenant is declared bankrupt, no action can be taken to recover rent arrears or maintenance charges accumulated before the date they were declared bankrupt. However, if a tenant continues to fall into rent arrears after being declared bankrupt, actions can be taken to gain possession of the property, taking into account the tenant's history (Financial Management of Rental Agreements 15.6.1). Under current legislation the Department cannot legally pursue previous clients for repayment of a debt if the client has been declared bankrupt after receiving assistance from the Department. However given that the Department's policy states that applicants for public rental housing must not have any outstanding debts the Department may withhold offering further assistance until the debt has been repaid” (Financial Management of Rental Agreements 15.6.2).

The South Australia and Victoria policies reflect aspects of the Western Australian policy, namely that they SHA will exercise the right to deny access to services (for a period of time) based on bankrupt applicants having a SHA debt. However, both policies also clearly acknowledge that the SHA cannot take any action to recover such a debt. The South Australia policy states that:

“Individuals who have been declared bankrupt and have a Trust debt may apply for housing assistance (and will accrue waiting time benefit if eligible), but must be advised that they will not be housed during the period of their bankruptcy. No claim for the repayment of a pre-bankruptcy debt can be made (Eligibility Procedure 2.4.1). Individuals who are approved Category 1 (ie. in urgent need of housing), will be exempt from these provisions and may be housed whilst bankrupt or with an outstanding Trust debt (Eligibility Procedure 2.4.3). A tenant who is declared bankrupt (either by self or creditors) and is unable to pay Trust debt as a result may be evicted during the bankruptcy period where any post bankruptcy amount owing is, at minimum, the equivalent of 2 weeks rent. Approval for this action must be obtained in line with the provisions of the Credit Policy Operating Procedures Manual (Credit Policy 2.13). An applicant for rehousing whose prior tenancy was terminated, as outlined in Clause 2.13 (Bankruptcy) or was evicted for non payment of debt and post eviction is declared Bankrupt with debt outstanding will not be rehoused during the bankruptcy period (Applicants who are approved for Category 1 of the Waiting List are exempt from this requirement). Pre-bankruptcy debts cannot be reinstated (Credit Policy 2.12).”

Similarly, the Victorian policy states that:

“If the applicant or another household member has outstanding charges but has been declared bankrupt, their application can be approved and placed on the waiting list. However, the household cannot receive an offer of housing for a period of 12 months from the date of application. When a person is declared bankrupt, any outstanding charges up to the date they are declared bankrupt is not recoverable by the Office of Housing. However any outstanding charges accrued after that date must be paid in full prior to an offer of housing.”

## **THE SURVEY**

### **Methodology**

Following discussion at the working group meeting on 12<sup>th</sup> September, 2000 a survey was developed (see attachment 1) to obtain further information on the profile of bankrupt applicants and housing choices in Western Australia. The

survey was sent out on 15 February 2001 to all 313 agencies/individuals on the Shelter WA database. A total of 20 responses were received.

In light of the poor response rate, the working group decided to resend the survey with a more detailed explanation of the background and purpose of the survey. On 15<sup>th</sup> February 2001, the survey was resent to Community Legal Centres, Financial Counsellors, Migrant Resource Centres, and Regional Housing Associations who had not previously responded, urging them to complete the survey. This was followed up with phone calls to those who did not respond. This resulted in a further 27 surveys being returned.

## Results

### Quantitative Data

The survey results provide useful insights into the profile of bankrupt clients and issues regarding housing choices in Western Australia. However, both the survey design and apparently inconsistent/incomplete answers from some respondents limited the conclusions that could be drawn from the results. In particular, the following should be noted:

