

# **Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2024**

## **Statement of Compatibility**

### **FOR**

## **Amendments to be moved during consideration in detail by the Honourable Meaghan Scanlon MP, Minister for Housing, Local Government and Planning and Minister for Public Works**

### **Prepared in accordance with Part 3 of the *Human Rights Act 2019***

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Meaghan Scanlon MP, Minister for Housing, Local Government and Planning and Minister for Public Works, make this statement of compatibility with respect to the amendments to be moved during consideration in detail of the Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2024 (Bill).

In my opinion, the amendments to be moved during consideration in detail of the Bill are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

### **Overview of the Bill**

#### ***Residential Tenancies and Rooming Accommodation Act and Other Legislation Amendment Act 2024***

The Bill will amend the *Residential Tenancies and Rooming Accommodation Act 2008* (RTRA Act) and other legislation to stabilise Queensland's rental market, ensure a fairer rental sector and respond to community concerns about the impact of current market conditions and cost of living pressures felt by Queensland's renting households.

The objectives of the amendments to be moved during consideration in detail of the Bill are to:

- address comments made by the Housing, Big Build and Manufacturing Committee (the Committee) outlined in its Report No. 7 (57th Parliament) (Committee Report)

- address issues raised in submissions made to the Committee during the Committee’s inquiry into the Bill, and
- correct or clarify some minor or technical drafting issues to ensure the policy intent of the Bill is achieved.

### ***Building Industry Fairness (Security of Payment) Act 2017 amendments***

The Bill will also amend the *Building Industry Fairness (Security of Payment) Act 2017* (BIF Act). The BIF Act prescribes the adjudication framework for disputed payment claims within the Queensland building and construction industry.

Section 79 of the BIF Act governs an application to the Adjudication Registrar about the adjudication of a payment claim where there has been a failure to pay the amount owed or there is a dispute about the amount payable as indicated in the payment schedule.

Section 79(2) provides that an application for adjudication of a disputed payment claim must be made in the approved form.

Section 79(3) of the BIF Act provides that in making an adjudication application, a copy of the application must be given to the respondent.

It is understood that if an application is lodged electronically with the Adjudication Registry, via an online portal, a summary document was automatically issued to the applicant. The summary document contained information which was submitted by an applicant via the portal but it did not include all of the information which was available on the online process.

In *Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd & Anor* [2023] QSC 290 (Iris Broadbeach case), the Supreme Court found that the summary document provided by the Adjudication Registry did not meet the requirements of s 79(3) of the BIF Act because it was not an exact copy of the online adjudication application form.

The Iris Broadbeach case leads to an uncertain position about the validity of adjudication applications lodged electronically where the summary document was provided by the Adjudication Registry, as well as decisions and any appeals and enforcement actions relating to those applications. This has the potential to erode public confidence in the effectiveness of the adjudication process.

The Iris Broadbeach case has exposed a potential systemic issue with the way in which adjudication applications are processed by the Adjudication Registry. It is possible that claims could be made that the summary documents given to respondents in purported compliance with s 79(3) were defective and potential assertions that the subsequent adjudication decisions are also void and liable to be set aside.

Since the Supreme Court delivered judgment in the Iris Broadbeach case, the Adjudication Registry has changed aspects of the way in which it processes adjudication applications.

The amendments to be moved during consideration in detail introduce curative amendments to the BIF Act to address the process issue related to adjudication applications.

The amendments clarify a claimants' requirements for making an adjudication application including that submissions may accompany the application, and that the respondent must be given a copy of an adjudication application and any submissions within 4 business days of making the application. The amendments also clarify that a copy of an adjudication application includes a document given to the claimant by the registrar for the purpose of notifying the respondent of the claimant's adjudication application.

