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13 July 2021

Committee Secretary
Community Support and Services Committee
Parliament House
BRISBANE QLD 4000

By email: CSSC@parliament.qld.gov.au

Dear Committee

Housing Legislation Amendment Bill 2021

Thank you for the opportunity to make a submission to the inquiry into the Housing Legislation Amendment Bill 2021.

Please find attached our submission.

Yours sincerely



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Queensland Human Rights Commissioner



Housing Legislation Amendment Bill 2021

Submission to the Community Support and Services Committee
13 July 2021

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Introduction

1. The Commission recognises that the environment for rental law reform is complex. The Explanatory Notes to the Housing Legislation Amendment Bill 2021¹ acknowledge the diverse community views about what needs to change and how, in order to improve the rental experience in Queensland. Some stakeholders are concerned about erosion of lessors' rights and increasing their exposure to risk. Others are concerned that tenants need greater certainty about their tenancy arrangements and a stronger foundation to enforce their rights.
2. The Explanatory Notes state that the reform in the Bill strikes, 'an appropriate balance between tenant and lessor interests and protections to improve certainty, transparency, and accountability for the decisions they make about their tenancy arrangements.'²
3. In considering the requirements imposed by the *Human Rights Act 2019* (Qld) the main issues relate to balancing the rights of tenants to privacy, home, and related family connections (sections 25 and 26 of the HRA) with a lessor's right to property (s 18). In situations where tenants or lessors are treated differently because of a personal attribute, the right to equality must also be considered (s 15).
4. In summary:
 - The Commission is concerned that creating additional categories for Notices to Leave, while retaining the ability to end a fixed term tenancy without grounds, will not achieve the stated policy objectives.
 - The Commission welcomes the amendments regarding family and domestic violence.
 - The Commission is disappointed that the Bill does not include enhanced rights for tenants to make minor modifications, particularly when considering the rights of tenants with a disability.
 - The Commission is concerned about how the provisions regarding 'working dogs' will interact with existing anti-discrimination and body corporate laws.
 - The Commission supports the amendments to the *Retirement Villages Act 1999* to allow resident-operated retirement villages exemption from the mandatory buy-back requirements.

¹ Explanatory Notes, Housing Legislation Amendment Bill 2021 (Qld) 3.

² Ibid.

The role of the QHRC

5. The Queensland Human Rights Commission (**the Commission**) has functions under the *Anti-Discrimination Act 1991* (**AD Act**) and the *Human Rights Act 2019* (**HRA**) to promote an understanding and discussion of human rights in Queensland, and to provide information and education about human rights.

Discrimination

6. A major purpose of the AD Act is to promote equality of opportunity for everyone through protection from unfair discrimination, including in the area of accommodation. The Commission receives and conciliates complaints in relation to discrimination alleged by both private and social housing tenants. In the financial year 2020-2021, the Commission received 61 complaints about contraventions relating to accommodation and housing. The complaints were mostly about discrimination based on impairment (including having assistance animals) and race.

Human rights

7. The HRA consolidates and establishes statutory protections for certain human rights recognised under international law. The proposed changes to the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (**RTRA Act**) must be scrutinised for compatibility with the human rights contained in the HRA.³ While the HRA does not include a specific right to housing, a number of important human rights are engaged in the application of residential tenancy laws, most relevantly, the:
- right to recognition and equality before the law⁴
 - right to privacy and reputation (which includes the right not to have one's home unlawfully or arbitrarily interfered with)⁵
 - right not to be arbitrarily deprived of one's property⁶
 - right to protection of families and children⁷
 - right to a fair hearing (including in determining housing matters).⁸
8. Under the HRA, a human right may only be limited where the limitation is reasonable and can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.⁹ In deciding

³ *Human Rights Act 2019* (Qld) pt 3 div 1.

⁴ *Human Rights Act 2019* (Qld) s 15.

⁵ *Human Rights Act 2019* (Qld) s 25.

⁶ *Human Rights Act 2019* (Qld) s 24.

⁷ *Human Rights Act 2019* (Qld) s 26.

⁸ *Human Rights Act 2019* (Qld) s 31.

⁹ *Human Rights Act 2019* (Qld) s 13(1).

whether limitations on the rights are reasonable and demonstrably justified, a number of factors must be considered and balanced, including the purpose of the limitation, and whether it is the less restrictive way of achieving the purpose of the legislation.¹⁰

9. The United Nations Human Rights Committee has commented that this obligation includes ensuring individuals are protected, not only by the State, but against violations of their rights by private persons. This includes taking appropriate measures or exercising due diligence to prevent, punish, investigate, or redress the harm caused by such acts by private persons or entities.¹¹
10. Since 1 January 2020, social housing tenants in Queensland have been able to make complaints about human rights. In the financial year 2020-2021, 13 human rights complaints were received by the Commission about accommodation and housing.

