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HOMEOWNERS PROTECTION BILL, 2017

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HOMEOWNERS PROTECTION BILL, 2017

A BILL FOR AN ACT TO PROVIDE PROTECTION AND RELIEF TO HOMEOWNERS AND FOR ANCILLARY MATTERS

Enacted by the Parliament of The Bahamas

PART I - PRELIMINARY

1. Short title.

This Act may be cited as the Homeowners Protection Act, 2017.

2. Interpretation.

In this Act —

“**arrears**” means scheduled instalment payments of principal and interest the mortgagor has failed to pay, and includes costs and fees as provided for in the mortgage agreement;

“**Court**” means the Supreme Court;

“**dwelling house**” means any building or part thereof, including a condominium unit or a duplex, which is used primarily as the dwelling house of the mortgagor or members of his immediate family;

“**financial institution**” means a financial institution as defined in section 3 of the Financial Transactions Reporting Act (*Ch. 368*);

“**immediate family**” includes the spouse, children and parents;

“**market value**” means the value of property determined by a licensed appraiser approved by the financial institution;

“**Minister**” means the Minister of Finance;

“**mortgage**” includes a charge on property used primarily as the residence of a mortgagor or members of his immediate family for —

- (a) securing money or monies loaned for the construction or purchase of a dwelling house;
- (b) funding educational needs or medical expenses of the mortgagor or any member of his immediate family; or
- (c) funding commercial ventures;

“mortgage debt” means the amount due and owing under a mortgage;

“mortgagee” means a financial institution to whom the property is mortgaged; the lender, assignee, transferee or purchaser of a mortgage debt;

“mortgagor” means a person who mortgages his property as security for a mortgage debt; a borrower;

“property” means real property;

“qualifying bid” means a bid substantiated with evidence that the person can meet the obligation;

“sums due under the mortgage” means the sum total due on the mortgage including all outstanding principal, accrued interest, and any other costs and fees that have been expended or accrued pursuant to the mortgage or agreement.

3. Application of Act.

This Act shall apply to financial institutions that provide, purchase or otherwise service mortgages.

PART II – PROTECTION FOR MORTGAGORS

PROTECTION FOR MORTGAGORS WHEN MORTGAGEE INSTITUTES COURT PROCEEDINGS

4. Obligation of mortgagee to give notice prior to instituting Court proceedings.

- (1) Where a mortgagor is in breach of the mortgage agreement, the mortgagee shall not institute proceedings before the Court in respect of the breach, unless there has been served upon the mortgagor either personally or by registered post at least thirty days prior to instituting such proceedings a notice in writing stating —
 - (a) the nature of the breach of any covenant of the mortgage;
 - (b) the amount of arrears the mortgagor owes, if any, as well as all sums due under the mortgage;

- (c) the amount of any administrative or other costs, including any property tax and insurance costs, necessarily incurred by the mortgagee and chargeable to the mortgagor;
 - (d) the actions the mortgagor must take by a stated time to cure the breach and avoid foreclosure and sale of the mortgaged property;
 - (e) the rights of the mortgagor under this Act including the right to apply to the Court for relief;
 - (f) the willingness of the mortgagee to discuss the breach with the mortgagor, with a view to entering into an agreement with the mortgagor regarding redress thereof, including modification of the mortgage terms if possible;
 - (g) contact information for the mortgagee, including an address to which a mortgagor may come in person and a telephone number.
- (2) The Court may as it sees fit upon an *ex parte* application by a mortgagee vary the method of service mentioned in subsection (1).

5. Mortgagor may apply to Court for relief.

Where a mortgagor receives notice in accordance with section 4, the mortgagor or a member of his immediate family who has been contributing to the payment of the mortgage prior to the breach may apply to the Court for relief as set out in section 6.

6. Power of court to grant relief in proceedings before the Court.

- (1) Where a mortgagee institutes proceedings before the Court as set out in section 4, the Court may exercise any of the powers conferred on it by subsection (2) if it appears to the Court that, in the event of its exercising those powers, the mortgagor is likely within six months, to be able to —
- (a) pay principal and accrued interest at a specified time;
 - (b) remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage; or
 - (c) pay arrears.
- (2) The Court may —
- (a) adjourn the proceedings; or
 - (b) on giving judgment, or making an order for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order —
 - (i) stay or suspend execution of the judgment or order; or
 - (ii) postpone the date for delivery of possession,
- for a maximum of six months.