1. In the first question respondents are asked how many bankrupt clients they have had contact with in the last 6 months. In the following four questions, respondents were then asked to provide specific information about these bankrupt clients. However, given the survey structure whereby respondents were asked to select from a numerical range (0; 1-2; 3-5; 6-10; 10+) for all questions, limited information can be drawn from responses to questions 2-5. For example, if a respondent indicated that they have had contact with 6-10 clients who are bankrupt and that 6-10 of these clients also had a debt to Homeswest, it is unclear what proportion of bankrupt clients seen also have a debt to Homeswest. The only conclusion that can be drawn is that at least some if not all of bankrupt clients seen also had a debt to Homeswest.
2. One respondent indicated that they had not seen any bankrupt clients in the last 6 months but in response to question 11 also indicated that 20-29% of income is being spent on rent. It is assumed that the answer to questions 11 related to clients generally and not bankrupt clients. This highlights the ambiguity of question 11 which can be interpreted to be asking for information about bankrupt clients (as is the case for all other questions) and/or in relation to all clients.
3. There were two agencies that sent in surveys that had been completed by two different workers at the agency. Given the variation in results, it is assumed that the survey was completed from the individual worker's perspective with regards to clients seen by that worker and not from an agency-wide perspective. Given that the survey instructions did not stipulate whether people should complete it on behalf of their agency or from their own experience, it is unclear as to how people interpreted this issue.
4. Given that the highest number that could be chosen was 10+, there is little indication of actual numbers of clients. This is highlighted by the fact that one respondent referred to having had contact with 36 bankrupt clients in the last 6

months in their general comments. It is therefore possible that the real figures are much higher than what is reflected in the survey responses.

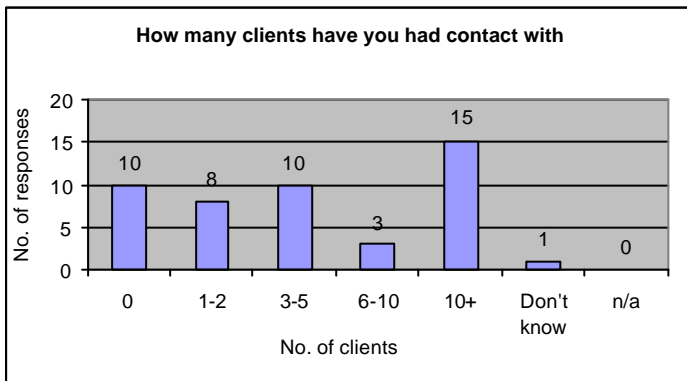
### **Profile of Respondents**

#### **General**

A total of 49 responses were received, 2 of which were deemed to be invalid due to the following reasons:

- No responses to the survey other than a comment that “I was unable to complete it as I have only been in the position since 8<sup>th</sup> January, 2001”
- The respondent indicated that they had not had contact with any clients who are bankrupt but also went on to answer subsequent questions.

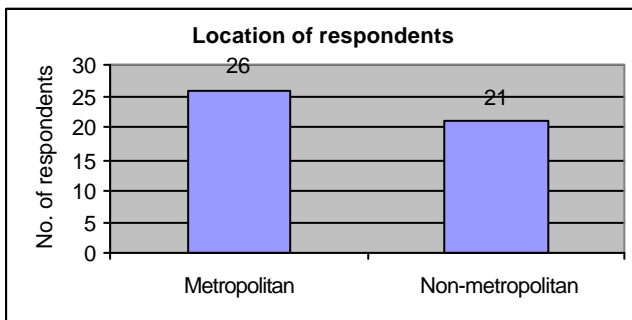
Of the 47 responses that were included for analysis, 10 (21%) indicated that they had not had any contact with clients who are bankrupt.



With the exception of one, these respondents did not answer any other questions. The exception to this was a respondent who indicated that 20-29% of income is being spent on rent in response to question 10. It is assumed that this response relates to clients generally rather than bankrupt clients.

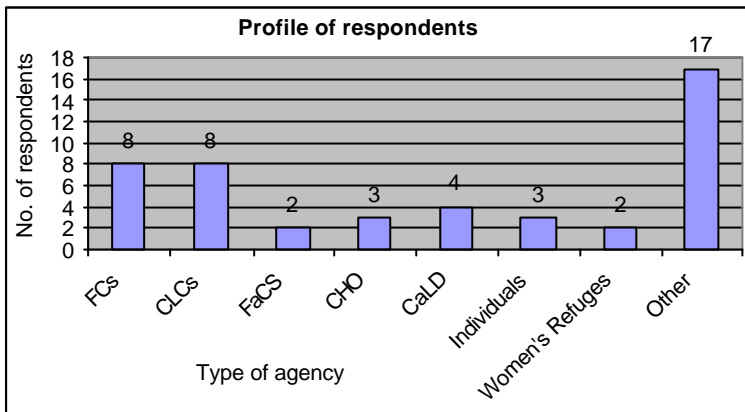
#### **Location**

Of the 47 respondents, 26 (55%) were from people located in the metropolitan region and 21 (45%) from regional areas.