Notices to leave

11. There is evidence that housing instability and homelessness is a concerning and vital issue that needs to be addressed in Queensland. An estimated one in 200 Queenslanders is experiencing homelessness.¹² In the private rental market, one in five moves are made by tenants involuntarily.¹³ Many of Queensland's 1.8 million tenants are facing constant moves, with the median tenancy lasting only 13.1 months for units and 17.9 months for houses.¹⁴
12. Of renting households, 43% include children¹⁵ for whom housing stability, connection to community, and access to schools is vitally important. If the current rates of short-term tenancies persist or worsen, there is a potential for children to have their education disrupted because of forced housing moves resulting in a need to move schools on several occasions during their education.

¹⁰ *Human Rights Act 2019* (Qld) s 13(2).

¹¹ United Nations Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add. 13(26 May 2004).

¹² Queensland Government, *Homelessness prevention* (Web Page, 10 August 2017) <<https://www.qld.gov.au/housing/emergency-temporary-accommodation/homelessness-prevention>>.

¹³ Australian Government Productivity Commission, *Vulnerable Private Renters: Evidence and Options* (Research Paper, September 2019) 9.

¹⁴ Residential Tenancies Authority, *Annual Report 2019-20* (Report, 2020) 11.

¹⁵ Department of Housing and Public Works (Qld) *A better renting future – Safety, security and certainty: Review of the Residential Tenancies and Rooming Accommodation Act 2008* (Consultation Regulatory Impact Statement, November 2019) 30.

13. A likely contributing factor to short-term renting is that lessors have the ability, at present, to terminate a tenancy without grounds at the end of a current lease term.¹⁶ As the Explanatory Notes identify:

Rental accommodation will continue to grow in importance as a sustainable housing solution for many Queenslanders, particularly as the population continues to grow and home ownership rates decline.¹⁷

14. The Explanatory Notes indicate that the Bill intends to deal with this issue by improving:

transparency and accountability of lessor and tenant decision-making about their tenancy arrangements while strengthening tenants' existing rights and supporting them to enforce their rights whilst also recognising circumstances where a lessor has the lawful ability to issue such notices for just reasons.¹⁸

15. To this end, the Bill inserts new sections 290B-290G which will require lessors to provide specific reasons, such as planned demolition or redevelopment, or significant repair or renovations.

Retention of Notice to Leave without reasons

16. However, section 291 (Notice to Leave without ground) is retained and merely reworded as a Notice to Leave 'for end of fixed term agreement'.
17. While there are proposed offences for providing false or misleading information in a Notice to Leave for a specific reason (under section 365A), it seems unlikely that lessors would rely on new sections 290B-290G to end fixed term tenancies.
18. In practice, the Commission anticipates that lessors will continue to use section 291 to issue a Notice to Leave two months before a fixed term lease has expired. This is particularly the case because sections 290B-290G Notices to Leave can only be issued two months prior to the end of a fixed term (see clause 88), which provides no advantage to using sections 290B-290G over the existing section 291.
19. Lessors would be required to use sections 290B-290G only in the limited circumstances that a fixed term has ended and has become a periodic tenancy. Periodic tenancies may be more practical and flexible in many circumstances for both lessors and tenants. The Commission is concerned that this approach might have a perverse outcome of encouraging lessors to end tenancies at the end of the fixed term period. Lessors may be minded to avoid periodic tenancies, since they carry the risk of needing to

¹⁶ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 291 'Notice to leave without ground'.

¹⁷ Explanatory Notes, Housing Legislation Amendment Bill 2021(Qld) 2.

¹⁸ *Ibid* 4.

later justify the reason for the tenancy being ended. This would have the effect of reducing, rather than increasing, housing stability for tenants.

20. This approach appears to be at odds with the purpose given in the Statement of Compatibility (**SOC**) for the Bill, to enhance:

... the tenant's property rights in respect of premises by providing more certainty about the continuation of their tenancy through limiting the lessor's ability to terminate the lease to specific scenarios.¹⁹

21. In order for a provision to be compatible with human rights, there must be a relationship between the limitation on rights imposed by the Bill and its purpose, including whether the limitation helps to achieve the purpose.
22. Unfortunately, the SOC does not justify this approach in detail, other than to note that it is intended to preserve the 'lessor's right to property by preserving their ability to enter a fixed term agreement which may end at the end of the fixed term'. The rights of lessors must be balanced against other relevant rights.
23. Arguably, issuing a Notice to Leave to a tenant that provides no valid grounds, other than the fixed term ending, might amount to an arbitrary interference with the right to 'home', which is part of the right to privacy and reputation under section 25 of the HRA, and where there are families with children renting, section 26 may be engaged. Any legislation that limits the important rights of people and families to their 'home' must be clearly justified.