- (3) Any such adjournment, stay, suspension or postponement as is referred to in subsection (2) may be made subject to such conditions as the Court thinks fit with regard to requiring the mortgagor to—
 - (a) pay principal and accrued interest at a specified time;
 - (b) remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage; or
 - (c) pay arrears.
- (4) At any time while an order granted pursuant to this section is in effect, the Court may, on application by the mortgagee or the mortgagor —
 - (a) vary the terms or conditions of the order;
 - (b) vary the conditions of stay, suspension or postponement; or
 - (c) impose such further conditions as the Court considers necessary.
- (5) Sections 4, 5 and 6 shall apply to any mortgage executed before or after the coming into operation of this section but not to any legal proceedings existing at the coming into operation of this Act.

PROTECTION FOR MORTGAGORS WHEN MORTGAGEE EXERCISES ITS POWER OF SALE

7. Obligation of mortgagee to give notice prior to exercising non-judicial power of sale.

- (1) Where a mortgagor is in breach of the mortgage agreement, the mortgagee shall not exercise the power of sale conferred by any other law, unless there has been served upon the mortgagor personally or by registered post at least thirty days prior written notice of the intention to exercise the power of sale.
- (2) A notice referred to in subsection (1) shall contain the particulars referred to in section 4(1)(a) - (g).

8. Mortgagor may apply to Court to postpone sale.

Where the mortgagee in accordance with section 7 serves notice of an intention to exercise power of sale, the mortgagor or a member of his immediate family who has been contributing to the payment of the mortgage debt, may within twenty-eight days of the service of the notice, make an application to the Court for relief as set out in section 9.

9. Power of Court to grant relief from mortgagee's exercise of power of sale.

- (1) On the hearing of an action pursuant to section 8, the Court may, without prejudice to any other power, make an order to postpone the sale of the mortgaged property for a reasonable period if it appears to the Court that in the event of its exercising those powers, the mortgagor is likely within a time period the Court deems reasonable, to be able to —
 - (a) pay any sums due under the mortgage;
 - (b) remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage; or
 - (c) pay arrears.
- (2) An order under subsection (1) shall not be made unless the mortgagor satisfies the Court that the following conditions exist in relation to him —
 - (a) that a sum equal to at least one half of the amount of principal and accrued interest has been paid to the mortgagee;
 - (b) that there has been, due to circumstances beyond his control, an adverse material change in his financial circumstances; or
 - (c) that he has been in occupation of the dwelling house for a period not less than twenty per cent of the original mortgage term.
- (3) Where an order is made to postpone the sale of a mortgaged property pursuant to subsection (1), no further sum shall be payable to the mortgagee on account of the unpaid balance of the mortgaged except in accordance with the terms of the said order.
- (4) At any time while an order granted pursuant to this section is in effect, the Court may on application by the mortgagee or mortgagor vary the conditions of postponement and impose such further conditions as the Court considers necessary.
- (5) The mortgagor or immediate family member shall provide to the court and the mortgagee within thirty days of an order of postponement of sale of the mortgaged property an affidavit of means setting out his current assets and liabilities, expressly stating whether there has been a change in financial circumstances and providing the particulars giving rise to the change.
- (6) Sections 7, 8 and 9 shall apply to any mortgage executed before or after the coming into operation of this section but not to any legal proceedings existing at the coming into operation of this Act.

10. Mortgagee's duty of fair dealing.

- (1) A mortgagee, in the exercise of the power of sale, shall not engage in unfair, deceptive or abusive acts or practices.

- (2) Any person who fails to comply with any provision of this section commits an offence.