**Type of Agency**

Of the 49 responses received, the overwhelming majority (44) represented an agency with only 3 respondents not naming an organisation. Just over one third (34%) of respondents were either from Community Legal Centres or Financial Counselling Services.



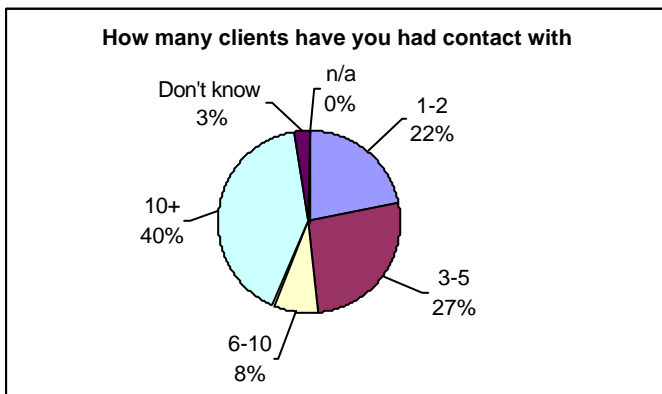
FCs = Financial Counselling Services  
CLCs = Community Legal Centres

FaCS = Family and Children's Services  
CHO = Community housing organisations

**Profile of Bankrupt Applicants**

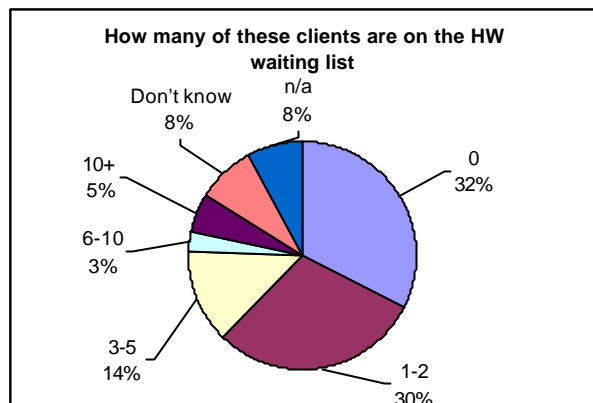
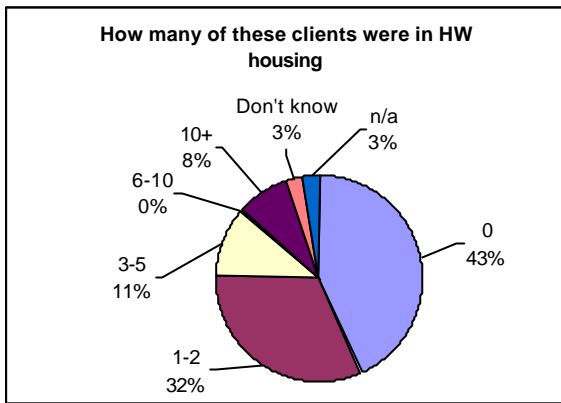
**Number of Bankrupt Clients**

Of the 37 respondents who have had contact with bankrupt clients, those indicating that they had contact with more than 10 clients represent the largest group at 40%.