Lessors' property rights

24. It is unclear to what extent the right to property under the HRA applies to the various interests arising from a tenancy agreement. Preventing a lessor from ending a tenancy once the lease is ended, unless a specific valid reason is available, may amount to diminishing the property rights of a lessor, but would probably not amount to an 'arbitrary deprivation' under the right to property. As described in the Explanatory Notes to the Human Rights Bill 2018²⁰, property rights are essentially intended to prevent a person from having their property 'removed', and there is an internal limitation in the provision to limit the scope to only 'arbitrary' removals of property.
25. While the HRA does not define 'deprived', it is possible to look to international case law on the meaning of deprivation of property rights.²¹

¹⁹ Statement of Compatibility, Housing Legislation Amendment Bill 2021 (Qld) 5.

²⁰ Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

²¹ Under section 48(3) *Human Rights Act 2019* (Qld), international laws relevant to human rights may be considered in interpreting a statutory provision. However, in *Momcilovic v The Queen*

Deprivation of property requires more than state interference, and requires there is a direct or indirect dispossession, or de facto dispossession. Direct dispossession includes, for example the extinguishment of title to property, and indirect dispossession includes forced sale.²² De facto dispossession involves a substantial restriction in fact of a person's use of, or enjoyment of, their property.²³ De facto dispossession does not include a mere diminution in value.²⁴

26. If section 291 was removed, since the lessor would still retain the property and the right to derive benefits from it, including payment of rent – albeit from the same tenants – this arguably would not amount to a 'deprivation' or 'removal' of property, either by direct or indirect dispossession or de facto dispossession. Even if the lessor was to, in theory, be able to re-rent the property for a higher value, the international case law indicates that a hypothetical reduction in benefits derived from the property is unlikely to be a deprivation of property rights.
27. The term 'arbitrary' refers to an action which is 'unjust, capricious, unpredictable, unreasonable or disproportionate'.²⁵ Arbitrariness involves an action being disproportionate to the legitimate aim sought.²⁶
28. Since there is a clear justification for a limitation of rights given significant housing instability and homelessness in Queensland, it is unlikely that requiring a lessor to provide reasons to end a tenancy at the end of the fixed term would amount to an arbitrary action.

Victorian approach

29. The HRA is based on the Victorian *Charter of Rights and Responsibilities Act 2006*. As noted in the SOC, Victoria recently amended its *Residential Tenancies Act 1997*. These changes include removing the ability for rental providers to issue a 120-day 'no specified reason' notice to vacate. Instead, to end most rental agreements, lessors must provide a valid

(2011) 245 CLR 1, the High Court cautioned that this should be done with 'discrimination and care'.

²² *Tonwerke v Austria* (European Court of Human Rights, Application No 7897/77, 13 December 1979, DR 18) 31; *A, B, C and D v UK*, European Court of Human Rights, Application No 3039/67, 29 May 1967; *Hakansson and Sturesson v Sweden* (European Court of Human Rights, Application No 11855/85, 13 October 1988).

²³ See *Papamichalopoulos v Greece* (1993) 16 EHRR 440. Also, in *Tre Traktor Aktiebolag v Sweden* (1989) 13 EHRR 309 [55] a restaurant's liquor license was removed because of financial irregularities. Although some of the rights to use the property in a particular way had been removed, they had not been 'deprived' of property.

²⁴ In *Lough v First Secretary of State* [2004] EWCA Civ 905 a challenge by a residents' association to an approval of a nearby redevelopment proposal – held that diminution in value of property was not deprivation.

²⁵ *Raytheon Australia Limited (Human Rights)* [2014] VCAT 1370 [109].

²⁶ *WBM v Chief Commissioner of Police (Vic)* (2012) 43 VR 446, [2012] VSCA 159 [114].

reason, such as sale, change of use, or because the provider is moving back into the rented property.²⁷

30. The only exceptions are fixed term agreements, which may be ended by notice being provided 60 or 90 days before the end of the initial fixed term (depending on the length of the agreement).²⁸ However, for subsequent agreements, a valid reason must be given. A notice given in such circumstances is of no effect if the giving of the notice would constitute direct discrimination within the meaning of the *Equal Opportunity Act 2010* (Vic),²⁹ or if it was given in response to the exercise, or proposed exercise, by the renter of a right under the Act³⁰.

Further justification

31. At a minimum, similar safeguards to those recently enacted in Victoria should be considered by the Committee. However, in the Commission's view the most effective way to achieve the stated purpose of the Bill would be to not retain section 291. While this would fetter the discretion of a lessor to end a tenancy without ground and therefore limit lessors' rights to some extent, this approach would further the goal of providing a stable home for a third of Queensland residents, which:

...enables people to achieve positive life outcomes such as good health, equality education and secure employment.³¹

Domestic and family violence

32. The Bill proposes new processes for tenants experiencing domestic and family violence to end the tenancy quickly, as well as enabling tenants experiencing such violence to access their share of rental bonds more easily. Tenants will also be able to change locks to a property without requiring the lessors' consent.
33. The Commission notes that tenants seeking to rely on these provisions must provide supporting evidence that they are experiencing domestic and family violence, including by providing a protection order.
34. The Commission agrees with the SOC that:

supporting tenants and residents who are experiencing domestic and family violence to end their interest in a tenancy or rooming accommodation agreement and enact plans to end the violence is consistent with a free and democratic society based on human dignity, equality and freedom. It is also

²⁷ See *Residential Tenancies Act 1997* (Vic) pt 2 div 9.