The amendments also ensure the validity of adjudication decisions made before the commencement of the amendments (the commencement), to the extent the validity of decisions was affected by the fact a copy of the adjudication application was not given to the respondent as required by s 79(3) of the BIF Act as in force before the commencement (former s 79(3)) but instead the claimant gave the respondent a registry summary of the adjudication application (as defined in new s 215 of the BIF Act). Specifically, these amendments provide that in these circumstances:

- a) the former s79(3) is taken to have been complied with:
- b) if the adjudicator made an adjudication decision but did not have jurisdiction to make the decision because former s 79(3) had not been complied with—the adjudication decision, and anything done, or purported to be done, in reliance on the adjudication decision are taken always to have been as valid as they would be if the adjudicator had jurisdiction;
- c) if the adjudication application has been made but not decided—the former s 79(3) is taken to have been complied with and the adjudicator can decide the adjudication application under part 4;
- d) if the adjudicator decided they did not have jurisdiction because former s 79(3) was not complied with—the decision of the adjudicator is void and of no effect and the Adjudication Registrar (registrar) is taken to have referred the decision to the adjudicator for decision (if the adjudicator accepts the referral, they must notify the claimant and respondent and proceed to decide the application and if the adjudicator refuses the referral, the registrar must refer the application to a new adjudicator);
- e) if a court has, before the commencement, decided the adjudication decision is invalid, void or otherwise of no effect because former s 79(3) was not complied with and the adjudicator did not have jurisdiction to make the decision—the adjudication decision, and anything done or purportedly done in reliance on it, are as valid as they would have been if former s 79(3) had been complied with and the adjudicator had had jurisdiction.

Finally, the amendments provide that no liability attaches to the Queensland Building and Construction Commission (QBCC), the registrar, a public service employee or the State, and no compensation is payable by them, in relation to giving the registry summary of the adjudication application to the claimant or anything done or purportedly done as a result of or in reliance on the giving of the registry summary to the claimant.

The proposed amendments to the BIF Act are consistent with the original policy intent. It should be noted that the proposed removal of civil liability to the QBCC, the registrar and Registry staff in connection with this matter is broader than the level of protection afforded to them currently under the BIF Act, which shifts civil liability for acts or omissions committed by them honestly and without negligence to the State. The proposed removal of liability in the circumstances is due to the technical nature of the deficiency which the QBCC and the Acting Registrar notified to the Department shortly after identifying the issue in an open manner.

## Human Rights Issues

### *Residential Tenancies and Rooming Accommodation Act and Other Legislation Amendment Act 2024*

#### **Solicitation of advance rental payment**

Sections 87 and 101 of the RTRA Act limit the ability of lessors and providers to require advance rental payment. Clauses 13 and 18 of the Bill amend ss 87 and 101 of the RTRA Act to provide that lessors, providers and their agents must not *accept* advance rental payments above a certain amount.

Clauses 8 and 12 of the amendments to be moved during consideration in detail omit clauses 13 and 18 from the Bill. However, clauses 1 and 5 of the amendments to be moved during consideration in detail insert new ss 57AA and 76AB in the RTRA Act, which prohibit persons from soliciting, inviting or accepting advance rental payments above a certain amount for residential tenancy agreements and rooming accommodation agreements respectively. The amendment limits the amount of rent in advance that can be accepted when a tenancy is advertised for rent, but does not limit the amount of rent in advance that can be accepted during the agreement.

#### Human rights potentially limited (Part 2, Divisions 2 and 3 *Human Rights Act*)

Clauses 1 and 5 of the amendments to be moved during consideration in detail potentially amount to an arbitrary deprivation of property (s 24(2) of the HR Act), because they limit the amount a property owner can receive in exchange for renting premises.

The rights in s 24(2) must not be ‘arbitrarily’ interfered with. In a human rights context, arbitrary refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim sought. If an interference is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference with property is arbitrary will be addressed below when considering the factors in section 13.

#### If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

However, any limit on the above human right is reasonable and justified as follows:

- Nature of the human right—The right of individuals to own and use property is a

cornerstone of a free and democratic society based on human dignity, equality and freedom.

- Purpose—The purpose of the limitation is to prevent rent bidding, which has the potential to distort the market, particularly during the current housing shortage, to ensure prospective tenants and residents whose financial means are lesser than those of other prospective tenants and residents have a fair opportunity to secure housing. This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.
- Relationship between limitation and its purpose— The limitation is effective to achieve the purpose.
- Less restrictive alternatives—Given the current housing shortage, there is no less restrictive way reasonably available to achieve the purpose. The shortage is pervasive and not limited to less expensive properties and rooms and therefore the limitation needs to apply to all sectors of the rental and rooming accommodation markets.
- Fair balance—Lessors and providers are not entirely prohibited from receiving advance rental payments. The limitation applies to the amount of payment that can be required or accepted when a premises is advertised for rent. Although the limitation is significant, it is necessary to prevent rent bidding distorting the markets and potentially worsening the current housing crises by locking individuals out of the market completely. It also does not prevent tenants and residents from offering rent in advance above the established limit during the agreement. In the circumstances, I am satisfied the amendment to be moved during consideration in detail strikes a fair balance between the rights of lessors and providers and the interests of prospective tenants and residents.