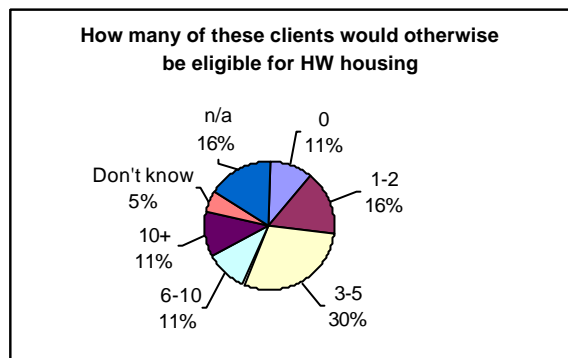
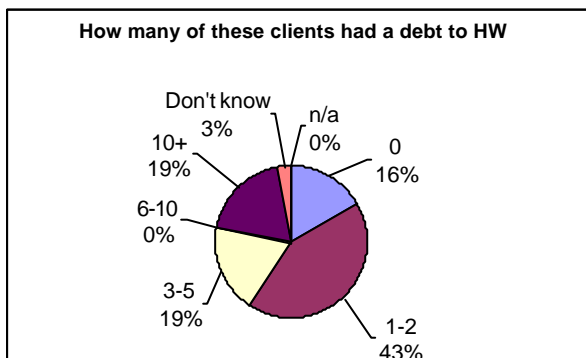


**Access to Public Housing**

Just over half (51%) of the respondents indicated that at least some of their bankrupt clients were in Homeswest housing with 52% reporting at least some on the Homeswest waiting list.

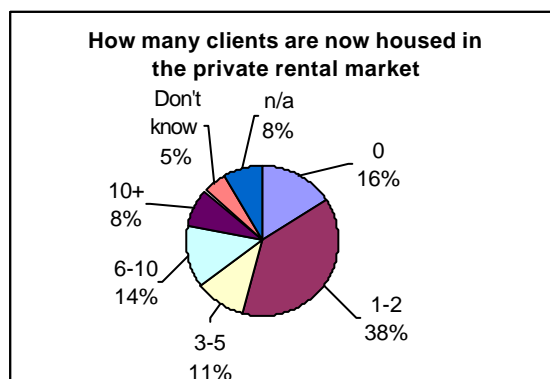


A total of 81% of respondents indicated that some/all of their bankrupt clients also had a debt with Homeswest with only 16% indicating that none of their clients had a debt to Homeswest. With regards to eligibility for Homeswest housing, 68% stating that some/all of their clients would otherwise have been eligible for Homeswest housing and 11% stated that none of their clients would have been eligible.

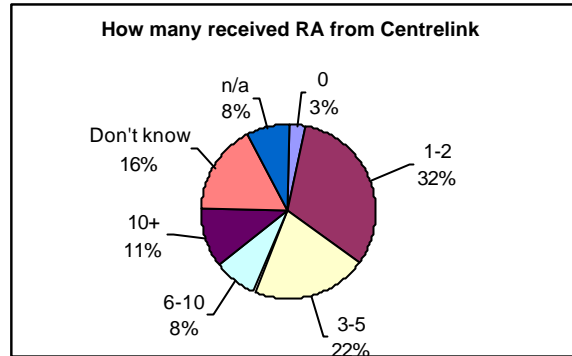
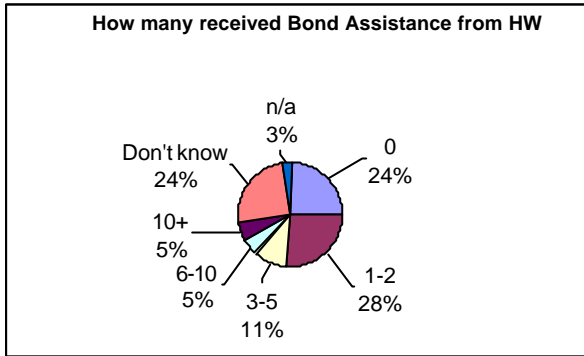


### ***The Private Rental Market***

With regards to the private rental market, 71% of respondents indicated that some/all of their clients were housed in this tenure.