11. Conditions on exercise of power of sale.

- (1) Where a mortgagee has failed to secure a sale of property at market value within six months from the date the mortgagee —
- (a) issued a notice of default to the mortgagor; or
 - (b) obtained vacant possession,
- the mortgagee at his option may after giving notice to the mortgagor, proceed to accept the highest qualifying bid offered in writing.
- (2) A mortgagee shall disclose in a notice issued under subsection (1) that—
- (a) in exercising its power of sale, the mortgaged property may be sold at less than the market value; and
 - (b) subject to subsection (8), in the event that the property is sold at less than the market value the mortgagee may pursue the mortgagor for the recovery of any sums remaining on the mortgage debt after said sale.
- (3) Within ten days of the receipt of the notice referred to in subsection (1), the mortgagor may issue a notice of objection stating therein the intention of the mortgagor within seven days —
- (a) to pay the amount of principal and accrued interest at a specified time;
 - (b) to remedy any default consisting of a breach of any obligation arising under the mortgage; or
 - (c) to apply to the court for relief.
- (4) In the absence of receipt of a notice of objection from the mortgagor within ten days from the issuance of the notice of sale, the mortgagee shall within seven days thereafter, cause to be advertised at least four times over a period of not less than sixty days in the Gazette and on the official website of the financial institution, the description of the mortgaged property being offered for sale.
- (5) Prior to the mortgagee accepting an offer to purchase the mortgaged property under this section, the mortgagor may make an offer to purchase the said mortgaged property at the market rate.
- (6) The mortgagee shall at its option accept the highest price offered for the sale of the mortgaged property even if the price is less than the market value and shall on receipt of the proceeds of such sale, apply the same to the sums due and owing under the mortgage.
- (7) Where a mortgagee sells the mortgaged property for a sum higher than the the mortgage debt, the mortgagee shall pay such remaining sums to the

mortgagor, or to the heirs or assigns as provided by law subject to the prior payment to any holder of a second mortgage of any sum due.

- (8) Save for any surplus amounts referred to in subsection (7), the exercise by the mortgagee of a power of sale shall, discharge the mortgagor from any and all liabilities for any sums due under the mortgage if at the date of sale —
 - (a) a sum equal to at least one half of the principal and accrued interest has been paid to the mortgagee; or
 - (b) the mortgagor has been in occupation of the dwelling house for a period not less than fifty per cent of the original mortgage term.
- (9) The mortgagee shall upon conveyance of the mortgaged property execute a Deed of Release in favour of the mortgagor.
- (10) The provisions of this section shall apply to all mortgages notwithstanding any provision in any other law or custom or any clause contained in any mortgage document executed before or after the coming into operation of this Act.
- (11) A mortgagee exercising the power of sale in accordance with the provisions contained herein shall not be liable to a mortgagor for any claim or claims for loss or damage suffered by the mortgagor by reason of such sale.
- (12) Any person who fails to comply with any provision of this section commits an offence.

12. Prohibition against sale to related parties.

- (1) Where a mortgagee exercises its power of sale, the mortgagee shall not sell the mortgaged property to —
 - (a) a director or employee of the financial institution;
 - (b) an immediate family member of a director or employee of the financial institution;
 - (c) a company beneficial owned by a director or employee of the financial institution;
 - (d) any person who by the nature of their intimate relationship with a director or employee of the financial institution would be given more favourable consideration as a result thereof.
- (2) For the purposes of this section “immediate family” shall include spouse, children, parents, siblings and cousins.
- (3) Any person who fails to comply with any provision of this section commits an offence.

13. Recital required for conveyance.

- (1) The conveyance from the mortgagee to a purchaser pursuant to the exercise of the power of sale, shall contain a clause reciting the mortgage document and that the mortgagee has exercised its right to sell after giving notice to the mortgagor.
- (2) The recital required under subsection (1) shall be conclusive of the facts contained therein and the said conveyance shall be effectual to bar all equity of redemption of the mortgagor or his successors in and to the said mortgaged property.

14. Mortgagee's exemption from stamp duty.

- (1) Notwithstanding anything to the contrary, where a mortgagee sells property under the power of sale contained in the mortgage agreement within five years of the date on which the last advance is made by the mortgagee, the mortgagee shall be exempt from paying fifty per centum of any sum due and owing under the Stamp Act (*Ch. 370*) on the sale of such property.
- (2) The mortgagee shall not charge to or debit the mortgagor's account for any amount of stamp duty payable by the mortgagee under subsection (1) on the conveyance upon sale.
- (3) Any person who fails to comply with any provision of this section commits an offence.