As the interference with property is proportionate and not arbitrary, the amendment does not limit the right. Accordingly, I consider these amendments to be moved during consideration in detail are compatible with human rights.

### **Exemptions from certain requirements for particular classes of lessor and provider**

Sections 61 and 77 of the RTRA Act provide that a lessor or lessor's agent, and a provider or provider's agent, respectively must ensure a residential tenancy agreement or rooming accommodation agreement is in writing and includes specified information. Clauses 8 and 11 of the Bill amend ss 61 and 77 of the RTRA Act respectively, to require that a written residential tenancy agreement or rooming accommodation agreement state the day the rent for the premises or room was last increased.

Clauses 3 and 6 of the amendments to be moved during consideration in detail further amend ss 61 and 77 to provide that the requirement that a written residential tenancy agreement or rooming accommodation agreement state the day the rent for the premises or room was last increased does not apply if the lessor of the premises, or the provider of the room, is an exempt lessor or exempt provider or agent for an exempt lessor or exempt provider.

Sections 91 and 105 of the RTRA Act set out the process a lessor or lessor's agent and provider or provider's agent respectively must follow to notify a tenant or resident of an increase in the rent payable by the tenant or resident under a residential tenancy agreement or rooming accommodation agreement. Clause 14 of the Bill amends s 91(3) to require that the notice also state the day rent was last increased for the premises. Clause 9 of the amendments to be moved during consideration in detail further amends s 91 of the RTRA Act to provide that this notice requirement does not apply to exempt lessors. Clause 13 of the amendments to be moved during consideration in detail amends s 105 of the RTRA Act to require the provider to include in notices given to residents the day rent was last increased for the premises and to exclude exempt providers from this obligation.

Clauses 15 and 19 of the Bill amend s 93 and 105B of the RTRA Act to provide that rent under a residential tenancy agreement or rooming accommodation agreement can only be increased once in each 12 month period. However, while clause 15 amends s 93 to provide that this limitation does not apply to exempt lessors, there is no corresponding exclusion for exempt providers in s 105B as amended by clause 19 of the Bill. Clause 14 of the amendments to be moved during consideration in detail further amends s 105B to provide the limitation on increasing rent more than once in a 12 month period does not apply to exempt providers.

Clauses 3, 6, 9, 13 and 14 of the amendments to be moved in consideration in detail will remove protections from the possibility of rent being increased more than once every 12 months from persons who rent or have rooming accommodation agreements with exempt lessors or exempt providers.

#### Human rights potentially limited (Part 2, Divisions 2 and 3 HR Act)

These amendments to be moved during consideration in detail potentially amount to an arbitrary deprivation of property (s 24(2) of the HR Act), given that tenancy and rooming rights can be considered as a species of property in the context of human rights law. In removing certain protections for tenants and residents, the amendments also potentially limit the freedom to choose where to live (s 19 of the HR Act), the right to non-interference with privacy, family and home (s 25(a) of the HR Act) and the right of families and children to protection (s 26 of the HR Act).

The rights in ss 24(2) and 25(a) of the HR Act include internal limitations. Both provisions state the right must not be 'arbitrarily' interfered with. Section 25(a) also provides the interference must not be unlawful. As the RTRA Act will be amended to remove the obligation on exempt lessors and exempt providers and their agents to comply with the amended requirements, no question as to lawfulness arises here.

In a human rights context, arbitrary refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim sought. If an interference is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference with property is arbitrary will be addressed below when considering the factors in section 13.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether

the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

However, any limit on the above human rights is reasonable and justified as follows:

- Nature of the human right — What is at stake is the stability of accommodation for tenants and residents who rent from an exempt lessor or provider. Living precariously threatens the ability to live a life with dignity.
- Purpose— The purpose of the limitation is to allow flexibility for housing providers who apply an income-based rent policy. Income-based rent policies are an effective tool to provide sustainable social housing and the increased flexibility provides an incentive for these providers to continue providing community housing and homelessness services.
- Relationship between limitation and its purpose—The limitation will be effective to create more flexibility.
- Less restrictive alternatives—There is no less restrictive way reasonably available to achieve the flexibility, as all alternative options provide less flexibility for lessors and providers and therefore reduce the incentive for them to continue to provide social housing.
- Fair balance—The general restrictions the amended provisions of the RTRA Act protect the rights of tenants and residents to be informed about the history of the rent payable for the premises or room and proposed rent increases. However, exempt lessors and providers play an important role within the housing market, ensuring the availability of housing for those tenants and residents of limited financial means where rent is determined by household income. If these lessors and providers were to exit the housing market, it would create a significant gap that could not be filled quickly or easily and an inflexible administrative burden risks having that effect. These lessors or providers are also subject to other controls such as funding arrangements to ensure they protect the rights of tenants and residents. Therefore, I am satisfied that the proposed amendments strike a fair balance between the protection of tenants' and residents' personal interests and the need to ensure the continuing availability of these types of housing and accommodation services.

As the interference with property and privacy is proportionate and not arbitrary, the rights to property and privacy are not limited by this amendment. The limits on the other human rights are justified. Accordingly, I consider these amendments to be moved during consideration in detail are compatible with human rights.

### **Utility charges**

Clause 57 of the Bill amends the existing provisions of the RTRA Act relating to passing on water consumption charges to tenants and require the lessor to pass the bill from the supplier to the tenant within 4 weeks of receipt. A tenant would not be required to pay the bill if the lessor failed to pass on the bill from the supplier to the tenant within 4 weeks.

Clauses 22, 23 and 24 of the amendments to be moved during consideration in detail amend clause 57 to allow a lessor to pass on water consumption charges if the parties have agreed to do so, at an amount that is no more than what the water supply authority charges, and the water meter readings are recorded. This allows lessors to recover costs of water consumption from tenants where the billing period does not align with the tenancy agreement start or end date.

Human rights potentially limited (Part 2, Divisions 2 and 3 HR Act)

I am satisfied this amendment to be moved during consideration in detail does not limit human rights of individuals who are tenants or lessors. The change simply reflects the practical reality that supplier billing cycles do not always align with tenancy agreement start and end dates and ensures that where that occurs, lessors are not penalised by being unable to pass on to tenants the costs of water the tenants have consumed.

**Conditions imposed by bodies corporate on attaching fixtures or making structural changes**

Clauses 64 and 67 of the Bill amend the existing provisions of the RTRA Act relating to tenants and residents attaching fixtures or making structural changes to rented premises and rooms. Clauses 25 and 26 of the amendments to be moved during consideration in detail amend clauses 64 and 67 to provide that where premises are part of a body corporate scheme, the tenant or resident must comply with any conditions given by the body corporate in relation to the attachment of the fixture or the making of the structural change.

Human rights potentially limited (Part 2, Divisions 2 and 3 HR Act)

These amendments to be moved during consideration in detail potentially constitute an interference with the property rights of tenants and residents (s 24(2)) of the HR Act) and the right to non-interference with privacy, home and family (s 25(a) of the HR Act).

The RTRA Act (as amended) will require tenants and residents to comply with any conditions imposed and therefore any limitation on the right to privacy will be lawful.

Both ss 24(2) and 25(a) require that interference be arbitrary. In a human rights context, arbitrary refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim sought. If an interference is proportionate under section 13 of the HR Act it will not be arbitrary. Accordingly, whether the interference with property is arbitrary will be addressed below when considering the factors in section 13.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

To the extent these amendments to be moved during consideration in detail limit the rights declared in s 24(2) of the HR Act, I am satisfied the limitation is reasonable and demonstrably justifiable for the following reasons:

- Nature of the human right—The amendments to be moved during consideration in detail affect the right of tenants and residents to adapt their homes to suit their needs and the



needs of their families.

- Purpose—The purpose of requiring body corporate consent is to protect the property rights and interests of other property owners participating in the community scheme by ensuring that the body corporate can condition structural changes that may affect the value of their property.
- Relationship between limitation and its purpose—The limitation will be effective to achieve the purpose.
- Less restrictive alternatives—Requiring tenants and residents to comply with a body corporate’s conditions on attaching fixtures or making structural changes is the only way to ensure that the interests of the other property owners in the body corporate scheme are protected.
- Fair balance—The limitation on the rights of tenants and residents is relatively minor, because they are not the owner of the premises and, at least in theory, could end the tenancy or rooming accommodation agreement and find more suitable accommodation if compliance with the body corporate’s requirements meant the premises were not suitable for them or their families. There is a future safeguard in that the *Body Corporate and Community Management Act 1997* requires that conditions imposed by bodies corporate on these types of changes be reasonable. I am therefore satisfied the amendments to be moved during consideration in detail strike a fair balance between the rights of tenants and residents and the rights of other property owners within the body corporate scheme.