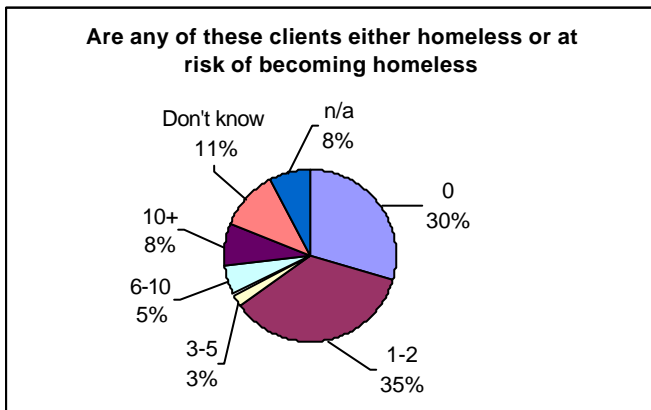


A higher percentage of respondents indicated that some/all of bankrupt clients were in receipt of Rent Assistance (73%) as compared to Homeswest Bond Assistance (49%).



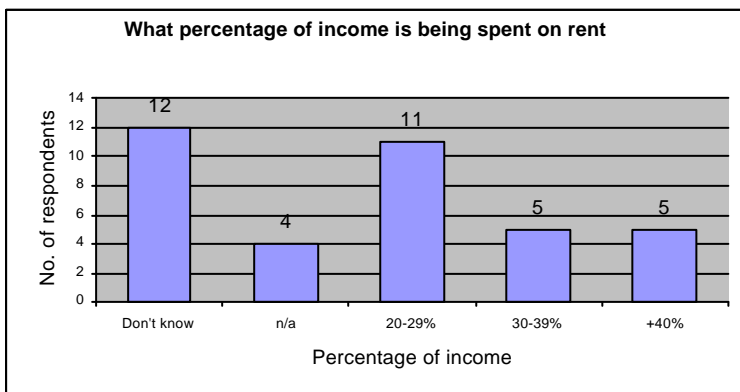
**Homelessness**

Just over half of the respondents (51%) reported that some/all of their bankrupt clients were either homeless or at risk of becoming homeless.



**Affordability**

The majority of respondents either indicated that they weren't aware of the rent being paid by clients (32%) or that it was between 20-29% of income (30%).



## Qualitative Data

There was only one question in the survey that sought qualitative information and this was in the form of an invitation for people to provide any comments in relation to Homeswest's bankruptcy policy. A total of 8 people provide comments as follows:

### Lack of data

- This service does not keep required data too accurately.
- Unable to complete survey as do not record stats for this information. If advised of need for these stats over a period of a few months, will record and forward information.

### Home Ownership

- 50% of bankrupt clients had home mortgages; many chose to walk away from home and rent privately; some with little or no equity in home chose to retain home.

### Access to Homeswest Services

- Some clients choose to allow Homeswest to continue deducting for their debts after bankruptcy because they believe this is the only way they will get future Homeswest accommodation or bond. They will not be dissuaded from this. Perhaps this is the result of information provided by Homeswest staff.
- Of the two clients (partners) both undischarged bankrupts, one Aboriginal woman also suffered from a heart condition and asthma. Male partner diagnosed with clinical depression. Due to Homeswest policies both unable to access Homeswest housing.
- As mentioned above, having repaid a debt there is no guarantee to access to Homeswest services.
- The Homeswest debt has had negative impact on 6 transfer applications.
- Clients go bankrupt and don't include MoH debt because of various serious repercussions to them so debt relief isn't always a remedy.
- Nine clients, in varying degrees cannot access the Homeswest waiting list because of debt.

### Consequences of Lack of Access to Homeswest Services

- Were forced to live in a caravan park at \$100 per week plus power and in the winter, needed emergency food assistance due to cost of living.
- I could say that all these cases have led to homelessness. However given the cultural implication of the family unit to Indigenous people there are numerous consequences – in one case (the most extreme), the mother had taken in her homeless daughter, her partner and their 4 and soon to be 5 children. Not long after this another 3 teenage grandchildren arrived from Perth. They now have their partners living there and one couple is expecting a child as well. This cryptic puzzle adds up to 11 people (minimum) in a 3 bedroom house! Of course this is leading to stress and family breakdown, health problems and maintenance problems for the tenant which will lead back to a tenant liability bill.

## Indigenous People

- Indigenous people seem less inclined to pursue bankruptcy procedures.

