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**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**PUBLIC EXPOSURE DRAFT  
RESIDENTIAL TENANCIES LEGISLATION AMENDMENT BILL 2022**

**EXPLANATORY STATEMENT**

**Presented by  
Shane Rattenbury MLA**

## Public Exposure Draft

### RESIDENTIAL TENANCIES LEGISLATION AMENDMENT BILL 2022

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the [Human Rights Act 2004](#) (HRA).

This explanatory statement relates to the Residential Tenancies Legislation Amendment Bill 2022. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

#### OVERVIEW OF THE BILL

This Bill amends the [Residential Tenancies Act 1997](#) (RTA) and the *Residential Tenancies Regulation 1998* (RTR) to:

- remove the 'without cause' tenancy termination provision;
- introduce new termination provisions to allow landlords to continue to manage their properties effectively and to allow the Commissioner for Social Housing (**the Housing Commissioner**) and non-Government supported accommodation providers to continue to provide targeted accommodation assistance programs;
- introduce associated protections for tenants to ensure new and existing termination provisions are not misused;
- make other minor and technical changes related to references to approved forms under the RTA (to reflect that there are currently no approved forms);
- make it an offence for landlords or agents to advertise a rental property without a fixed rental rate and also make it an offence to solicit rent bids;
- introduce provisions to support the introduction of minimum standards including changes to advertising and information disclosure requirements, access provisions, tenancy termination, rent reduction and compensation provisions; and
- clarify, by way of regulation, what gardening activities to grow food and compost fall within the scope of the minor modifications provision in the RTA.

The Bill also amends the [Housing Assistance Act 2004](#) (HAA) to:

- modify sections 20 and 21 to require that any determinations or operational guidelines which relate to decisions to review a person's eligibility for housing

assistance, require a transfer or provide temporary housing assistance be made disallowable instruments (rather than notifiable instruments);

- introduce a transitional provision which deems that the existing *Housing Assistance Public Rental Housing Assistance Program (Review of Entitlement to Housing Assistance) Determination 2020 (No 1)* (NI2020-658) to be a disallowable instrument;
- introduce other minor and technical transitional provisions related to the deeming of existing legislative instruments under the HAA; and
- insert a new definition for temporary housing assistance to support a new tenancy termination provision for housing assistance provided on a temporary basis.

## **CONSULTATION ON THE PROPOSED APPROACH**

The ACT Government conducted initial targeted consultation with key residential tenancy stakeholders in March 2021. Early consultation meetings were conducted with the Real Estate Institute of the ACT, Legal Aid ACT, Canberra Community Law, ACT Shelter, Better Renting, Community Housing Canberra, and YWCA Canberra.

These early meetings were followed by a public consultation process in the form of a public consultation paper and a short survey via the Your Say website from 6 August to 15 October 2021. The Government received 49 submissions and 256 survey responses. A listening report about the feedback received from the consultation was also release on the Your Say website:

<https://yoursayconversations.act.gov.au/expanding-rights-renters>

This Public Exposure Draft Bill has been informed by community feedback received during the 2021 consultation processes. The purpose of releasing this Public Exposure Draft is to provide the ACT community with a further opportunity to comment on the specific provisions of the Bill before the Bill is introduced into the Legislative Assembly. If necessary, this will allow for further refinement of the Bill in response to community feedback before its introduction in the Legislative Assembly.

## **CONSISTENCY WITH HUMAN RIGHTS**

### **Rights engaged**

The Bill engages the following rights under the HRA:

- Right to privacy and reputation (Section 12)
- Right to recognition and equality before the law (Section 8)
- Right to a fair hearing and procedural fairness (Section 21 (1))
- Right to be innocent until proven guilty (Section 22 (1))

### ***Rights Promoted***

This Bill will promote the right to privacy and the right to fair hearing and procedural fairness.

### ***Right to privacy***

The right to privacy includes the right not to have one's home interfered with unlawfully or arbitrarily. This Bill amends the RTA to prevent the termination of tenancies without cause. Removing the 'without cause' termination provision significantly strengthens the right to privacy by making tenancy terminations less arbitrary – it ensures that a tenancy may only be terminated for an identified reason, that is, in accordance with a prescribed 'with cause' ground under the RTA.

The Bill also engages and promotes the right not to have one's home interfered with unlawfully or arbitrarily by providing additional protections for tenants who believe they have received a retaliatory notice to vacate (**NTV**). This has been done by allowing the tenant to challenge the proposed tenancy termination at the point of receiving the NTV rather than having to wait until the termination and possession order hearing to make the argument that the eviction is retaliatory (as is currently the case). This change will give both lessors and tenants greater certainty about whether the proposed termination will be considered retaliatory ahead of the proposed termination date.

The Bill also institutes an additional ground under which a NTV may be considered retaliatory – where the tenant publishes information or discloses information that is published about the premises, the residential tenancy agreement, or the lessor. This new ground will provide tenants with protection from retaliatory eviction if they speak to the media or post on social media reasonable or truthful statements about their tenancy. The changes to the retaliatory eviction provision guard against arbitrary interference with a person's home by ensuring a lessor's reliance on a termination provision is lawful and genuine.

### ***Right to fair trial***

The right to a fair trial includes the right to a fair hearing and procedural fairness. The Bill engages and promotes these rights by providing procedural safeguards requiring tenancy terminations to satisfy legislative criteria and providing mechanisms for tenants to seek review of decision making in certain circumstances where the lessor purports to terminate the tenancy.

This Bill introduces provisions which grant the Housing Commissioner the right to terminate a tenancy where they have made a decision under the HAA and its subordinate legislation (**Housing Assistance legislation**) to withdraw housing assistance following a review of eligibility, to require a transfer or where they have provided a short-term period of assistance following a breakdown of tenancy situation. In each of these circumstances, the right to terminate the tenancy under the RTA is connected to the Housing Commissioner's powers under Housing Assistance legislation. This means that there are clear and legislated criteria for the

exercise of the termination provision. Further, in some circumstances where the Housing Commissioner makes decisions to withdraw assistance or require a transfer, tenants will have administrative review rights under Housing Assistance legislation before the tenancy can be terminated. This provides additional procedural safeguards before the right of tenancy termination can be exercised by the lessor, promoting the right to fair trial.

### ***Rights Limited***

The preamble to the HRA notes that few rights are absolute and that they may be subject to reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Section 28 of the HRA requires that any limitation on a human right be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 70-. A party must show:

*“... [f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.*

The Bill engages and may limit:

- Right to privacy and reputation (Section 12)
- Right to recognition and equality before the law (Section 8)
- Right to a fair hearing and procedural fairness (Section 21 (1))
- Right to be innocent until proven guilty (Section 22 (1))

The ways in which the Bill does this are set out below.

### **Right to privacy and home**

Section 12 (a) of the HRA provides for the right to privacy, and the right not to have one’s home interfered with unlawfully or arbitrarily. The Bill will introduce a number of amendments that will engage and may limit the right to privacy and home for both tenants and lessors. The Bill will introduce:

- new tenancy termination provisions,
- mandatory disclosure requirements for lessors; and

- expanded circumstances in which lessors can access a rental premises to comply with the minimum housing standards.

These issues will be addressed in turn.

### ***Right to privacy and home – introduction of new tenancy termination provision generally***

#### *Nature of the right and the limitation (ss 28 (2) (a) and (c))*

The removal of the ‘without cause’ termination provision means that any legitimate circumstances for tenancy termination needs to be recognised as standalone grounds for termination under the RTA. The introduction of new prescribed grounds for tenancy termination will engage and may limit the right to privacy as they create additional grounds on which a lessor may seek to end a tenancy.

#### *Legitimate purpose (s 28 (2) (b))*

The purpose of introducing new tenancy termination provisions into the RTA is to facilitate the removal of the more arbitrary ‘without cause’ ground for tenancy termination which currently permits lessors to end a tenancy without providing the tenant any reason for doing so. Further, the introduction of new termination provisions recognises that there are legitimate grounds on which a lessor may need to end a tenancy which are not currently recognised as prescribed grounds under the RTA. The new terminations provisions support private landlords to utilise their property assets for lawful purposes other than as rental accommodation and also support social and community landlords to provide supported accommodation programs that are effectively targeted towards eligible tenants.