As the interference with property and privacy is proportionate and not arbitrary, the rights to property and privacy are not limited by this amendment. The limits on the other human rights are justified. Accordingly, I consider these amendments to be moved during consideration in detail are compatible with human rights.

### **Requirement to destroy records of personal information after 3 months**

Clause 80 of the Bill inserts a new chapter 9, part 2 in the RTRA Act that is intended to ensure that personal information collected from tenants and residents, and prospective tenants and residents, is protected. Clause 80 inserts a new s 457E(1), which requires lessors, providers and their agents to destroy personal information collected from an applicant who does not become a tenant or resident within 3 months after the start of the tenancy agreement or rooming accommodation agreement for which the applicant applied.

Clause 31 of the amendments to be moved during consideration in detail amends new s 457E(1)(a) to provide that the applicant can agree to the lessor or provider or their agent retaining the applicant’s personal information for a longer period.

### **Human rights potentially limited (Part 2, Divisions 2 and 3 HR Act)**

This amendment to be moved during consideration in detail potentially limits the right of freedom of expression (s 21 of the HR Act). This right includes the freedom to seek, receive

and impart information and ideas. Restricting the manner in which personal information is stored, accessed and disposed of interferes with the ability to impart information. The amendment to be moved during consideration in detail also potentially limits the privacy rights of tenants and residents (s 25(a) of the HR Act), by permitting lessors and providers to retain tenants' and residents' personal information for a longer period.

Section 25(a) of the HR Act protects against unlawful and arbitrary interference with privacy. As the retention of personal information for longer than 3 months will be allowed under the RTRA Act if the person to whom the information relates gives consent, any limitation of this right will be lawful. In a human rights context, arbitrary refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim sought. If an interference is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference with property is arbitrary will be addressed below when considering the factors in section 13.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

However, any limit on the above human rights is reasonable and justified as follows:

- Nature of the human right—The ability to control personal information and receive, access and impart information, and the ability of individuals to protect their personal information, are important elements of a free and democratic society based on human dignity, equality and freedom.
- Purpose— The purpose of the limitation (if any) is to enable applicants who are content for agents to retain their personal information for longer than three months to do so. This may be useful for applicants whose housing placements are likely to take more than three months to be realised (e.g. applicants who require specialist accommodation such as accommodation designed for persons with particular types of disabilities) and may seek to have their details included on a waitlist. Allowing these applicants the freedom to permit agents to retain their personal information for longer periods, thereby avoiding the need to resubmit the information, is consistent with a free and democratic society based on human dignity, equality and freedom.
- Relationship between limitation and its purpose— The limitation will be effective to achieve the purpose.
- Less restrictive alternatives— It is also the least restrictive way reasonably available to achieve the purpose because the only alternative is to prescribe a longer retention period, without any guarantee that the longer period will be sufficient for the applicant's purposes.
- Fair balance—As the period can be extended only with the consent of the person whose personal information is involved, and given the extension is intended to benefit both applicants and lessors/providers, I consider the amendment to be moved during consideration in detail strikes a fair balance between protecting the rights and achieving the purpose of the limitation.

As the interference with privacy is proportionate and not arbitrary, the right to privacy is not limited by this amendment. The limit on the other human right is justified. Accordingly, I consider this amendment to be moved during consideration in detail is compatible with human rights.

### **Requirement to destroy records of personal information after 3 years**

Clause 80 of the Bill inserts a new chapter 9, part 2 in the RTRA Act that is intended to ensure that personal information collected from tenants and residents, and prospective tenants and residents, is protected. Clause 80 inserts a new s 457E(2)(c), under which lessors and providers, and their agents, must destroy any personal information of a tenant or resident within 3 years after the end of the residential tenancy agreement or rooming accommodation agreement to which the personal information relates.