²⁸ *Residential Tenancies Act 1997* (Vic) s 91ZZDA.

²⁹ *Residential Tenancies Act 1997* (Vic) s 91ZZI(2).

³⁰ *Residential Tenancies Act 1997* (Vic) s 91ZZI(4).

³¹ Explanatory Notes, Housing Legislation Amendment Bill 2021(Qld) 3.

consistent with the protection of the following human rights for tenants and residents: the right to life under section 16; the protection of families and children under section 26; and rights to liberty and security under section 29 of the *Human Rights Act 2019*.³²

35. The Commission strongly supports the Bill's efforts to improve safety and housing stability for tenants experiencing domestic violence.

Suspected illegal activity

36. Clause 61 of the Bill adds s 297B to the *Residential Tenancies and Rooming Accommodation Act 2008* to create new grounds for a lessor to apply to the tribunal for a termination order, if they reasonably believe the tenant, an occupant, a guest of the tenant, or a person allowed on the premises has used the premises for an illegal activity. Proposed subsection 297B(3) allows the lessor to form a reasonable belief that the premises or property have been used for an illegal activity, whether or not anyone has been convicted or found guilty of an offence.
37. This new ground is not discussed in detail in the Explanatory Notes or the Statement of Compatibility. In the short explanation about its use, it is described as providing 'a streamlined process to terminate a lease where a rental property has been used illegally.'
38. The purpose of the Bill overall is to deliver the key objectives of the Housing Strategy, including modernisation, connections (e.g. a system that is fair and responsive) and confidence. The Explanatory Notes acknowledge that:
- a stable home enables people to achieve positive life outcomes such as good health, quality education and secure employment. With more Queenslanders renting, and renting longer, it is important that our rental laws support individuals and families to access and sustain safe and secure rental accommodation'.³³
39. It is unclear to the Commission how providing a process for a tenant to be evicted from their home on the basis of mere suspicion achieves these goals.

Existing s 290A

40. This amendment is based on a ground that already exists under s 290A(3), albeit with a different process of eviction in relation to social housing tenants. Subsection 297B(4) clarifies that section 297B does not apply to a residential tenancy agreement where the lessor is the chief executive officer of the housing department, acting on behalf of the State,

³² Explanatory Notes, Housing Legislation Amendment Bill 2021(Qld) 3.

³³ Ibid.

or where the lessor is a community housing provider. This is because serious breaches by tenants with those lessors are covered under section 290A (Notice to leave for serious breach) at public or community housing.

41. In the Commission's view, existing section 290A unreasonably limits several rights including privacy, equality, family, and the presumption of innocence until proved guilty. The process for section 290A requires only that the social housing provider has issued a notice to leave for a serious breach (e.g. suspected illegal activity).
42. The Commission is aware of a policy position for social housing providers where section 290A is only used as a last resort, once other attempts to resolve the issues have been exhausted.³⁴ Steps that are routinely taken by a social housing provider include referrals to mental health and domestic violence services to address the issues underlying challenging and disruptive behaviours. Unless the breach is of the most serious nature (e.g. drug production, supply, or trafficking) sufficient warnings will be first provided including through the issuing of letters or Notices to Remedy Breach.
43. Social housing providers, such as government or government-funded entities, must provide procedural fairness to tenants. Generally there will be an investigation into allegations during which a tenant can provide their side of the story. This is particularly important where the threshold is mere suspicion, rather than the existence of a criminal conviction.

Differences with proposed s 297B

44. New section s297B creates a new set of human rights limitations that have not been adequately justified in the Statement of Compatibility.
45. While the Commission appreciates that the lessor's right to property includes protection from significant damage caused by illegal behaviour, we question whether the current provisions strike an appropriate balance between the rights of tenants and lessors.
46. Unlike existing section 290A, where a Notice to Leave can be issued to a social housing tenant for a serious breach, the proposed new process under section 297B involves a lessor applying to the tribunal for a termination order on the basis of the serious breach. Under section 347A the tribunal may make the order if satisfied:
 - (a) The grounds for the making the application are established; and

³⁴ Queensland Government, *Tenant behaviour: Information for Queensland public housing tenants* (Web Page, 12 June 2020) <<https://www.qld.gov.au/housing/public-community-housing/public-housing-tenants/during-your-tenancy/tenant-behaviour>>.