#### *Rational connection between the limitation and the purpose (s 28 (2) (d))*

The introduction of new prescribed termination grounds which engage and may limit the right to privacy is rationally connected to the overarching goal of removing the ‘without cause’ tenancy termination provision. This is because the introduction of a limited number of new and narrowly circumscribed termination provisions which recognise the legitimate circumstances in which a tenancy may need to be ended, facilitate the removal of the open ended and arbitrary ‘without cause’ termination provision.

#### *Proportionality (s 28 (2) (e))*

Each of the new termination provisions contain safeguards to ensure any potential limitations on the right to privacy are reasonable and justified. The provisions are narrowly targeted so that they only apply in limited circumstances. Further, each provision requires the lessor to provide the tenant with a reason for the tenancy termination. Providing a reason in line with a prescribed ground for termination guards against the termination of the tenancy being arbitrary.

In addition, each of the new tenancy termination provisions will operate within the existing framework of protections for tenancy termination in the RTA. That is, unless a tenant vacates a tenancy in accordance with a notice to vacate, a tenancy will only terminate in accordance with an ACT Civil and Administrative Tribunal (**ACAT**) order. In the case of each of the new termination provisions, ACAT will retain a discretion as to whether to make the termination order. This safeguard ensures ACAT is permitted to consider all the circumstances of a case when making an order and may decline to make a termination order where appropriate.

In addition, the Bill will broaden the application of the existing retaliatory eviction provisions to provide greater protections for tenants. The current retaliatory eviction provision requires the tenant to wait until the termination and possession order hearing before making the argument that the termination being sought is retaliatory. The proposed amendments will allow tenants to apply to the ACAT to seek review of a purported NTV at the time the notice is received, rather than at the tenancy termination hearing. This gives tenants greater certainty as to whether their tenancy will end on the proposed end date and allows them time to prepare to move if necessary. Additionally, the amendment will introduce an additional ground on which an eviction may be considered retaliatory, that is, where a tenant has spoken in the media or posted on social media about their tenancy experience.

The retaliatory eviction provisions act as an additional safeguard by ensuring that a lessor's reliance on a proposed termination ground is genuine, ensuring new and existing termination provisions are not misused by lessors.

Additional safeguards specific to each new termination provision have also been incorporated and are discussed further below.

***Right to privacy and home – new tenancy termination provision on the ground the lessor requires the premises for a lawful use other than as a home***

*Nature of the right and the limitation (ss 28 (2) (a) and (c))*

The Bill will introduce a new tenancy termination ground where the lessor requires the premises for a lawful use other than as a home. This provision engages and may limit the right to privacy as it creates an additional circumstance in which a lessor may seek to end a tenancy.

*Legitimate purpose (s 28 (2) (b))*

The purpose of this tenancy termination provision is to preserve the right of lessors to manage their private property and utilise it as they see fit, within legal boundaries. This includes the right to recover possession of the property to convert its use to a purpose other than a home (such as operating a business). There are existing provisions in the RTA which preserve the right of lessors to regain possession of the premises when they want to utilise their property in a different way, including where they want to sell, renovate, reconstruct, or live in the property. The introduction of

this new provision is consistent with the purpose of these existing provisions, providing for an additional circumstance where a lessor may have cause to terminate a tenancy to utilise their private property for a purpose other than a residential lease.

*Rational connection between the limitation and the purpose (s 28 (2) (d))*

The limitation on the tenant's right to privacy which may arise from the introduction of this new termination provision is rationally connected to the purpose of the provision as it allows a lessor to recover possession of their property to use it for a lawful alternative purpose.

*Proportionality (s 28 (2) (e))*

This provision contains a number of safeguards to ensure any potential interference with a tenant's right to privacy is reasonable and justified. First, the provision is drafted to apply only in narrow circumstances – that is, where the lessor wants to convert the use of the premises to a non-residential purpose. Second, the termination provision can only be used during a periodic tenancy, not during a fixed term. This preserves the nature of a fixed term tenancy and narrows the operation of the provision. Third, the provision requires the lessor to provide the tenant with significant notice of the proposed tenancy termination – a 26 week notice period. This notice period provides the tenant with time to prepare for a move and to source alternative accommodation. Fourthly, the lessor must provide evidence that their reliance on the ground is genuine, such as having lodged a development application for the proposed conversion of use for the premises. Further, the termination provision requires that the proposed alternative use of the premises be lawful. This means, for example, that the proposed use must comply with zoning and unit titles rules. This would mean a property could not be converted to a commercial use if it was in a residential zone that prohibited a commercial venture of the nature proposed.

These safeguards prevent arbitrary interference with the home by limiting the extent to which lessors may misuse the provision and terminate a tenancy without genuinely satisfying the prescribed ground for termination.

***Right to privacy and home – new tenancy termination provisions which may be exercised by the Housing Commissioner***

*Nature of the right and the limitation (ss 28 (2) (a) and (c))*

The Bill introduces several termination provisions which allow the Housing Commissioner to terminate a tenancy, including:

- termination when the Housing Commissioner withdraws housing assistance upon finding the tenant is no longer eligible for housing assistance;

- termination of the original tenancy where the tenant has two tenancies simultaneously;
- termination of tenancy where the Housing Commissioner requires a transfer and has made an alternative premises available; and
- termination of a tenancy following a temporary period of housing assistance.

Each of these termination provisions engage and may limit a tenant's right to privacy by creating new grounds on which a tenancy may be terminated.

*Legitimate purpose (s 28 (2) (b))*

The objects of the HAA include facilitating the provision of housing assistance for those most in need and maximising the opportunities for everyone in the ACT to have access to housing that is affordable, secure and appropriate to their needs. To this end, the HAA empowers the Minister to approve housing assistance programs, including the [\*Housing Assistance Public Rental Housing Assistance Program \(2013 \(No 1\)\*](#) ('**the Program**') which set out the kinds of assistance that can be provided, eligibility criteria for the assistance and how decisions of the Housing Commissioner can be reviewed.

The Program enables the effective targeting of accommodation assistance to vulnerable community members. From a human rights perspective, the Program can be conceptualised as a 'special measure' or 'affirmative action' which is specific action required to be 'taken in order to diminish or eliminate conditions which cause or help to perpetuate discrimination'<sup>1</sup>. An example of a special measure is action that confers a benefit and results in preferential treatment of disadvantaged persons compared to the rest of the community. In the case of the Program, it enables the Housing Commissioner to confer a special benefit (housing assistance) on individuals which is needed to improve access to housing and reduce discrimination and inequality experienced by certain groups, including those experiencing social and economic disadvantage, individuals living with disability, individuals from culturally and linguistically diverse background, women and children escaping domestic violence and Aboriginal and Torres Strait Islanders.

The purpose of each termination provision applying to the Housing Commissioner is discussed further below.

*Loss of eligibility and requirement to transfer*

The purpose of the proposed new termination provisions is to support the operation of the Program and enable access to housing for the most disadvantaged in the community. The termination provisions support the effective targeting of social

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<sup>1</sup> UN Human Rights Committee, General Comment No. 18: Non-discrimination (1989) ('General Comment No. 18'), [10].

housing by ensuring it can be made available to eligible individuals by withdrawing assistance from those who are no longer eligible. The termination provisions also support the Housing Commissioner to require individuals to transfer to an alternative premises in certain circumstances. This allows the Housing Commissioner to manage limited resources to support the maximum number of people through an effective allocation of housing stock.

*Termination where the tenant is a party to two tenancies*

Similarly, the termination provision which allows the Housing Commissioner to terminate the original tenancy following the tenant transferring to a second premises allows the Housing Commissioner to quickly recover possession of the original tenancy after the tenant has commenced occupation in a second property. This is connected to the purpose of ensuring the effective operation of the social housing Program and address inequality of access to housing for disadvantaged groups, by allowing the Housing Commissioner to manage limited resources to support the maximum number of people through an effective allocation of housing stock.