Clause 32 of the amendments to be moved during consideration in detail amend new s 457E(2)(c) to require the personal information be destroyed within 7 years after the end of the residential tenancy agreement or rooming accommodation agreement.

### Human rights potentially limited (Part 2, Divisions 2 and 3 HR Act)

This amendment to be moved during consideration in detail potentially limits the right of freedom of expression (s 21 of the HR Act). This right includes the freedom to seek, receive and impart information and ideas. Restricting the manner in which personal information is stored, accessed and disposed of interferes with the ability to impart information. The amendment to be moved during consideration in detail also potentially limits the privacy rights of tenants and residents (s 25(a) of the HR Act), by permitting lessors and providers and their agents to retain tenants' and residents' personal information for a longer period.

Section 25(a) of the HR Act protects against unlawful and arbitrary interference with privacy. As the retention of personal information for 7 years will be required under the RTRA Act, any limitation of this right will be lawful. In a human rights context, arbitrary refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim sought. If an interference is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference with property is arbitrary will be addressed below when considering the factors in section 13.

### If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

However, any limit on the above human rights is reasonable and justified as follows:

- Nature of the human right—The ability to control personal information and receive, access and impart information, and the ability of individuals to protect their personal information, are important elements of a free and democratic society based on human dignity, equality and freedom.
- Purpose— The purpose of the limitation is to create consistency with information

retention requirements imposed on agents under the *Agents Financial Administration Act 2014* and the *Property Occupations Act 2014* and to ensure agents are able to provide information to insurers or the Australian Taxation Office. Ensuring businesses are not subject to conflicting regulatory requirements and can access their insurance cover are consistent with a free and democratic society based on human dignity, equality and freedom.

- Relationship between limitation and its purpose— Increasing the retention period to 7 years will be effective to achieve the purpose of the limitation.
- Less restrictive alternatives—There is no less restrictive way reasonably available to achieve the purpose, given the retention periods imposed by other legislation.
- Fair balance—Although privacy and freedom of expression are important, so is the ability of businesses to operate without contradictory regulation. Proposed s 457E requires the information to be stored securely and accessed only for purposes connected with the tenancy. In that context, increasing the retention period strikes a fair balance between protecting the human rights and achieving the purpose of the limitation.

As the interference with privacy is proportionate and not arbitrary, the right to privacy is not limited by this amendment. The limit on the other human right is justified. Accordingly, I consider this amendment to be moved during consideration in detail is compatible with human rights.

### **Transition provision for requirement to give evidence of last rent increase**

Section 91 of the RTRA Act sets out the process a lessor or lessor’s agent must follow to notify a tenant of an increase in the rent payable by the tenant under a residential tenancy agreement. Clause 14 of the Bill amends s 91(3) to require the notice also state the day rent was last increased for the premises. Clause 13 of the amendments to be moved during consideration in detail makes corresponding amendments to s 105 of the RTRA Act for notices given by a provider to a resident with whom the provider has a rooming accommodation agreement.

Clause 16 of the amendments to be moved during consideration in detail inserts new ss 579A and 579B in the RTRA Act. New ss 579A and 579B are transitional provisions stating that if a lessor or provider has acquired the premises within 12 months after the commencement and does not have information about the last rental increase, the lessor or provider is not required to provide evidence of the day of the last rent increase as would otherwise be required under ss 93A(2) and 105C(2) (as inserted by clauses 16 and 19 respectively of the Bill).

### **Human rights potentially limited (Part 2, Divisions 2 and 3 HR Act)**

Clause 16 of the amendments to be moved during consideration in detail potentially limits the freedom of tenants and residents to receive information (s 21 of the HR Act) and may by extension affect their freedom to choose where to live (s 19 of the HR Act) and their rights to be protected as a family unit (s 26 of the HR Act).

**If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)**

However, to the extent this amendment to be moved during consideration in detail limits the human rights, I am satisfied the limitation is reasonable and demonstrably justifiable for the following reasons:

- Nature of the human right—What is at stake is the ability of tenants and residents to obtain information that confirms whether their lessor or provider is complying with their obligations under the RTRA Act to not increase the rent too frequently. This is an important protection for residents and tenants and goes to the ability to live securely and with dignity.
- Purpose—The purpose of the limitation is to ensure that lessors and providers are not subject to penalties for failing to provide information that is not in their possession or under their control. This is consistent with a free and democratic society based on human dignity, equality and freedom.
- Relationship between limitation and its purpose—The limitation will be effective to achieve the purpose.
- Less restrictive alternatives—The alternative would be to require lessors and providers to attempt to obtain the information. However, it is likely that in many cases the previous owners of the premises will not respond to requests for the information and requiring lessors and providers to attempt to obtain the information would be unlikely to achieve significant practical benefits for tenants and residents.
- Fair balance—In the circumstances, I am satisfied the proposed amendments to be moved during consideration in detail strike a fair and reasonable balance between the rights of tenants and residents and those of lessors and providers.