## Other

- ... with the statute of limitations providing no relief either.
- Going through the due process of substantiating Homeswest debts is tedious and time consuming though often worth the work involved.
- The majority of welfare clients I see are having a problem with unpaid rent or Centrelink advances for basic living, eg. rent. The ruthless approach to collection disturbs me.
- Western Power and Alinta Gas take on clients (who have gone bankrupt owing them money) without penalty. Why is Homeswest not doing the same?

## DISCUSSION

### Survey Results

While the limitations of the survey design certainly impact on the conclusions that can be drawn from the survey results, there are some themes that emerge. In addition, it should also be noted that information emerging from the survey responses certainly supports the views and research discussed in other sections of this report.

Firstly, the overwhelming majority (81%) of respondents reported that at least some, if not all, of the bankrupt clients seen in the last 6 months also had a debt to Homeswest. There are therefore significant numbers of bankrupt clients who are potentially denied access to Homeswest housing as a result of current policies and practices. This was further supported by specific examples provided as part of respondents' general comments.

Secondly, just over half of the respondents (51%) indicated that at least some, if not all, of their bankrupt clients are either homeless or at risk of homelessness. This was supported by comments from respondents that being denied access to public housing leads to increased homelessness and associated poor social outcomes including health problems and family breakdown.

Thirdly, just under a third of respondents (30%) indicated that clients are paying between 20-29% of income on rent. However, given that a further 32% indicated that they were unaware of the level of rent being paid by clients, little can be concluded from the survey regarding affordability of housing.

Finally, there were a number of comments that agencies do not keep the necessary data required for this survey in a manner that is easily accessible. This was raised both in general comments on the survey and in discussions as part of the telephone follow up.

## Legal and Socio-Economic Implications

In examining the Homeswest bankruptcy policy, both the legal implications and the socio-economic impact of the policy are explored.

### Legal Opinions

There are a range of legal opinions relevant to Homeswest's bankruptcy policy, with several indicating that the policy contravenes the Residential Tenancy Act, 1987 and/or the Bankruptcy Act, 1966.

In 1997, the Tenants Advice Service (TAS) sought an opinion from Legal Aid regarding difficulties faced by Homeswest clients with both the further assistance and bankruptcy policies. Firstly, in relation to further assistance for applicants with a debt, the opinion states that:

“Homeswest may argue that the debt which is required to be paid arose from a previous tenancy, and thus in no way connected with the current application. However, the problem with this argument is that the practical *effect* of the policy is that an applicant will not receive a new tenancy agreement until the previous debt is repaid. This is in effect a pre-condition to the new tenancy, and as such links the payment of the debt to the new tenancy application. Since the requirement to repay the debt constitutes neither ‘rent’ nor a ‘security bond’, section 27 of the RTA is contravened.”

With regards to bankrupt applicants, the opinion states:

“The effect of this provision [s.58(1) of the Bankruptcy Act] is that because the property of the bankrupt vests in the Trustee, the creditor is no longer able to pursue the bankrupt person. Any claims or demands of a creditor must therefore be addressed to the Trustee, and not to the bankrupt person ... The above provisions clearly demonstrate that Homeswest is in breach of the provisions of the Bankruptcy Act in requiring the bankrupt person to clear their Homeswest debt before an application for assistance be dealt with.”

It goes on to state:

“Where a person is a discharged bankrupt under s. 153 of the Act, the discharge .... *operates to release him from all debts (including secured debts) provable in the bankruptcy ...* Section 153(2) of the Act does exempt certain debts from the above release ...[but] Homeswest debt does not qualify as one of the exempted debts under s. 153(2). Homeswest is therefore in breach of the release provisions of the Act in insisting that the debt must be repaid before assistance may be given” (Legal Aid, 1997).

With regards to requiring an applicant to repay a debt prior to receiving housing, the following two decisions make relevant comments. Firstly, in *Jones v Commissioner for Housing*, ACT Administrative Appeals Tribunal, 20/8/99 Senior Member P O' Neil states:

“... I consider it is inappropriate for the Commissioner to attempt to recover the old debt as a condition of providing accommodation in this case.”