*Termination due to a temporary period of housing assistance ending*

The Program allows the Housing Commissioner to offer (on a discretionary basis) a person who has been residing in a public housing property, housing assistance outside of the normal allocation process following a tenancy breakdown situation. A tenancy breakdown occurs when a tenant dies or no longer occupies the property (for example, because they need to move into aged care or where they leave due to a relationship breakdown).

Instead of requiring any remaining residents to immediately vacate the premises following the death or departure of the tenant, the Program supports the Housing Commissioner to act with compassion by allowing remaining residents to stay in the premises for a bit longer, thereby giving them a period to adjust to their changed circumstances. This temporary period of assistance also allows the Housing Commissioner to receive and assess an application for housing assistance from the remaining resident(s) to ascertain whether they are eligible for ongoing assistance. However, noting that this housing assistance is provided outside of the normal allocations process and that it may potentially be provided to a person who is ultimately assessed as ineligible for housing assistance, the compassionate assistance provided in these circumstances is intended to be of finite duration only.

The purpose of this termination provision is to allow the Housing Commissioner to recover possession of the property after the tenant has been given a short-term period to adjust to their changed circumstances. This supports the operation of the Program to address inequality of access to housing for disadvantaged groups, by allowing the Housing Commissioner to recover possession of a premises following a temporary period of assistance if the tenant is found not to be eligible for ongoing

assistance, or where the tenant is eligible, but would be more appropriately housed in an alternative premises.

*Rational connection between the limitation and the purpose (s 28 (2) (d))*

There is a rational connection between allowing for the termination of a tenancy in circumstances where the Housing Commissioner withdraws assistance due to loss of eligibility, requires a transfer, terminates a tenancy when the tenant holds two tenancies, or where the Housing Commissioner has provided a temporary period of housing assistance, and the purpose of ensuring the Program can function to provide access to housing for those most in need.

The connection is that, in all these circumstances, the purpose of the limitation is to ensure that tenancies can be ended so that the rental premises can be used in the most effective way possible to achieve the overarching goals of the Program.

*Proportionality (s 28 (2) (e))*

The new tenancy termination provisions for social housing are narrowly worded and carefully targeted towards achieving the goals of the social housing program. They are closely linked to the Housing Commissioner's powers under the Program - specifically the Housing Commissioner's powers to withdraw assistance upon loss of eligibility, to require a transfer, or to provide temporary assistance following a breakdown of tenancy.

As noted above, each of these provisions supports the targeting of social housing to vulnerable community members. This is an important human rights safeguard as it ensures tenancy termination can only occur when it aligns with the operation of the Program and supports the effective functioning of public housing for the benefit of those most in need.

It is noted that the tenancy termination provisions are drafted such that the Housing Commissioner will have the power to end a tenancy where the Housing Commissioner takes action under Housing Assistance legislation (for example by deciding to withdraw assistance upon loss of eligibility, require a transfer or to provide temporary assistance following a breakdown of tenancy). It is also noted that, in future, the Housing Commissioner may amend the Program or other Housing Assistance legislation in order to expand the circumstances in which the Housing Commissioner may withdraw housing assistance or require a transfer. If the Housing Commissioner does this, it will expand the circumstances in which the tenancy termination provision is available to the Housing Commissioner. To ensure any amendments to Housing Assistance subordinate legislation which may create a tenancy termination pathway are reasonable and justified from a human rights perspective an additional human rights safeguard has been put in place through amendments to the HAA.

The first safeguard is to require that any operational guideline or determination made by the Housing Commissioner which is connected to a decision that may lead to a tenancy termination (for example, guidance on when to withdraw housing assistance) be a disallowable instrument (**DI**).

Currently, under sections 20 and 21 of the HAA, determinations or operational guidelines made by the Housing Commissioner are required to be notifiable instruments (**NI**). Making these instruments DIs provides an additional level of scrutiny, as DIs must be tabled in the Legislative Assembly, must be accompanied by an explanatory statement (**ES**), and are subject to a disallowance process whereas NIs only need to be notified on the legislation register to have effect. This means that if there were human rights concerns with a proposed policy approach set out in a DI, the DI could be disallowed by the Legislative Assembly on that basis (and would no longer be in effect). The preparation of an ES will mean that any human rights limitations created by the instrument will need to be explained and justified in the ES at the time the instrument is made.

It is also noted that the Housing Commissioner is a Public Authority for the purposes of the HRA and must give proper consideration to human rights issues when making decisions, including decisions to make a housing assistance program or a determination or operational guideline under a housing assistance program. This Public Authority obligation to give proper consideration to human rights issues acts as an additional safeguard to ensure human rights are considered and addressed in the making of any subordinate legislation.

The individual termination provisions available to the Housing Commissioner also contain additional safeguards to ensure the proportionality of any limitation on the right to privacy, which are outlined further below.

*Termination due to loss of eligibility or where tenant has refused a transfer to an alternate premises*

The provisions which allow the Housing Commissioner to terminate the tenancy upon withdrawing housing assistance upon loss of eligibility or requiring a transfer, prevent the Housing Commissioner from issuing a NTV until *after* any administrative review process available in connection with the decision to withdraw assistance or to require a transfer has been finalised.

This is a procedural safeguard which supports the tenant's right to receive a fair hearing. These provisions also require the Housing Commissioner to provide 26 weeks' notice of the proposed termination date, which gives the tenant time to prepare for a move and to source alternative accommodation (if required), thereby limiting any potential impacts on the right to privacy and home by providing an extended adjustment period to the tenant.

*Termination where tenant has refused a transfer to an alternate premises*

With respect to the provision which allows for termination where the tenant refuses to transfer to an alternative premises, a procedural safeguard has been incorporated which prevents the Housing Commissioner from issuing a NTV until the tenant has failed to accept or has actively refused the offer of moving to an alternate premises. This ensures the tenancy termination provision is only available to the Housing Commissioner in circumstances where the operation of the Program (that is, the transfer of tenants) is hindered by the tenant's refusal of alternate accommodation.

Further, the Housing Commissioner's exercise of their rights under tenancy legislation in this circumstance (through the issue of an NTV) will not prevent the Housing Commissioner from exercising their discretion under the Program to make subsequent additional offers of alternate accommodation to the tenant during the NTV period, should the Housing Commissioner choose to do so. This will allow the Housing Commissioner to continue to offer housing assistance to the tenant (in the form of an alternate premises) where it is appropriate to do so. If the tenant refuses a tenancy transfer, the Housing Commissioner will be empowered to end the tenancy and recover possession of the premises so that the premises may be used to further the aims of the Program, thereby supporting the operation of the Program to address inequality of access to housing and enable access to housing for those most in need.

#### *Termination of the original tenancy where a tenant is a party to two tenancies*

The termination provision which allows the Housing Commissioner to terminate a tenancy where the tenant holds two tenancies simultaneously contains a procedural safeguard which prevents the Housing Commissioner from issuing the NTV for the original tenancy until *after* the tenant has commenced occupation of the second premises. This safeguard ensures that this termination provision can only be utilised when the tenant is already securely housed in a second property, further it provides a 1 week overlap between tenancies to support the tenant to undertake the move between premises.

Further, the provision is crafted so that a notice period of longer than 1 week can be provided where appropriate. This provision thereby balances the individual's need to have a secure home and a period in which to relocate, with the Housing Commissioner's need to recover the use of a property that could then be sold, repaired, redeveloped or made available to another person on the social housing list in furtherance of the goals of the social housing Program.

#### *Termination of a tenancy following a temporary period of housing assistance*

The termination of a tenancy on the grounds that a temporary period of housing assistance has ended contains the safeguard that it will not be available in all social housing tenancies - it can only be used by the Housing Commissioner in circumstances where the Housing Commissioner has indicated they are providing temporary housing assistance. This provision also requires the Housing Commissioner to provide a 26 week notice period ensuring that the tenant has an

extended period of time in which to prepare to move and to source alternative accommodation. These safeguards ensure any potential limitation on the right to privacy is limited.