I am therefore satisfied that any limitation on the human rights is reasonable and demonstrably justifiable and that the amendment is therefore compatible with human rights.

### **Transitional provision for return of rental bond**

Clause 55 of the Bill amends s 146 of the RTRA Act to provide that that in all cases, the maximum amount of a rental bond payable for a residential tenancy agreement or rooming accommodation agreement is four times the weekly rent, regardless of the amount of the weekly rent.

Clause 33 of the amendments to be moved during consideration in detail inserts a new s 585A, which applies where a tenant or resident has, before the commencement, paid a rental bond that exceeds four times the maximum weekly rental, the residential tenancy agreement or rooming accommodation agreement ends and the tenant or resident enters into a new agreement with the lessor or provider for the same premises. New s 585A permits the tenant or resident

to apply to the Residential Tenancies Authority to refund the ‘excess’ amount of the original bond paid, without having to go through the process under chapter 2, part 3, division 3.

Human rights potentially limited (Part 2, Divisions 2 and 3 HR Act)

This amendment to be moved during consideration in detail potentially limits the right not to be arbitrarily deprived of property (s 24(2) of the HR Act) because it reduces the level of financial protection available to a lessor if a tenant or resident defaults or causes damage to the property. While a lessor or provider is not automatically entitled to bond money, the concept of property in the human rights context may be broad enough that s 24(2) of the HR Act applies here.

Under s 24(2), the interference must not be arbitrary. In a human rights context, arbitrary refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim sought. If an interference is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether the interference with property is arbitrary will be addressed below when considering the factors in section 13.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HR Act)

Nature of the human right—The right to own and use one’s property is a cornerstone of a free and democratic society based on human dignity, equality and freedom.

Purpose—The purpose of the transitional provision is to facilitate the return of excess rental bond amounts to tenants and residents with the minimum administrative burden.

Relationship between limitation and its purpose—The limitation is effective to achieve the purpose.

Less restrictive alternatives—The available alternative is to require the processes in chapter 2, part 3, division 3 of the RTRA Act to be complied with, which imposes an administrative burden on tenants and residents and potentially delays them receiving their money.

Fair balance—After the commencement of the relevant amendments to the RTRA Act, lessors and providers will no longer have any ability to claim on the excess amounts of bond paid under the RTRA Act. In those circumstances, I consider the limitation on property rights to be minimal at best and outweighed by the interests of tenants and residents in receiving their money as quickly and efficiently as possible.

As any interference with property rights is proportionate and not arbitrary, the transitional provision does not limit the right. Accordingly, I consider this amendment to be moved during consideration in detail is compatible with human rights.

## ***Building Industry Fairness (Security of Payment) Act 2017 amendments***

### **Human rights relevant to the Bill (Part 2, Division 2 and 3, HR Act)**

In my opinion, the human rights under the HR Act that are relevant to the amendments to the BIF Act are:

- the right to equal protection of the law without discrimination (HR Act, s 15(3));
- the right not to be arbitrarily deprived of property (HR Act, s 24(2)); and
- the right to a fair hearing (HR Act, s 31)).

Section 15 of the HR Act provides that every person is equal before the law and is entitled to the equal protection of the law without discrimination. It ensures that all laws and policies are applied equally, and do not have a discriminatory effect.

The amendments to be moved during consideration in detail potentially engage the right to equal protection of the law without discrimination because of the potential disadvantage to respondents resulting from the validating amendments. However, the right is not limited in this case because the right stated in s 15(3) of the HR Act is the right to equal protection of the law without discrimination. Under the HR Act, ‘discrimination’ includes direct and indirect discrimination within the meaning of the *Anti-Discrimination Act 1991* (AD Act), on the basis of an attribute stated in s 7 of the AD Act. Any disadvantage sustained by respondents as a result of the validating amendments is not because they have a protected attribute under the AD Act.