- (b) The relevant action justifies terminating the tenancy agreement.
47. Under s 347A, in deciding if the relevant action is justified, the tribunal must consider:
- The damage done to the premises;
 - Whether the relevant action was recurrent and the frequency of such recurrence; and
 - The adverse effects on any person including physical harm and financial loss.
48. Notably, the tribunal is not expressly required to consider the culpability of the tenant in making a determination. The provision is broad in scope and includes actions of a 'guest' or 'person allowed on the premises'. While the tenant may not be in any way at fault for the damage, placing others in danger, or significant interference with 'reasonable peace comfort or privacy', they may, nevertheless, have their tenancy terminated. Even more concerning, the provision could doubly victimise the very tenants that the Bill is seeking to protect – victims of domestic violence.
49. The Commission is concerned that this provision could be used to unfairly terminate the tenancy of a person who is experiencing abuse. For example, if a tenant's partner attends the property, becomes violent, and damages the property, this could amount to unlawful wilful damage. If a tenant is experiencing ongoing verbal or physical abuse which is loud, frequent, and interferes with the peace, comfort, or privacy of neighbours, the lessor could apply for termination for a serious breach.
50. The low threshold required and the lack of clear criteria for the tribunal to consider (including factors relevant to the tenant) suggest that the tenant's right to equality, privacy (home life), and potentially the right to family, are significantly limited by the current provisions and this issue is exacerbated by the Bill.
51. Case law from the United Kingdom and the European Court of Human Rights suggests that a social housing provider must demonstrate that any eviction of a social housing tenant is a proportionate limitation on their right to privacy.³⁵ In *Director of Housing v TK*, the Victorian Tribunal found that a notice to vacate on the basis of illegal activity was justified for reasons that included the landlord agreeing to delay a decision after seeking submissions from the tenant's legal advisers. The notice to vacate was issued after the tenant was convicted of the offence.³⁶

³⁵ See for example *Manchester City Council v Pinnock* [2011] 2 AC 104.

³⁶ *Director of Housing v TK (Residential Tenancies)* [2010] VCAT 1839.

52. Under current section 290A(3) and proposed s 297B, a 'reasonable belief' on the part of the lessor of illegal activity by any person on the premises can lead to the termination of the tenancy in the absence of a charge or conviction. This may result in patently unfair outcomes where the tenant, occupant, or guest did not in fact do anything illegal on the premises.
53. Unlike social housing providers, private lessors will not be required to investigate, provide appropriate warnings and referrals, or to only seek to end the tenancy for a serious breach as a last resort. The provision is likely to be used to terminate the tenancies of those tenants most at risk of homelessness, including people experiencing domestic violence, or who have mental health issues. This runs contrary to the purpose of the Bill to ensure 'that vulnerable community members are supported to sustain tenancies in appropriate and secure housing that facilitates social, economic, and cultural participation'.³⁷
54. Depending on the circumstances, the presumption of innocence may also be unfairly limited as protected by section 32 (Rights in criminal proceedings) of the HR Act. The UN Human Rights Committee (UNHRC) has explained that the scope of the right includes a duty for all public authorities to refrain from prejudging the outcome of a trial. The right guarantees that no guilt can be *presumed* until the charge has been proved, and ensures the accused has the benefit of the doubt.³⁸
55. The Commission appreciates that the right to property of lessors is an important consideration, and the amendment protects their interests in extreme situations where illegal activity may cause a lessor to be arbitrarily deprived of their property. However, the broad scope of the provision and the trigger being the mere 'reasonable belief' of a lessor does not appear to be a proportionate response to protecting the property rights of lessors. The purpose of the amendments are not discussed in any detail in the Explanatory Notes to the proposed amendments.
56. In the absence of clear justification for this amendment, the Commission suggests its compatibility with human rights must be questioned. Without that justification, we recommend the provision be removed, or at least amended.
57. Possible amendments for both proposed s 297B and existing s 290A include the additional considerations included in Victorian and ACT legislation³⁹ and others, such as requiring:

³⁷ Explanatory Notes, Housing Legislation Amendment Bill 2021 (Qld) 1.

³⁸ United Nations Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 9.

³⁹ *Residential Tenancies Amendment Act 2018* (Vic) s 330A(h) and *Residential Tenancies Act 1997* (ACT) s 48.

- some proof of illegal activity (e.g. a conviction)
 - that the activity must reach a minimum threshold of seriousness;
 - consideration of the consequence of ending the tenancy on the tenant and/or their dependents, particularly if there are children involved
 - any mitigating factors, such as physical or mental health of the person said to have engaged in the conduct, or whether the person was experiencing family or domestic violence at the time
 - the extent of the impact on the lessor, other tenants, or those living in nearby premises, and
 - whether any other order or course of action is reasonably available.
58. At a minimum, justification should be sought from the Minister as to how the proposed amendments are compatible with human rights.
59. There is also little discussion in the Explanatory Notes about how the consultations that led to the Bill informed the decision to extend the existing grounds of eviction for suspected illegal behaviour.

Other existing provisions

60. The Commission recommends that parliament makes amendments to the Bill which would repeal or amend sections 297A and 290A, considering the issues raised above. The provisions in their current form are arguably incompatible with the HRA when other less restrictive options are available to achieve this purpose.