### ***Right to privacy – Community housing provider termination clause***

#### *Nature of the right and the limitation (ss 28 (2) (a) and (c))*

The Bill introduces a termination provision which will permit lessors (such as community housing providers) who are receiving housing assistance (by being given the use of a public asset to manage for the purpose of delivering a housing support program), to terminate a tenancy agreement when the lessor is required to return the premises to the Housing Commissioner due to the Housing Commissioner withdrawing assistance from the lessor.

This termination provisions engages and may limit a tenant's right to privacy by creating a new ground on which a tenancy may be terminated.

#### *Legitimate purpose (s 28 (2) (b))*

In addition to the Program discussed above, another housing assistance program that operates under the HAA is the [Housing Assistance Asset Program 2008 \(No 1\)](#) ('**the Asset Program**').

The object of the Asset Program is to make available public housing assets to eligible organisations for the provision of services within the social housing and human services system. In other words, the Asset Program allows the Housing Commissioner to make publicly owned properties available to community housing organisations so that they can, in turn, provide accommodation support programs to vulnerable community members. However, the Asset Program also allows the Housing Commissioner to withdraw assistance from the organisation in a range of circumstances including where the property is no longer being used for the intended purpose, where the Housing Commissioner requires the property for another purpose or where the organisation is in breach of its obligations to the Housing Commissioner.

In circumstances where the community housing organisation has a tenancy agreement in place with a tenant, the purpose of this termination provision is to allow the community housing organisation to end the tenancy with the tenant so that they can return possession of the property back to the Housing Commissioner. In a similar way to the Program, the Asset Program can be conceptualised as a 'special measure' aimed at making a more diverse range of housing supports available to vulnerable community members. The purpose of this termination provision is to support the Housing Commissioner to utilise public assets in the most effective way possible to address inequality of access to housing for disadvantaged groups.

*Rational connection between the limitation and the purpose (s 28 (2) (d))*

There is a rational connection between allowing tenancy termination in circumstances where the Housing Commissioner requires the return of a public asset in that the purpose of requesting the return of the premises is to ensure that the premises can be utilised in the most effective way possible to support the implementation of the Asset Program.

*Proportionality (s 28 (2) (e))*

This termination provision has been crafted so that the tenant will receive the same notice periods as other tenants would in the event the property is to be sold or renovated (8 and 12 weeks respectively) or, in any other case where the Housing Commissioner requires the return of the property, a 26 week notice period. The 26 week notice period provides the tenant with an extended period of time in which to prepare to move and to source alternative accommodation, thereby limiting any potential impacts on the tenant's right to privacy by providing a significant period of adjustment. This ensures any limitation is proportionate to the aim of allowing the Housing Commissioner to recover the property to use it in some other manner which will further the aims of the HAA.

***Right to Privacy - Termination when the tenant is no longer eligible for a supported accommodation program (other than programs provided by the Housing Commissioner)***

*Nature of the right and the limitation (ss 28 (2) (a) and (c))*

The Bill introduces a new tenancy termination provision which provides for the termination of a tenancy where the tenant is no longer eligible for a supported accommodation program. This termination provision engages and may limit a tenant's right to privacy by creating a new ground on which a tenancy may be terminated.

*Legitimate purpose (s 28 (2) (b))*

In a similar way to housing assistance programs, supported accommodation programs provide targeted accommodation assistance to eligible vulnerable community members. Again, these programs can be conceptualised as special measures, designed to protect and advance the rights of individuals and reduce discrimination and inequality for people experiencing socio-economic disadvantage, people living with a disability, refugees fleeing persecution etc. (noting different supported accommodation programs will target different groups).

As with the termination provision which allows the Housing Commissioner to terminate a tenancy following a decision to withdraw housing assistance, the purpose of a termination provision on the grounds the tenant is no longer eligible for

supported accommodation is to ensure that these supported accommodation programs can continue to be targeted to those most in need.

*Rational connection between the limitation and the purpose (s 28 (2) (d))*

There is a rational connection between any limitation on the right to privacy arising from the lessor's ability to terminate the tenancy and the purpose of the measure, which is to ensure the effective targeting of supported accommodation programs, in that allowing the termination of a tenancy for a person no longer eligible for supported accommodation allows the property to be made available for someone who *is* eligible for assistance.

*Proportionality (s 28 (2) (e))*

There are several procedural safeguards built into this provision. These safeguards assist in ensuring that any potential limitations on the right to privacy arising from this termination are proportionate to the purpose of the measure.

This termination provision requires that when a tenant is issued with a NTV, the NTV must include the lessor's reasons as to why they consider the tenant is no longer eligible for the supported accommodation. In circumstances where a tenant disagrees with the reasons given, the tenant may make a tenancy dispute application to ACAT. This tenancy termination provision also requires the lessor to provide 26 weeks' notice to the tenant, providing the tenant with an extended period of time to prepare for a move and to source alternative accommodation.

***Right to Privacy - Termination on the grounds a party to the agreement has threatened harassed, intimidated, or abused the other party to the agreement***

*Nature of the right and the limitation (ss 28 (2) (a) and (c))*

The Bill introduces a new tenancy termination provision which provides for the termination of a tenancy where one party to the agreement threatens, harasses, intimidates or abuses the other party to the agreement. This termination provision will be available to both lessors and tenants, however, for tenants the provision will engage and may limit a tenant's right to privacy by creating a new ground on which a tenancy may be terminated. Although available to both parties, it will more directly impact on a tenant's right to privacy than a lessor's as the consequence of tenancy termination for a tenant is an interference with their home, whereas for a lessor the impact may be a financial impact associated with re-letting the property.

*Legitimate purpose (s 28 (2) (b))*

The purpose of this termination provision is to support an individual's ability to live free from intimidation, harassment or abuse. The provision provides both parties timely recourse - the ability to end the tenancy in a relatively short timeframe – in

circumstances where they are subjected to inappropriate behaviour by the other party.

*Rational connection between the limitation and the purpose (s 28 (2) (d))*

There is a rational connection between allowing a tenancy to be terminated when a party has engaged in inappropriate conduct and ensuring a person can live free from intimidation, harassment or abuse as ending the tenancy severs the contractual relationship between the parties, allowing them to part ways.

*Proportionality (s 28 (2) (e))*

The provision builds in several safeguards to ensure any limitation on the right to privacy is proportionate to the goal of ensuring a party can live free from threats, intimidation, harassment or abuse. The provision requires the aggrieved party to apply to ACAT for an order to end the tenancy. However, the provision expressly grants ACAT a discretion as to whether to end the tenancy, providing that it may only end the tenancy in these circumstances where it is appropriate to do so. Further, the provision gives ACAT significant guidance as to factors it must consider when determining if tenancy termination is appropriate in the circumstances. These factors include:

- the nature, frequency and duration of the conduct;
- whether the conduct was engaged in by the tenant, someone else living at the premises, or another person who does not ordinarily live at the premises;
- the circumstances of the conduct, including any behaviour of the other party to the agreement or related person
- whether conduct is likely to continue;
- whether the tenant has, or is likely to, remedy the conduct;
- any family violence order or protection order made against the tenant by the Magistrates Court; (or a similar order made in a different jurisdiction)
- the effect of the conduct on the other party;
- whether any other order under the RTA is reasonably available (such as an order for specific performance under section 83); and
- any other matter the ACAT considers relevant.

These factors guide ACAT through a range of circumstances that may be impacting on both parties and requires ACAT to weigh the seriousness of the conduct that has occurred, and the impacts that behaviour has had, against the seriousness of ordering a tenancy termination.

Further, in the event ACAT does consider it appropriate to end the tenancy, where the order will result in the eviction of the tenant, ACAT also has the discretion to suspend the termination order for up to 3 weeks where the impact of not suspending the order would create greater hardship for the tenant than the lessor.