The right not to be arbitrarily deprived of property, which is declared in s 24(2) of the HR Act, is also potentially engaged by the amendments to be moved during consideration in detail because respondents may be deprived of rights to commence proceedings and obtain compensation for damage suffered as a consequence of flaws in the adjudication process. Property in the context of human rights law is considerably wider than it is under the general law. The right stated in s 24(2) of the HR Act will not be limited unless the deprivation is arbitrary, which in this context means capricious, unjust or unreasonable. A decision or action that is proportionate cannot be arbitrary and therefore the question of whether any deprivation of proposed caused by the validating amendments is arbitrary will be considered as part of the proportionality analysis under s 13 of the HR Act below.

The right to a fair hearing is potentially engaged because the validating amendments remove the opportunity for respondents to challenge the validity of adjudication decisions on the basis of particular types of non-compliance with s 79(3) of the BIF Act. However, the right stated in s 31 of the HR Act does not guarantee access to the courts. It is a right that applies to individuals who are charged with a criminal offence or who are parties to a civil proceeding and requires the criminal or civil proceedings be conducted competently, fairly and impartially. Here, there is no issue of criminal charges and individuals who may have otherwise had a right to commence proceedings are not parties to a proceeding. Accordingly, the proposed decision does not limit the right.

**If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HR Act)**

Although the amendments to be moved during consideration in detail potentially limit the right not to be arbitrarily deprived of property, the limitation is reasonable and demonstrably justified for the following reasons.

- Nature of the human right —The right to have and enjoy property of one’s own is central to the operation of a free and democratic society. Accordingly, any interference with the right is serious.
- Purpose—The amendments to be moved during consideration in detail will remove uncertainty about the validity of what is likely to be a large number of adjudication decisions made since the registry introduced the online adjudication application facility which produced a summary document. The amendments will prevent any further disputes about the adjudication claims and the consequences of the Adjudication Registry giving claimants documents that were not exact copies of adjudication applications the claimants lodged electronically.

Certainty and finality in dispute resolution is compatible with a free and democratic society based on human dignity, equality and freedom. It is relevant in this context that the deficiency identified in the Iris Broadbeach case is merely technical. Instead of receiving an exact copy of the electronic application, respondents received a summary document. There is no indication that the receipt of the summary document placed respondents at a disadvantage in responding to the adjudication claim or that the adjudication process was not procedurally fair.

- Relationship between limitation and its purpose—The validating amendments will create certainty and remove the risk of further litigation associated with technical deficiencies in the Adjudication Registry’s processes for adjudication applications lodged electronically.
- Less restrictive alternatives—The technical nature of the deficiency in the online adjudication application process means that respondents were not substantively disadvantaged. In those circumstances, a blanket validation of previous adjudication decisions and applications, to the extent they may be affected by the provision to respondents of documents that were not exact copies of the adjudication applications, and the removal of civil liability to the commissioner, registrar and registry staff and a right to compensation, is the only reasonable and practical way to achieve certainty and finality.
- Fair balance—In many cases, parties have relied on adjudication decisions and arranged their business and financial affairs accordingly. It would cause substantial disruption to individuals and potentially to the broader construction industry if there is uncertainty, or a perception of uncertainty, as to the validity of these decision.

There is no indication that the technical deficiencies in the Adjudication Registry’s processes for handling electronically lodged adjudication applications adversely affect respondents’ ability to respond to adjudication applications or adjudicators’ ability to make



fair and considered decisions. Therefore, limiting the right will not adversely affect the substantive interests of respondents.

- Taking into account the matters described above, I am satisfied that the proposed amendments strike a fair balance between the importance of protecting the right not to be arbitrarily deprived of property and the importance of avoiding widespread uncertainty by validating the adjudication decisions and removing avenues for future disputes arising from the provision of documents that were not exact copies of electronically lodged adjudication applications.

As the limitation is proportionate, it is not arbitrary, and I am therefore satisfied that the proposed decision does not limit the right stated in s 24(2) of the HR Act.

## **Conclusion**

In my opinion, the amendments to be moved during consideration in detail are compatible with human rights under the HR Act because they limit human rights only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HR Act.

**MEAGHAN SCANLON MP**

Minister for Housing, Local Government and Planning  
Minister for Public Works