Pets and assistance animals

61. Clause 44 inserts new Chapter 3, Part 1A to provide a framework for tenants and lessors to reach agreement about pets in premises where there is a residential tenancy agreement. 'Pet' is defined to mean a domesticated animal, or an animal that is dependent on a person for the provision of food or shelter. A working dog or an animal prescribed by regulation is not included in the definition of pet. 'Working dog' is defined to mean an assistance dog, guide dog or hearing dog, a corrective services dog, or a police dog under the relevant legislation (*Guide, Hearing and Assistance Dogs Act 2009, Corrective Services Act 2006 and Police Powers and Responsibilities Act 2000*).
62. New subsections 184B(1) and (2) provide that the tenant may keep a pet or other animal at the premises only with the approval of the lessor. However, the tenant may keep a working dog at the premises without the lessor's approval.

63. Section 184B(3) states that authorisation to keep a pet, **working dog** [emphasis added], or other animal at the premises is subject to a body corporate by-law, park rule, or other law relating to keeping animals at the premises. The section provides two examples, including where the premises may be subject to a body corporate by-law that requires the tenant to obtain approval from the body corporate before keeping a pet at the premises.
64. The Commission is concerned that including the words 'working dog' in section 184B(3) creates confusion and inconsistency with other laws. A by-law that does not permit the keeping of *any* animal would be indirectly discriminatory under section 11 of the AD Act. A decision of a lessor to refuse a tenancy on the basis of the prospective tenant having an assistance animal would be clearly unlawful under section 85 of the AD Act which states that:
- A person must not discriminate by doing any of the following—
- (a) refusing to rent accommodation to another person because the other person has an impairment and relies on a guide, hearing or assistance dog;
 - (b) requiring the other person to keep the dog elsewhere;
 - (c) requesting or requiring the other person to pay an extra charge because the dog lives at the accommodation.
65. Notwithstanding this provision, the Commission often hears of instances where a person with a disability who has an assistance animal is refused rental accommodation, or is required to go through onerous body corporate approval processes. This can cause unnecessary stress, and in some cases creates barriers to obtaining suitable housing for people with disabilities. Conflating pets with assistance animals in the proposed section 184B(3) may encourage lessors to require body corporate approval for assistance animals in circumstances where it is otherwise not required by law, or where it could amount to unlawful discrimination.
66. In addition, section 181 of the *Body Corporate and Community Management Act 1997* states that:
- (1) A person with a disability under the Guide, Hearing and Assistance Dogs Act 2009 who relies on a guide, hearing or assistance dog and who has the right to be on a lot included in a community titles scheme, or on the common property, has the right to be accompanied by a guide, hearing or assistance dog while on the lot or common property.
 - (2) A person mentioned in subsection (1) who is the owner or occupier of a lot included in a community titles scheme has the right to keep a guide, hearing or assistance dog on the lot.
 - (3) A by-law can not exclude or restrict a right given by this section.

67. In summary, section 184B(3) as drafted is inconsistent with anti-discrimination and body corporate legislation, and might lead to more confusion for lessors and tenants. For this reason, the Commission recommends removing the words 'working dog' from section 184B(3).

Minor modifications

68. The Commission notes the mention in the Explanatory Notes to the Bill that one of the issues emerging from the consultations informing the Bill was allowing a tenant to make minor modifications.⁴⁰ It is therefore disappointing that the Bill did not make amendments to allow such modifications.

69. As noted by the Queensland Disability Network, this is a particular issue for tenants with disabilities, who often need small additions to their homes:

Minor modifications like the addition of a shower or other rails make places safer for tenants with little impact upon the appearance and structural integrity of a property.

What we hear from our members is that they are often reluctant to contact their real estate in fear of a backlash like ending their tenancy or not renewing their lease.⁴¹

70. This suggests without clear process for minor modifications, people with disabilities, in particular, risk being discriminated against in the rental market.

Retirement villages

71. The Bill would amend the *Retirement Villages Act 1999* (**RV Act**) to establish a regulation-making power to exempt named resident-operated retirement villages from the mandatory buy-back requirements under the RV Act.
72. The amendment follows a review of the timeframes for paying exit entitlements conducted by an independent review panel, and after receiving the panel's interim report, a commitment by the government during the 2020 State election to act quickly to exempt resident-operated retirement villages from the buy-back requirements.

⁴⁰ Explanatory Notes, Housing Legislation Amendment Bill 2021 (Qld) 3.

⁴¹ Queenslanders with Disability Network, *Joint media release: It's time for Queensland renters to be given a fair go* (Web Page, 18 June 2021) <<https://qdn.org.au/media-release-its-time-for-queensland-renters-to-be-given-a-fair-go/>>.