These safeguards help to ensure that tenancy termination in these circumstances can only occur when the nature of the conduct that has occurred warrants such an outcome, thereby limiting any potential impacts on the right to privacy.

***Right to privacy – requests for information from the tenant to assess ongoing eligibility***

*Nature of the right and the limitation (ss 28 (2) (a) and (c))*

The right to privacy incorporates the right to keep one's personal information private. However, as noted above, the Bill introduces termination provisions that operate when the tenant has been assessed as being ineligible for assistance. Implicit in these provisions is that prior to the issue of a NTV, a review of the tenant's eligibility for ongoing assistance will have occurred. This review process will require the tenant to disclose personal information (for example, information about their household income) to establish their ongoing eligibility for assistance.

For tenants of the Housing Commissioner, the HAA specifically grants the Housing Commissioner the power to require the tenant to provide information required to review the housing assistance being provided to them. For tenants in supported accommodation, the Bill builds in, as a term of the tenancy agreement, a provision that allows the supported accommodation provider to request information they reasonably believe is relevant to assessing the tenant's ability to live in the premises. This requirement to provide personal information to allow an eligibility assessment to occur will engage and may limit the right to privacy.

*Legitimate purpose (s 28 (2) (b))*

The purpose of requesting personal information is to assess the tenant's eligibility for ongoing accommodation assistance. As noted above, the purpose of assessing eligibility is to ensure that housing assistance and supported accommodation programs can be effectively targeted to those most in need.

*Rational connection between the limitation and the purpose (s 28 (2) (d))*

Requesting personal information is rationally connected to the purpose of assessing eligibility for assistance as the only way to establish if a person meets the eligibility criteria for supported accommodation or housing assistance is to assess their individual circumstances.

*Proportionality (s 28 (2) (e))*

Any personal information collected by the Housing Commissioner or by Community Housing Organisations providing Government services under contract is subject to the Territory Privacy Principles (TPPs) as set out in the *Information Privacy Act 2014*. The TPPs set out standards, rights and obligations for the collection, use, disclosure, storage, accessing and correction of personal information (including

sensitive information). These principles ensure there are appropriate safeguards for any personal information collected in connection with an eligibility assessment. This safeguard ensures that any limitation on the right to privacy that may arise in connection to an eligibility review is proportionate to the aim of the measure.

### ***Right to Privacy and home – mandatory disclosure requirements***

The Bill introduces new mandatory disclosure requirements for lessors. These requirements impose pre-contractual obligations on lessors, requiring them to disclose whether their premises comply with minimum housing standards and provide documentary evidence of their compliance or valid exemption to tenants.

However, it is noted that the mandatory disclosure requirement is limited to disclosing information as to whether the premises complies with a minimum standard. This information is also not personal in nature - it relates to the rental premises and not to the lessor themselves and as such is unlikely to impose any limitation on the right to privacy.

### ***Right to privacy and home – access to premises***

The Bill expands lessors' rights to access rental premises by allowing them access to the premises for the purpose of complying with minimum housing standards.

#### *Nature of the right and the limitation (ss 28(2)(a) and (c))*

The expansion of the lessor's right of access will engage and may limit the right to privacy for tenants by creating additional circumstances in which the lessor can attend the premises, potentially impacting on the tenant's quiet enjoyment of the premises.

#### *Legitimate purpose (s 28(2)(b))*

The purpose of providing additional access rights for the lessor is to ensure that the lessor is able to comply with their obligations to ensure the rental premises meets any applicable minimum housing standards that are in force. Minimum housing standards are an important equity measure to ensure all tenants in the ACT are entitled to a minimum standard of safety, security and comfort in their homes, regardless of what rental property they are in.

#### *Rational connection between the limitation and the purpose (s 28 (2) (d))*

The limitation on the right to privacy through additional access rights is rationally connected to the purpose of ensuring compliance with minimum standards as it allows the lessor to attend the property to assess if the property meets minimum housing standards and, if necessary, to undertake or inspect any work required to ensure the property meets the standard.

### Proportionality (s 28 (2) (e))

Although lessors will have an expanded right to access rental premises for the purposes of ensuring compliance with the minimum housing standard, there are safeguards in place for tenants to ensure any impacts on their quiet enjoyment of the premises are reasonable. As is currently the case when the lessor seeks to exercise their right of access to undertake repairs, to obtain access for the purpose of complying with minimum housing standards, the lessor must provide the tenant with 1 week notice (or another agreed period) and may only enter the premises at a reasonable time, having regard to the interests of the tenant and the lessor.

These safeguards ensure that the lessor's right of access is narrowly circumscribed to the purpose of complying with minimum standards. They also ensure a tenant will have notice before access occurs and that they can arrange a mutually agreeable time for access to the property. There are no less restrictive means available for the lessor to ensure the premises complies with minimum housing standards. Together the safeguards ensure any limitation on the right to privacy is reasonable and justifiable.

### **Right to equality before the law**

#### ***Right to equality before the law – termination provisions specific to tenants in public housing or supported accommodation programs***

As noted above, the Bill will introduce new tenancy termination provisions which will allow the Housing Commissioner or supported accommodation providers to terminate tenancies in accordance with Housing Assistance legislation or where the tenant fails to meet the eligibility criteria for the supported accommodation. These tenancy termination provisions will not apply to all tenancies - only to social housing or supported accommodation tenancies. Tenants of social housing or supported accommodation programs represent a category of persons in our community who are likely to be vulnerable and have protected attributes (such as experiencing socio-economic disadvantage) for the purposes of human rights law.

### Nature of the right and the limitation (ss 28 (2) (a) and (c))

Section 8 of the HRA provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. Discrimination under the HRA encompasses a distinction based on particular grounds (e.g. race, colour or sex) which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination') of adversely affecting human rights. Not all differential treatment will amount to discrimination. To be discrimination, the differential treatment must be linked to a prohibited ground of discrimination.

Tenants of social housing or accommodation assistance programs are often vulnerable members of our community that experience intersecting instances of disadvantage. Termination provisions that provide additional grounds for termination

to the Housing Commissioner and supported accommodation providers will apply only to this category of tenants. Due to this level of hardship and vulnerability, legislation which applies only to tenants of social housing or supported accommodation programs will engage and may limit the right to equality before the law.

*Legitimate purpose (s 28 (2) (b))*

As noted above in the right to privacy section, the purpose of introducing the new termination provisions for the Housing Commissioner and supported accommodation providers is to support the operation of housing assistance programs, with the ultimate goal being to ensure that the housing assistance Program and supported accommodation programs are targeted to those who are eligible for assistance.

*Rational connection between the limitation and the purpose (s 28 (2) (d))*

The measures are rationally connected to the objective of supporting housing assistance programs, as the new tenancy termination provisions allow the Housing Commissioner or supported accommodation provider to recover possession of the premises from a tenant who is no longer eligible for assistance or where the tenancy is no longer operating in a way that supports the overarching goals of the housing assistance program. This then allows the Housing Commissioner or supported accommodation provider to make the premises available to someone who is eligible for assistance.

*Proportionality (s 28 (2) (e))*

The new tenancy termination provisions for the Housing Commissioner and supported accommodation programs have procedural safeguards to ensure that where the right to equality before the law may be engaged and limited, the limitation is proportionate and aligned with the legitimate purpose of supporting the housing assistance program to address inequality of access to housing and enable access to housing for those most in need.

These human rights safeguards for each provision have been outlined in detail in the right to privacy section above. Further, it is considered that there are no less restrictive means available to ensuring the housing assistance program can continue to operate effectively without incorporating these termination provisions. This is because the Housing Commissioner and supported accommodation providers must be able to terminate a tenancy where required to support the housing assistance program objective of providing access to housing for those most in need and ensure it operates in a way that enables the Housing Commissioner to assist as many disadvantaged persons as possible.