PART III – OTHER ENTITLEMENTS OF MORTGAGORS

15. Right of mortgagor to request mortgage statement.

- (1) A mortgagor may, not more than twice in any year request in writing to the mortgagee, to furnish him or a person designated by him, without the charge of any fee for so doing, a statement in writing setting out with respect to the mortgage the amount of principal, interest and any other costs and fees owing.
- (2) The mortgagee shall respond to a request given under subsection (1) within thirty days of receipt thereof and if, without reasonable excuse, the mortgagee fails to do so, any rights that he may have for the enforcement of the debt or mortgage or for the cancellation or specific performance of its terms shall be suspended until he has complied with the request.
- (3) A mortgagee who —
 - (a) charges or attempts to charge any fee or accepts any amount, for providing a statement referred to in subsection (1); or

(b) fails to respond to a request as required by subsection (2), commits an offence.

(4) This section shall apply to any mortgage executed before or after the coming into operation of this section but not to —

(a) any existing proceedings before the court; or

(b) any prior written request for a mortgage statement.

16. Right of mortgagor to choose attorney and appraiser for mortgage transaction.

(1) On the mortgage of any property, the mortgagor shall be permitted at his expense to —

(a) retain and instruct a counsel and attorney chosen by him from a list of attorneys approved by the mortgagee;

(b) select an appraiser of his own choice from a list provided by the mortgagee containing at least twelve names of appraisers or assessors who have been approved by the Minister for the purposes of the Acquisition of Land Act (*Ch. 252*);

(c) select an insurance broker registered under the Insurance Act (*Ch. 347*).

(2) Every mortgagee shall publish on its website or widely circulated newspaper a list of approved attorneys along with criteria for inclusion on the list.

(3) A mortgagor shall not be required to pay the cost of any attorney other than his own in a mortgage origination or modification transaction.

17. Request by mortgagor to transfer mortgage.

(1) Where a mortgagor exercises his entitlement under section 17 of the Conveyancing and Law of Property Act (*Ch. 138*), the mortgagee shall in compliance with the direction of the mortgagor, assign the mortgage debt or convey the mortgaged property to any other lender, without requiring from the mortgagor or the new lender any payment of any costs for executing the assignment of the mortgage debt or the conveyance of the mortgaged property.

(2) Subsection (1) shall apply to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation or practice to the contrary.

18. Mortgage transfer, assignment or sale at option of mortgagee.

(1) If a mortgagee transfers, assigns or sells a mortgage debt, the mortgagee shall provide to the mortgagor a notice of transfer, assignment or sale not

- less than thirty days before the effective date of the transfer, assignment or sale.
- (2) The notice of transfer, assignment or sale must be served upon the mortgagor either personally or by registered post.
 - (3) The notice of transfer, assignment or sale must include —
 - (a) the effective date of the mortgage debt transfer, assignment or sale;
 - (b) the name, address, and a contact number for both the current mortgagee and the transferee, assignee or purchaser mortgagee; and
 - (c) a statement that the transfer of the mortgage debt does not adversely affect any term or condition of the mortgage agreement.
 - (4) Where a mortgagee transfers, assigns or sells a mortgage debt, the transferee, assignee or purchaser of the mortgage debt shall not —
 - (a) vary the rate of interest applied to the mortgage debt with the effect that it is higher than the interest rate prior to the transfer;
 - (b) require the mortgagor to pay fees, administrative or otherwise, or charges with or arising from the purchase of the mortgage debt; or
 - (c) offer the mortgagor new payment terms that place the mortgagor in a worse position than he would have been had his mortgage debt not been sold.
 - (5) Any person who fails to comply with any provision of this section commits an offence.

PART IV - MISCELLANEOUS

19. Employer obligation with regard to salary deduction request.

- (1) Where a mortgagor whose mortgage payments are deducted from his earnings by his employer, seeks to have his employer give effect to a request to facilitate a payment on his behalf that will result in the deduction from his earnings of a sum which when calculated together with his mortgage payment deduction results in the total deductions from his earnings exceeding in the aggregate such percentage of those earnings as may be prescribed by notice by the Minister, the employer shall not give effect to such a request.
- (2) Any person who fails to comply with any provision of this section commits an offence.