Background

73. The RV Act regulates the operation of retirement villages in Queensland, with a view to promoting consumer protection and fair trading practices. A retirement village is premises (other than a manufactured home park site) where older members of the community or retired persons reside in independent living units or service units, under a retirement village scheme.
74. The protections under the RV Act apply to retirement villages that are registered under the RV Act.⁴² Most retirement village schemes operate as leasehold villages where the right to reside is secured by a registered lease, and some operate under a licence and loan agreement. Some freehold complexes also operate as retirement villages. These complexes differ in that the house or unit is owned by a person, and the common areas are owned by the body corporate for the complex. The body corporate is comprised of the owners of the units, and the complex is also regulated under the *Body Corporate and Community Management Act 1997*.
75. For all registered retirement villages there is a scheme operator who is responsible for operating the retirement village, including providing services and charging relevant fees. For some freehold title retirement village schemes, the scheme operator is a company that is comprised of home owners. These are referred to as resident-operated retirement villages. The home owners who are members of the scheme operator usually perform the functions on a voluntary basis, similar to committee members of a body corporate.
76. The Commission understands there is a relatively small number of resident-operated retirement villages. The Explanatory Notes to the present Bill states that the independent review panel sought to consult with seven villages that were potentially resident-operated.⁴³
77. Retirement village schemes are able to lawfully discriminate on the basis of age to limit residence in the scheme to older people. This is because the RV Act expressly excludes this type of discrimination from the operation of the AD Act. The RV Act provides in section 26:

Despite the *Anti-Discrimination Act 1991*, it is not unlawful for a scheme operator to discriminate on the basis of age if the

⁴² Many residential complexes that are promoted as 'over 50s' villages are not registered under the RV Act.

⁴³ The report of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee notes advice from the department that it had identified 10 retirement villages where the residents are the scheme operator for the village in some capacity. See n 38 at 19.

discrimination merely limits residence in a retirement village to older members of the community and retired persons.

The buy-back requirements

78. In 2017 the RV Act was amended to require a scheme operator to pay a resident their exit entitlement if their unit remains unsold 18 months after their right to reside in the retirement village is terminated, or a grant of probate in the case of the death of the resident. This amendment is referred to as the buy-back requirements.
79. Further amendments made in 2019 clarified that the buy-back requirements apply to freehold retirement villages, including resident-operated retirement villages.
80. For resident-operated retirement villages, the residents need to contribute funds to enable the scheme operator to purchase a lot in accordance with buy-back requirements.
81. The Committee that inquired into the 2019 amendments noted in its report, that in response to issues raised in relation to resident-operated retirement villages, the department advised the Committee:

The department is working with these resident-operated villages to support them to understand the proposed amendments and their obligations regarding the other legislative changes arising from the 2017 amendments to the Act which are commencing progressively through 2019. It may be relevant for the resident-operated villages to consider whether operating as a registered retirement village continues to offer the most appropriate model for the village and residents.

It is anticipated that some of these villages may elect to deregister as a retirement village and continue to operate as a community title scheme. They may also wish to apply for an exemption to the [anti-discrimination] legislation so that they can continue to offer accommodation exclusively to seniors.

The QRVAS is available to provide free legal advice and has offered to support the resident operators in applying for anti-discrimination exemption is needed.⁴⁴

82. The department's advice to the Committee was made without any consultation with the Commission.

⁴⁴ Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Health and Other Legislation Amendment Bill 2018* (Report No. 18, February 2019) 40-41. The Committee supported the intent of the proposed amendments to ensure that the 2017 amendments apply to all tenure types. The reference by the department to the QRVAS is the Queensland Retirement Village and Park Advice Service, a free legal service provided by Caxton Legal Centre Inc.

Applications for exemptions under the *Anti-Discrimination Act 1991*

83. The AD Act empowers the tribunal to grant an exemption from the operation of a specified provision of the AD Act for a specified period of not more than five years.⁴⁵ An exemption may be renewed for further periods of not more than five years.
84. Before deciding an application for an exemption, the tribunal is required to:
- give the Human Rights Commissioner copies of the application and all material filed in support of it, and
 - have regard to any submissions of the Commissioner about the substance of the application and/or the process for deciding the application.
85. Three resident-operated retirement villages have applied to the Queensland Civil and Administrative Tribunal for an exemption to allow discrimination on the basis of age, to restrict accommodation, goods and services provided, and disposition of land, in the respective retirement villages to residents over the age of 50 years.
86. The three applicants intend to de-register as retirement villages under the RV Act due to the burden of the buy-back requirements.
87. The Commission has made submissions to the applications, and all three applications have yet to be decided by the tribunal.

Commission's response to the exemption applications

88. For a number of years now, the Commission has not supported age restrictions in accommodation. The Commission's concerns about exemptions that allow age restrictions in accommodation include:
- Tribunal exemptions are temporary and not suited to permanent arrangements such as accommodation.
 - Housing affordability is a national concern for all, irrespective of age.
 - Segmenting housing by age is not consistent with an inclusive age-friendly community.
 - All age groups benefit from intergenerational engagement, whereas working and socialising in age-segregated worlds does not promote a healthy society.

⁴⁵ For work-related matters the tribunal is the Queensland Industrial Relations Commission, and for all other matters the tribunal is the Queensland Civil and Administrative Tribunal.