### ***Right to equality before the law – length of notice periods***

The Bill will introduce some notice periods for the new tenancy termination provisions which are shorter than the 26-week period a lessor is required to provide to a tenant under the without cause termination provision. Specifically, the Bill will reduce the notice periods for the following tenancy termination provisions with less than 26 weeks' notice:

- Termination when the lessor is required to return the premises to the Housing Commissioner when the Housing Commissioner withdraws assistance from the lessor. (Notice period varies from 8 to 26 weeks' notice); and
- Termination of the original tenancy following a transfer or where the tenant has two tenancies simultaneously (1 weeks' notice).

From a human rights perspective this may be considered a potential limitation on the right to equality as it will result in a disadvantage to tenants.

The notice periods for these tenancy termination provisions have been shortened in accordance with the nature of the respective tenancy termination provisions and are discussed in more detail below.

#### *Termination when the lessor is required to return the premises to the Housing Commissioner when the Housing Commissioner withdraws assistance from the lessor*

Under this termination provision, the lessor is required to provide the tenant with 8 weeks' notice if the Housing Commissioner wishes to sell the property, 12 weeks' notice if the Housing Commissioner wishes to reconstruct, renovate or make major repairs to the premises and, in all other circumstances, 26 weeks' notice must be provided. This means the notice period is only shorter than the 26-week without cause provision where the property is to be sold or renovated. Here, the notice periods align with the notice periods for all other lessors in circumstances where the property is to be sold or renovated.

The purpose of this variable notice period is to enable the Housing Commissioner to recover the premises in the same timeframe as they would be able to if they were managing the property directly and to ensure that they have the same ability to recover the premises in the event of sale or renovation as any other landlord. The safeguard associated with this change is that where the Housing Commissioner requires the lessor to return the use of the premises in any other circumstance, the notice period will be 26 weeks.

*Termination of the original tenancy following a transfer or where the tenant has two tenancies simultaneously*

Under this termination provision the lessor is required to provide the tenant with 1 weeks' notice of the tenancy termination only. This notice period needs to be viewed in the context in which the availability to terminate the tenancy can arise, that is, where the tenant holds two tenancies simultaneously (most likely due to the tenant having transferred from one premises to another).

In most circumstances where a NTV period is provided, the purpose of a more extensive notice period is to allow time for the tenant to prepare for the move and, if necessary, to source alternative accommodation. However, in the circumstance of this termination provision, the NTV cannot be issued until the tenant has commenced occupation of an alternative premises. In this way, the impacts on the tenant of the shorter notice period are limited as they will have already assumed occupation of an alternative premises. Further, in circumstances where it is likely a tenant will need a longer period in which to move between premises, the provision allows a longer notice period to be given.

The short notice period is also considered justified on the basis that the Housing Commissioner has significant wait lists for social housing and needs to recover vacant properties in a timely manner to make them available to others in need. To provide a tenant with a longer notice period when they are already occupying a second premises would be unreasonable and deny other disadvantaged persons in need of housing access to a tenancy. Thus, it is considered reasonable and proportionate to reduce the notice period for the purpose of achieving the legitimate aim of supporting the housing assistance program to effectively operate housing assistance services.

**Right to be presumed innocent until proven guilty**

This Bill introduces new strict liability offences which will support the effective operation of the minimum housing standards and protect renters from solicited rent bidding. Specifically, the Bill will introduce the following strict liability offences:

- failure to disclose if a rental property meets the minimum housing standard when advertised for rent - Section 11AB (1);
- publishing an advertisement for a rental property that makes a false or misleading statement about its compliance with a minimum housing standard – Section 11AB (3);
- failure to advertise a rental rate for a premises – section 11AC (1); and
- for a lessor or their agent to solicit a rent bid from a tenant – Section 11AD (1).

These new strict liability offences are designed to deter non-compliance with the minimum housing standards and strengthen consumer protections for renters by

ensuring renters are not asked to engage in rent bidding. These offences address consumer risks for tenants arising out of the power and information asymmetry that favours lessors and their agents in the ACT rental market.

*Nature of the right and the limitation (ss 28 (2) (a) and (c))*

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The Bill introduces new strict liability offences to support the effective operation of the new minimum housing standards and to prevent lessors from advertising a property without a fixed rental rate and to prevent lessors or their agents from soliciting rent bids from tenants. Strict liability offences engage and may limit the right to be presumed innocent until proven guilty as they impose guilt without the need to prove the person's fault.

*Legitimate purpose (s 28 (2) (b))*

The intention of the strict liability offences introduced by this Bill is to deter non-compliance with minimum housing standards and strengthen consumer protection outcomes for tenants by deterring non-compliance with the prohibition on soliciting rent bids. These offences are regulatory in nature and making the offences strict liability offences aids in their enforcement.

The purpose of the strict liability offences to be introduced for non-disclosure and false or misleading disclosure of compliance with the minimum housing standards is to ensure that tenants are provided with correct and transparent information about properties they are seeking to rent.

Information asymmetry between tenants and lessors or agents when entering into a lease for a rental property can disadvantage tenants, who must rely on the information provided to them by lessors or agents when deciding to rent a property. Knowing whether a property complies with minimum standards may be an important factor for a tenant to take into account when deciding whether to apply to rent a particular rental property. To address this power and information imbalance, disclosure of compliance with the minimum housing standards by lessors and agents has been mandated. To encourage compliance with this requirement non-compliance by lessors or their agents has been penalised.

The purpose of introducing a strict liability offence for lessors or agents advertising a property without a fixed rental rate or for soliciting a rent bid is to protect tenants from this practice, which undermines transparency in the market and may disadvantage low-income tenants. Housing is a fundamental human need, and it is important to implement measures that facilitate transparency in the market and mitigate undue upward pressure on rents to ensure low-income tenants are not unfairly priced out of the rental market.

The purpose of the specific penalties attributable to these offences is to provide an appropriate disincentive to individuals from undertaking the actions subject to the offence provisions.

*Rational connection between the limitation and the purpose (s 28 (2) (d))*

Making non-compliance with these legislative requirements a strict liability criminal offence demonstrates the seriousness of the conduct and is an effective means of deterring non-compliance. It is intended that this will provide enhanced consumer protection outcomes for tenants by facilitating transparency in the rental market and preventing predatory practices.

The limitation on the right to the presumption of innocence imposed by the strict liability offences is rationally connected to the legitimate purpose as it provides a measure to enhance consumer protection outcomes for the community by ensuring lessors and their agents must disclose if they comply with the minimum housing standards and preventing solicited rent bidding.

*Proportionality (s 28 (2) (e))*

The strict liability offences are necessary to deter lessors and agents from soliciting rent bidding and from providing false or misleading information about their compliance with the minimum housing standards or failing to disclose their compliance altogether. It is appropriate for these provisions to be strict liability offences as the RTA places obligations on lessors and agents with respect to renting properties to tenants, and although it does not provide a licensing scheme, it does regulate their behaviour when renting to tenants. Strict liability offences are not uncommon in a regulatory framework as strict liability aids in enforcement. Indeed, the RTA already contains a number of strict liability offences of a similar nature. However, to ensure lessors and agents are aware of the new offences targeted communications will be prepared to notify them of the new offences.

The strict liability offences introduced or amended by this Bill are framed with clear criteria as to whether the offence has occurred. This means individuals can reasonably be aware they have an obligation under the law, and it will be clear what conduct constitutes an offence.

In addition, the strict liability offences for failing to disclose or for providing false or misleading disclosure about compliance with the minimum housing standards have been framed to provide safeguards for individuals. Specifically, the minimum housing standards advertising offence provisions do not apply if the individual has a reasonable excuse. Further, the offence provision for providing false or misleading disclosure provides an additional safeguard for individuals, in that the provision does not apply if the disclosure statement is not false or misleading in a material particular. These safeguards minimise the limitation on human rights and ensure the offence provisions are proportionate and carefully targeted.

The penalty amount for these offences have been designed to ensure they are proportionate to the seriousness of the conduct and align with the ACT Government Guide for Framing Offences.