20. Offences and penalties.

- (1) Any —

- (a) financial institution that contravenes or fails to comply with any provision of this Act;
 - (b) director of a company who knowingly concurs in a contravention or failure to comply with any of the provisions of this Act,
commits an offence and is liable —
 - (i) in the case of a company, to a fine not exceeding two hundred thousand dollars;
 - (ii) in the case of a director of a company, to a fine not exceeding one hundred thousand dollars.
- (2) An employer shall not be liable for a breach of section 19(1) where he shows he reasonably acted upon representations by the employee that the deductions would not be in breach of that section.

21. Administrative fine by regulatory body.

Notwithstanding any penalties that may be imposed under section 20, any —

- (a) financial institution that fails to comply with any provision of this Act;
 - (b) director of a company who knowingly concurs in a failure to comply with any of the provisions of this Act,
- may be subject to an administrative fine imposed by the body with responsibility for regulating that financial institution and —
- (i) in the case of a company, to a fine not exceeding two hundred thousand dollars;
 - (ii) in the case of a director of a company, to a fine not exceeding one hundred thousand dollars.

22. Regulations.

- (1) The Minister may, after consultation with the regulators of financial institutions, make regulations for carrying out the purposes and provisions of this Act and without prejudice to the generality of the foregoing, regulations may —
- (a) restrict the percentage or other amount a mortgagor may be required to pay as administrative costs in respect of a mortgage;
 - (b) limit any sum payable in the nature of a penalty in respect of the pre-payment of a mortgage;
 - (c) establish procedures to be adhered to by financial institutions in respect of mortgages;
 - (d) make any other regulations deemed necessary to carry out the purpose of this Act;

- (e) provide for the creation of a fund or the implementation of such other measures to assist a mortgagor with legal and other fees where such mortgagor by virtue of his financial inability is unable to make an application under this Act.
- (2) The provisions of sections 31 and 32 of the Interpretation and General Clauses Act shall not apply in relation to any regulations or orders made by the Minister under this Act, but instead all such regulations or orders shall be subject to affirmative resolution of both chambers of Parliament.

23. Savings.

- (1) Nothing in this Act shall —
 - (a) affect the rights of a bona fide assignee or holder for value without notice; or
 - (b) derogate from the existing powers or jurisdiction of the Court.
- (2) Without prejudice to subsection (3), nothing in this Act shall prejudice any benefit otherwise conferred upon a mortgagor by the mortgage document or any other law.
- (3) No mortgagee shall recover from any mortgagor any sum owing under any judgment by the Court for the repayment of any sums borrowed by the mortgagor from the mortgagee after the expiry of six years from the date on which the judgment was obtained or the date of the last payment pursuant to that judgment.

OBJECTS AND REASONS

This Bill seeks to provide protection and relief to homeowners.

Clause 1 of the Bill provides for the short title and commencement and clause 2 of the Bill provides for the definitions of certain terms in the Bill.

Clause 3 of the Bill provides for the application of the Act.

Clause 4 of the Bill mandates that the mortgagee gives the mortgagor 30 days' notice of his default in payment prior to instituting legal proceedings. The Clause further provides for the contents of the notice to be issued by the mortgagee.

Clause 5 of the Bill gives the mortgagor or a member of his immediate family who has been contributing to payment of the mortgage the right to apply to the Court for relief where he is unable to satisfy his obligations under the mortgage agreement.

Clause 6 of the Bill provides that where the Court considers that the mortgagor is likely to be able within a six month period to pay principal and accrued interests at a specified time, remedy a default or pay arrears; the Court may —

- (i) adjourn proceedings; or
- (ii) stay or suspend execution of the judgment or order; or
- (iii) postpone the date for delivery of possession.

Clause 7 of the Bill provides for the restriction of the mortgagee's power of sale by requiring that the mortgagee give the mortgagor residing in the mortgage property, thirty-days written notice of its intent to exercise its power of sale.

Clause 8 of the Bill allows for the mortgagor or his immediate family who has been contributing to the payment of the mortgage to apply to the Court for an order to postpone sale within twenty-eight days of receipt of the mortgagee's notice.