Secondly, in *Britten v Commissioner for Housing*, ACT Administrative Appeals Tribunal, 24/11/99, Senior Member P O' Neil states:

“... Thus a consideration required in return for an offer of housing assistance to a prospective tenant has the same effect as a consideration required for a right to occupy premises ... I find that requiring that consideration in return for agreeing to offer a new tenancy to Mr Britten is proscribed by section 15 of the Residential Tenancies Act. ... That finding does not mean that the Authority cannot seek to recover money owed by tenants and prospective tenants arising from earlier tenancies. It can attempt to do so by voluntary agreement or it can use the usual legal means of debt recover ... It [ACT Housing Authority] cannot demand that debt repayment be commenced before a new tenancy is offered. To do so contravenes section 15 of the RTA.”

In correspondence dated 13<sup>th</sup> March, 2001 Macdonald refers to the judgement of Gibbs, C. J. of the High Court in the decision of *Storey v Lane* (1981) 147 CLR 549:556 which cites the purposes of bankruptcy law as being essentially three in number:

- the appropriation of the assets of the debtor and their equitable distribution amongst his creditors
- to prevent one creditor, who has the right to enforce payment of his debt under some other law, from exercising that right so as to gain an advantage over other creditors
- to protect the debtor from punishment because he has not paid the debt when payment might be a breach of the bankruptcy law.

In the light of this, Macdonald argues that:

“If a housing, water, power or other authority uses the threat of refusal of supply of services to a prospective consumer because of a debt which was part of a bankruptcy, the authority is acting contrary to the principles of bankruptcy law as they have been laid out by the High Court. It is using the threat of refusal of supply to gain an advantage over other creditors, who are limited to an equal sharing with other creditors of any assets or income which may be distributed by the trustee in bankruptcy ...” (Macdonald, 2001).

While it is understood that the Ministry of Housing has obtained its own legal advice regarding the application of Homeswest's Bankruptcy Policy, this has not been made available to the working group. It is therefore unclear as to the legal basis for Homeswest's continuing application of the bankruptcy policy (Tenants Advice Service, 2000a).

### **Socio-economic Impact**

The Tenants Advice Service reports significant community concern regarding the effect of Homeswest's bankruptcy policy. In particular, it is argued that the policy exacerbates homelessness through families being locked out of public housing and for whom the private rental market is not a viable option due to the discriminatory nature of this tenure (Tenants Advice Service, 2000a).

The first section of the report provides a full description of the state of housing in Western Australia. In particular, it highlights the fact that increasing numbers of people are unable to access public housing and are therefore forced to rely on the private rental market which, for many reasons, does not represent a viable housing option.

Homelessness is by far the most severe consequence of being denied access to adequate housing. In terms of costs associated with homelessness research by Neil and Fopp (1992), Dixon (1993) and Pinkney and Ewing (1997) highlight the far-reaching consequences of the absence of housing.

Neil and Fopp (1992) refer to short term and long-term costs stating that:

“The cost of homelessness is not the same for all families or individuals. Family breakdowns, physical and mental health problems, educational difficulties, social isolation, unemployment, frustration and powerlessness, loss of identity, violence and antisocial behaviours have all been associated with homelessness ... All these factors are likely to combine to make homeless individuals or families 'different', and thereby marginalise them in a society which places a high value on having a job and a home that reflects a position in society ... These are the short-term costs of homelessness. The long-term costs may be much greater through lost productivity, lost capital accumulation, extra demand for a whole range of community, health and legal services, and a recurring cycle of long term dependency or antisocial behaviour” (Neil and Fopp, 1992:26-27 as cited by Ninyette, 1995).

Dixon (1993) estimates the cost of homelessness in Australia to be AU\$7,400 per person. This is based on the cost of unemployment benefits and the associated loss of tax revenue based on the assumption that homeless people are unemployed. It is argued that homelessness has significant non-economic costs through a loss of potential for people to contribute to their communities and the broader community (Dixon, 1993). Pinkney and Ewing (1997) argue that the total cost attributable to homelessness in 1994 was \$574 million (ie. \$132 million in costs associated with ill health and involvement in the criminal justice system and

\$442 million in foregone education and long term unemployment) (Pinkney and Ewing, 1997).