The strict liability offences for failing to disclose or providing false or misleading disclosure about compliance with the minimum housing standards and the offence of advertising a property without a rental rate are subject to a maximum penalty unit of 5 penalty units. It is also consistent with the framing of existing offence provisions in the RTA that penalise a failure to disclose required information to tenants, such as section 11AA that has a maximum penalty of 5 penalty units for failing to disclose that the residential tenancy agreement has a term endorsed by ACAT but inconsistent with the Standard Residential Tenancy Terms. As a result, these offence provisions are considered proportionate to meet the legitimate purpose of providing a necessary deterrent to non-compliance.

The strict liability offence for lessors or their agents to solicit a rent bid from tenants or for a lessor to direct their agent to solicit a rent bid from a tenant, has a maximum penalty of 20 penalty units. Solicited rent bidding is a practice that produces inequitable outcomes for renters, undermines transparency in the market and is a result of a power imbalance between lessors and tenants that favours lessors. As the practice of rent bidding allows lessors to receive a significant financial benefit, the penalty must act as an effective deterrent. The framing of the penalty unit is also consistent with the framing of other offences in the RTA which penalise conduct similar in severity, such as failure by the lessor to lodge the bond, which may also result in financial enrichment for the lessor at the expense of the tenant. This framing is considered proportionate to meet the legitimate purpose of deterring soliciting rent bidding by lessors and their agents.

## CLAUSE NOTES

### Part 1 Preliminary

#### Clause 1 Name of Act

This clause provides that the name of the Act is the *Residential Tenancies Legislation Amendment Act 2022*.

#### Clause 2 Commencement

This clause sets out the scheme of commencement for the provisions of the Act. It provides that the Act (other than the specified sections, listed below) commence on the day after the notification day.

The following sections commence 12 months after the Act's notification day:

- section 4;
- section 8;
- sections 12 to 15;
- sections 18 to 23;
- sections 26 to 32;
- sections 40 to 42;
- sections 44;
- sections 46 to 48;
- sections 50 to 53;
- schedule 1.

The clause also contains two notes which explain:

For Note 1 - That the naming and commencement provisions automatically commence on the notification day. This note also refers the reader to the *Legislation Act 2001 (ACT)*, s 75 (1) for more detail about automatic commencement.

For Note 2 - That a single day or time may be fixed, or different days or times may be fixed, for the commencement of different provisions. This note also refers the reader to the *Legislation Act 2001 (ACT)*, s 77 (1) for more detail about the commencement of different provisions.

#### Clause 3 Legislation amended

This clause provides that the Act amends the *Residential Tenancies Act 1997 (RTA)* and the *Residential Tenancies Regulation 1998* (the **Regulations**).

This clause also includes a note which explains that the Act also amends the *Housing Assistance Act 2007 (ACT)* (the **Housing Assistance Act**). It refers the reader to schedule 1 for further details.

## **Part 2      Residential Tenancies Act 1997**

### **Clause 4      Section 8**

Clause 4 substitutes section 8 to clarify when and how the standard residential tenancy terms (the **SRTTs**) are intended to operate. As the Bill introduces new tenancy terms that apply in some circumstances but not others, section 8 has been reworked to indicated when a tenancy agreement is taken to contain certain tenancy termination provisions.

Section 8 provides that a fixed term residential tenancy agreement is taken to contain the SRTTs, as in force on the day the lessor and tenant(s) enter the agreement. However, this section also clarifies that any amendments to the Act that effect the operation (rather than substantive content) of the SRTTs will apply to a fixed term agreement.

Section 8 further provides that where a periodic residential tenancy agreement has commenced at the expiry of a fixed term residential tenancy agreement, it is taken to contain the SRTTs that are in force at any given time. This means that if the standard terms are updated, the updated terms will automatically be incorporated into an existing periodic tenancy agreement.

This section also clarifies the operation of the clauses specific to particular residential tenancy agreements:

- where a tenant has entered into a residential tenancy agreement for a social housing property and the lessor is the Housing Commissioner, the agreement is taken to contain the social housing termination clauses;
- where the premises are a social housing dwelling, the lessor is the Housing Commissioner and the tenant is receiving temporary housing assistance, the agreement is taken to contain the temporary housing assistance termination clause;
- where a tenant has entered into a residential tenancy agreement for a social housing property, the lessor is the Housing Commissioner and the tenant is receiving temporary housing assistance, the agreement is taken to include the temporary housing assistance termination clause;
- where a lessor is a registered community housing provider that leases properties that are owned by either the Housing Commissioner, or another Territory entity, the agreement is taken to include the community housing provider termination clause;
- where the leased premises is supported accommodation, the residential tenancy agreement is taken to include the supported accommodation clauses.

A residential tenancy agreement may also include a posting termination clause if both the lessor and the tenant agree.

A fixed term residential tenancy agreement may also include a break lease fee clause where both the lessor and the tenant agree to the clause being included.

This section further clarifies that any residential tenancy agreement may include an additional term that is consistent with the SRTTs. Should either the lessor or the tenant wish to include any terms that are inconsistent with the SRTTs, these terms must be endorsed by the ACT Civil and Administrative Tribunal (**ACAT**) under section 10 of the Act.

Section 8 also defines the following terms for the purposes of this section:

- **break lease fee clause** – refers the reader to schedule 2, section 2.1;
- **community housing provider termination clause** – refers the reader to schedule 2, section 2.2;
- **posting termination clause** – refers the reader to schedule 2, section 2.3;
- **social housing termination clauses** – refers the reader to schedule 2, section 2.4;
- **supported accommodation clauses** – refers the reader to schedule 2, section 2.5;
- **temporary housing assistance termination clause** – see schedule 2, section 2.6

#### **Clause 5      New section 10A**

This clause inserts new section 10A which introduces a new definition of '**publish**' for the purposes of Part 2, Division 2.2.

It provides that **publish** means communicate or distribute information in a way or to an extent that makes it available to, or likely to come to the notice of, the public or a section of the public.

#### **Clause 6      Energy efficiency rating – advertising Section 11A (7)**

This is a consequential amendment to clause 5 above. It removes a definition of '**publish**' that was specific to section 11A. Clause 5 applies the definition to the whole division.

#### **Clause 7      New section 11AB**

New section 11AB makes it a strict liability offence for a lessor to publish an advertisement pertaining to the lease of a residential premises if that advertisement does not include a statement as to whether the premises complies with, or is otherwise exempt from complying with, any minimum housing standards that are in force at the time of publication.

It also provides that a lessor commits a strict liability offence if, in an advertisement for the lease of a residential premises, that advertisement includes a statement regarding compliance with minimum housing standards that is false or misleading. However, this does not apply if the statement is not false or misleading in a material particular.

The provision also contains the safeguard that the strict liability offences will not apply if the person has a reasonable excuse.

The maximum penalty for both offences is 5 penalty units.

This amendment is intended to ensure that lessors disclose to prospective tenants whether the rental premises complies with minimum housing standards so that tenants have information about the premises when deciding whether to apply to rent the premises.

#### **Clause 8      New sections 11AC and 11AD**

New section 11AC makes it a strict liability offence for a lessor or agent to publish an advertisement for the lease of a residential premises which does not state the rental rate payable for the premises.

New section 11AC introduces *rental rate* as a defined term for the purposes of this section. *Rental rate* is defined as a single amount and does not include a range of amount or a minimum or maximum amount.

The maximum penalty for this offence is 5 penalty units.

New section 11AD makes it a strict liability offence for a lessor to solicit or invite a tenant to offer to pay rent that exceeds the advertised price.

The maximum penalty for this offence is 20 penalty units.

The provision does not prevent a lessor from accepting a tenant's offer to pay rent that exceeds the advertised price.

These sections were introduced in response to community concerns about the impact of solicited rent bidding on the transparency, affordability and accessibility of accommodation in the Territory. Requiring a lessor to advertise a fixed rental rate is intended to strengthen the prohibition on solicited rent bidding, by removing avenues that implicitly encourage prospective tenants to offer varying amounts.