- Negative stereotypes about children and younger people is not a proper basis for granting an exemption.
 - Queensland has an existing legislative framework that allows discrimination on the basis of age, under the *RV Act*.
 - The residential complexes with age restrictions do not necessarily cater for age-related disabilities.
 - Where accommodation and facilities are accessible, younger people should also be able to benefit.
 - The ages of 50 and 55 are not old, particularly considering that eligibility for the age pension is currently 67 years.
 - Affordable and accessible accommodation for seniors can be achieved through non-discriminatory means.
89. Age discrimination in accommodation, goods and services, and disposition of land, is also prohibited under the *Age Discrimination Act 2004* (Cth). Only one age-related housing exemption has been granted by the Australian Human Rights Commission, which was for a community title complex in Caloundra. The exemption was granted to allow the applicant time to utilise existing legislative avenues to confirm the status of the complex, and the AHRC noted: 'There is an existing comprehensive legislative framework for registration and regulation of retirement villages in Queensland'.
90. In deciding an exemption application, the tribunal is acting in an administrative capacity, and is therefore required to properly consider human rights and to make a decision that is compatible with human rights.⁴⁶ The right to equality before the law and protection without and against discrimination is affected by an exemption to allow discrimination on the basis of age in residential accommodation. The right may only be limited under law if the limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality, and freedom, in accordance with section 13 of the HR Act. The Commission considers that this type of exemption is unlikely to constitute a special measure under section 15(5) of the HR Act, and means an exemption would limit the right. The Commission considers that it is unlikely that the limitation would be reasonable and justified.
91. It is also unclear how an age exemption in a freehold complex could legally operate. A tribunal exemption allows discrimination, whereas the desired outcome is to force lot owners to discriminate in the sale or occupation of their lot.

⁴⁶ *Human Rights Act 2019* (Qld) s 58.

92. A freehold complex is regulated by the *Body Corporate and Community Management Act 1997* (**BCCM Act**). The BCCM Act provides in section 180(4) that a by-law cannot prevent or restrict transmission, transfer, mortgage, or other dealing with a lot. One of the examples to that section is: 'A by-law cannot prevent the sale of a lot to a person under or over a particular age.'⁴⁷
93. Accordingly, seeking a tribunal exemption under the AD Act is not an appropriate solution for a resident-operated retirement village that wishes to retain the age restriction but feels it is necessary to de-register under the RV Act due to the burden of the buy-back requirements. Even if the tribunal would grant an exemption, the owners need to make another application to renew the exemption every time the exemption expired.
94. The prohibition of age restrictions in the BCCM Act, together with the explicit provision in the RV Act enabling age restrictions, is a strong indication of the legislative intent that age restrictions in community title schemes are intended to apply only to schemes registered under the RV Act.

Conclusion

95. Exempting a resident-operated retirement village from the buy-back requirements under the RV Act may mean that the village is able to continue to operate under the RV Act.
96. The tribunal exemption framework under the AD Act is not appropriate for long-term arrangements such as age restrictions in residential housing complexes, regardless of whether the complex operates as freehold community title, leasehold, or as a manufactured home park under the *Manufactured Homes (Residential Parks) Act 2003*.
97. The Commission considers it is a matter for government policy as to whether the ability to discriminate on the basis of age that exists under the RV Act should be extended to other forms of residential community housing. If age discrimination in residential community housing is supported by the government, then appropriate amendments should be made to relevant legislation to provide clarity for the community and relieve the burdens associated with using the tribunal exemption process for this purpose.
98. The Commission supports the proposed amendment to the RV Act that would enable resident-operated retirement villages to apply for exemption from the buy-back requirements.

⁴⁷ Examples in an Act form part of the Act – *Acts Interpretation Act 1954* (Qld) s 14(3).

Recommendations

In summary, the Commission recommends that:

Recommendation 1: Notices to leave

Further explanation should be provided as to how the approach of retaining section 291 is expected to meet the policy objective of improving housing stability in Queensland.

The government consider alternative approaches that may be more likely to meet the policy objective and fairly balance human rights, either by:

- adopting the approach in the Victorian *Residential Tenancies Act 1997* which requires reasons for termination at the end of second, and subsequent fixed term leases, or
- removing section 291 entirely.

Recommendation 2: Domestic and family violence

The provisions regarding domestic and family violence are enacted.

Recommendation 3: Illegal activity

Proposed section 297B should be removed from the Bill, or at a minimum additional tribunal considerations should be required (as detailed in paragraph 57 of this submission).

The government should consider whether section 290A should be also repealed or amended.

Recommendation 4: Animals

The words 'working dog' be removed from Section 184B(3).

Recommendation 5: Minor modifications

The government allow tenants to make minor modifications with the important objective of improving housing accessibility and stability for tenants with disability.

Recommendation 6: Retirement housing

The government review age restrictions in residential housing, and form a policy position about extending the exemption in the *Retirement Villages Act 1999* to other forms of residential housing.