## General Comments

Homeswest argues that the bankruptcy policy was developed “in response to an increasing trend by its clients to declare bankruptcy in order to avoid repaying their debts to Homeswest”. However, information from the Insolvency Trustees Service Australia (ITSA) and the Tenants Advice Service suggest otherwise.

Information from ITSA suggests that people’s reasons for petitioning for bankruptcy are much more likely to be linked to unemployment than any other issue. Specifically, a study done in 1997 indicates that ‘unemployment’ was identified by 29% of bankrupts as the primary cause of bankruptcy. In addition, the study indicates that it is reasonable to assume that most of those who identified ‘low income’ (10%) and some of those who identified ‘excessive use of credit’ (18%) as the primary cause of their bankruptcy are also unemployed. Coupled with the fact that 67% of bankrupts are not employed, unemployment is clearly a major factor in bankruptcy. Furthermore the same study indicates that the amount owed to State Housing Authorities represents 0.3% of the total bankrupt debt (TAS 2000a).

The Tenants Advice Service notes that the most likely reasons for Homeswest clients becoming bankrupt are:

- “a) They are homeless, or living in high cost private rental, or boarding with relatives in overcrowded conditions.
- b) They have been charged with a Homeswest vacated debt from a previous tenancy, the greater part of that debt being a tenant liability account.
- c) The size of the debts is such that they are not in a position on current income, to comply with Homeswest’s policy of paying 100% of the rental debts and 50% of the tenant liability before receiving further assistance.
- d) It is extremely difficult for tenants to challenge the tenant liability assessment (given its arbitrary determination), even with advocate assistance and the availability of HAM [Homeswest Appeals Mechanism]. The process is also extremely time consuming and complex involving an FOI [freedom of information] application, research into policy and construction of lengthy submissions – often beyond tenants’ capability particularly for those with literacy problems.
- e) They may be subject to action from Collections agents and are aware that the ultimate sanction for non-payment of debts in WA is imprisonment” (Tenants Advice Service, 2000a:3).

It is therefore unclear as to the basis on which Homeswest formed the view that people were going bankrupt to avoid debts to Homeswest. In addition, Homeswest has not provided any evidence to suggest that this reflects the current situation.

A fundamental aspect of Homeswest’s bankruptcy policy is the extent to which Homeswest believes “that the application was made to avoid the repayment of a debt to Homeswest”. It is both unclear as to the basis on which any such

assessment is made and it fails to address Homeswest's social and moral obligation to provide housing to some of the most disadvantaged people in society.

Regardless of whether Homeswest's bankruptcy policy is deemed to contravene the Residential Tenancy Act, 1987 and/or the Bankruptcy Act, 1966, there is a much larger question at hand as to whether Homeswest, as the houser of last resort, should adopt any policies and/or practices which have the effect of exacerbating homelessness. This is particularly pertinent when considered in the context of access to adequate housing being seen as a basic human right.

It needs to be noted that in order to recover monies owing by a tenant from a prior tenancy agreement, Homeswest, like any other landlord (or in fact, any other creditor), can negotiate debt repayments and has recourse to the civil courts in an action for debt.

Finally, Homeswest policies and practice have the effect of treating at least some bankrupt applicants (ie. those who are deemed to have gone bankrupt in order to avoid paying their debt to Homeswest) in the same manner as other applicants with a debt to Homeswest. This raises a much broader issue about the legal and moral implications of requiring an applicant to repay a debt prior to being provided with housing assistance. However, given the terms of reference of the current review, this report only refers in passing to issues regarding further assistance for applicants with a debt. This issue warrants a more detailed exploration which would be best undertaken as part of a broader review of debt management policies and practices.

## **RECOMMENDATIONS**

1. That the existing Homeswest bankruptcy policy be abolished.
2. That the Homeswest debt management policy contain a clause to the effect that "Homeswest cannot take action to recover a debt incorporated in an application for bankruptcy".
3. That there be a full review into Homeswest's debt management policies and practices.

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