Clause 9 of the Bill empowers the Court to grant relief from the mortgagee's exercise of the power of sale. The Court may make an order to postpone the sale of the mortgage property for a reasonable period where a sum equal to at least one half of the principal and accrued interest at a specified time has been paid to the mortgagee or there has been an adverse material change in his financial circumstances. This clause also stipulates that on application by the mortgagee or mortgagor the conditions of postponement may be varied at any time while an order is in effect.

Clause 10 of the Bill provides that the mortgagee shall deal fairly in exercising the power of sale and not engaging in unfair, deceptive or abusive acts or practices.

Clause 11 of the Bill provides for the conditions on exercise of power of sale. Therein, where a mortgagee who has failed to secure a sale of property at market value within one year from the date the mortgagee has issued a notice of default to the mortgagor or obtained vacant possession, the mortgagee at his option after giving notice to the mortgagor, proceed with the sale. A mortgagee shall disclose in a notice issued under this clause that exercising its power of sale the mortgaged property may be sold less than the market value or that in the event that the property is sold at less than the market value the mortgagee may pursue the mortgagor for the recovery of any sums remaining on the mortgage debt after said sale. Where a mortgagor objects to the sale, he may issue a notice of objection stating his intention to pay the sums due under the mortgage or to remedy the default or apply to the court for relief within seven days. Should the mortgagor not object within 10 days of the notice, the mortgagee can within seven days cause a description of the mortgaged property to be advertised at least four times over a period of not less than sixty days on the official website of the mortgagee and in the Gazette.

Prior to accepting an offer, the mortgagee shall disclose to the mortgagor the highest price offered for the property and allow the mortgagor to counter that offer within 28 days of the notice. The exercise of a power of sale discharges the mortgagor

from any and all liabilities for sums due under the mortgage if at the date of the sale a sum equal to at least one half of the principal and accrued interest has been paid to the mortgagee or the mortgagor has been in occupation of the dwelling house for a period not less than twenty per cent of the original mortgage term. Further, should the sale realize a surplus, it is applied to the benefit of any second mortgagee and then the mortgagor.

Clause 12 of the Bill provides for a prohibition of sale to related parties where the mortgagee exercises the power of sale.

Clause 13 of the Bill provides that the conveyance from the mortgagee to a purchaser as it regards the power of sale must contain a clause reciting the mortgage document and such recital shall be conclusive of the facts contained therein.

Clause 14 of the Bill provides for an exemption of stamp duty payable on the sale of the mortgaged property within five years of the date of the last payment under the mortgage. Further, that the mortgagor shall not be charged for any amount beyond the remaining duty payable after the exemption.

Clause 15 of the Bill gives the mortgagor the right to request a statement in writing without the charge of any fee owing on the mortgage account, not more than twice a year. The mortgagee must respond to this request within thirty days and if he fails to respond within this time period any rights that he may have for enforcement of the mortgage shall be suspended until he has complied with the notice.

Clause 16 of the Bill permits a mortgagor to retain and instruct an attorney, an appraiser and an insurance broker of his own choosing and at his own expense.

Clause 17 of the Bill provides that where a mortgagor exercises his entitlement, the mortgagee shall in compliance with the direction of the mortgagor, require the mortgagee to assign the mortgage or convey the mortgage property to a third party, the mortgagee shall do so without requiring the mortgagor or the new lender to make any payment of any costs for assigning the mortgage debt or conveying the mortgage property.

Clause 18 of the Bill makes provisions for the notification to the mortgagee where a mortgagor has agreed to transfer, assign or sell his mortgage to a third party and the contents of such notice. Further, when a mortgagee transfers, assigns or sells a mortgage debt, the transferee, assignee or purchaser of those mortgage debts shall not put the mortgagor in a worse position than he would have been in had his mortgage debt not been sold.

Clause 19 of the Bill provides that deductions shall not exceed in the aggregate such percentage of those earnings as may be prescribed by notice by the Minister.

Clause 20 of the Bill seeks to provide for penalties for offences committed under the Bill.

Clause 21 of the Bill provides that a financial institution that fails to comply with any provision of this Act or a director of a company who knowingly concurs in a failure to comply with any of the provisions of this Act may be subject to an administrative fine by the regulatory body.

Clause 22 of the Bill empowers the Minister, after consultation with the regulators of financial institutions, to make regulations.

Clause 23 of the Bill provides for the savings of certain rights.