#### **Clause 9      Lessor's obligations New section 12 (3) (g)**

New subsection 12 (3) (g) requires a lessor to provide a prospective tenant with a written statement as to whether the premises complies with any minimum housing standards at the time the parties enter a residential tenancy agreement. If the residential premises does not comply with any minimum housing standards, the lessor is required to provide a written statement as to the reason and a proposed compliance date. If the residential premises is exempt from complying with any minimum housing standards, the lessor is required to provide a written statement disclosing the reason that the premises is exempt.

Similar to clause 7, the policy intent is to ensure that tenants are aware whether their prospective rental complies with minimum housing standards. By requiring a lessor to provide a written statement, new subsection 12 (3) (g) will also ensure there is a written record of the representations made to a tenant, which may be relied upon should any dispute pertaining to minimum housing standards arise.

**Clause 10 Section 12 (4), new definition of *proposed compliance date***

This clause inserts a new definition for the term '*proposed compliance date*'.

A ***proposed compliance date*** in relation to premises that do not comply with a minimum housing standard, means —

(a) if a regulation prescribes a period in which the premises must comply—the end of the period; or

(b) in any other case 1 month after the residential tenancy agreement for the premises is entered into.

**Clause 11 New division 2.5**

This clause inserts new division 2.5, consisting of new sections 19A – 19D.

Under current section 136 (2) (d) of the RTA, the Executive can make regulations to introduce minimum housing standards for residential tenancies.

New division 2.5 is intended to support the implementation of future minimum housing standards.

**Section 19A** reproduces the regulation-making power formerly in section 136 (2) (d) with a slight amendment to the wording in order to create a new definition for the RTA of ***minimum housing standards***.

A ***minimum housing standard*** is a minimum standard prescribed by regulation for a premises made available for occupation under a residential tenancy agreement in relation to physical accessibility, energy efficiency, safety and security, sanitation or amenity.

For the avoidance of doubt, the relocation of the regulation-making power is not intended to amend its scope or operation. Rather, this amendment was made so that sections relevant to the implementation of minimum housing standards are grouped tighter in a single division. This relocation supports readability and clarity.

New section 19A also provides that a regulation in relation to minimum housing standards may incorporate a law or instrument or a provision of a law or instrument that is in force at a particular time (or updated versions of that instrument).

This section also makes ***incorporate*** and ***law*** defined terms for the purposes of section 19A.

**Incorporate** includes apply or adopt.

**Law** means – (a) a law of the Territory; or (b) an Act or statutory instrument, or a provision of an Act or a statutory instrument, of the Commonwealth, a State or another Territory.

**Section 19B** creates an obligation for lessors to ensure that a premises available for occupation under a residential tenancy agreement complies with any minimum housing standard no later than the proposed compliance date (defined in new section 12 (4) (above). If, during a residential tenancy, a lessor becomes aware that a premises does not comply with any minimum housing standards, the section provides that the lessor has an obligation to rectify the non-compliance as soon as practicable.

**Section 19C** creates an obligation for lessors to keep certain records pertaining to minimum housing standards for any premises that is available for occupation under a residential tenancy agreement. The records that must be kept include evidence of compliance, and if an exemption from compliance applies – evidence supporting the exemption, and any other record prescribed by regulation.

## **Clause 12 Termination**

### **New section 36 (1) (b)**

Current section 36 provides that a tenancy agreement must not terminate or be terminated in situations other than those listed in the provision.

Current section 36 (1) (b) provides that a tenancy may terminate where a tenant notifies the lessor in the form approved under section 133 of the RTA and then vacates in accordance with that notice. However, as there are currently no approved forms under section 133, this provision may prevent a tenant from terminating a tenancy by notice.

The listed circumstances in section 36 also do not provide for tenancy termination in circumstances where the lessor issues the tenant with a notice to vacate and the tenant moves out in accordance with that notice.

To correct this situation, this clause substitutes subsection 36 (1) (b) so that it now provides that a lessor may terminate a tenancy if they serve a termination notice on the tenant in accordance with the SRTTs and the tenant vacates the premises in accordance with the notice.

This clause also inserts new subsection 36 (1) (ba) which provides that a residential tenancy agreement can be terminated if a tenant serves a termination notice on the lessor in accordance with the SRTTs, this notice is accepted by the lessor and the tenant vacates the premises in accordance with the notice.

It is noted that, under the current SRTTs at clause 84 (2) (b), if a lessor chooses *not* to accept a tenant's notice of intention to vacate then the lessor can apply to ACAT for confirmation of the tenancy, compensation or both.

### **Clause 13 Section 36 (1) (n)**

This clause removes the phrase 'fair clause for posted people' from subsection 36 (1) (n) from the RTA and substitutes it for the phrase 'posting termination clause'. This clause provides clearer language for the purpose of the termination provision.

### **Clause 14 Section 36 (2), definition of *fair clause for posted people***

This is a consequential amendment to clause 13. It substitutes the definition of ***fair clause for posted people*** and introduces a new definition for the term ***posting termination clause***.

A ***posting termination clause*** is defined in reference to schedule 2, section 2.3.

### **Clause 15 New section 45A**

This clause inserts new section 45A. New section 45A provides that if ACAT is satisfied that it is appropriate, it is empowered to make a Termination and Possession order (**TPO**) if a lessor engages in threatening, harassing, intimidating or abusing behaviour towards a tenant, or has permitted another person to behave in this way towards the tenant or a related person. This includes conduct that the tenant or a related person are likely to find threatening, harassing or intimidating.

This clause also introduces ***related person*** and ***lessor*** as defined terms for the purposes of new section 45A.

***Related person*** means – (a) a person who lives at the premises; or (b) a family member of the tenant.

***Lessor*** is defined to include an agent or representative of the lessor.

Currently, a tenant may apply to ACAT under section 45 for the immediate termination of a tenancy, if the lessor has caused or is likely to cause, serious danger to the premises or injury to the tenant or their family.

Further to the above, the SRTTs create obligations for both a tenant and lessor. Specifically, a lessor must not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant (clause 70).

While behaviour that is threatening, harassing, abusive or intimidating may fall within the scope of the above provisions, new section 45A is intended to ensure that terminations in such circumstances are accessible, expedient and not overly narrow in application (for example, not requiring a serious injury to have been suffered).

To ensure that this new protection for tenants is appropriately balanced, subsection 45A (3) provides that ACAT must consider a range of factors in deciding whether it is appropriate to make a TPO including: the nature, frequency and duration of the conduct; the circumstances of the conduct, including any behaviour of the tenant or a related person; whether the conduct is likely to continue; whether the lessor has stopped, or is likely to stop the conduct; any family violence order or protection order made against the lessor by the Magistrates court (or any order under a law of a State, another Territory or a foreign country that has the same effect, or substantially the same effect); the effect of the conduct on the tenant and any related person; whether any other order is reasonably available; and any other matters ACAT considers relevant.

To assist ACAT in determining whether any other order is reasonably available, this clause provides an example. The example refers the reader to the orders available under section 83, which relevantly include, an order restraining any action in breach of a residential tenancy agreement or occupancy agreement.

#### **Clause 16 New section 46AA**

This clause inserts new section 46AA.

New section 46AA confers powers on ACAT specific to disputes in relation to minimum housing standards. The provision allows ACAT, upon application by a tenant, to make an order terminating a residential tenancy agreement where a lessor has failed to meet their obligations under the new minimum housing standards provisions established under new section 19B. This provision allows a tenant to take a tenancy dispute to ACAT when the lessor does not comply with any applicable minimum housing standards.

#### **Clause 17 Termination of agreement for aged care or social housing needs Section 46A (5), definitions of *registered community housing provider* and *social housing dwelling***

This clause removes the definitions for '*registered community housing provider*' and '*social housing dwelling*'. These terms are already defined in the dictionary to the RTA and there is no intention to create a different meaning for the purposes of section 46A. This amendment was made for readability and clarity.

#### **Clause 18 No breach of standard residential tenancy terms New section 47 (1A) and (1B)**

Existing section 47 allows ACAT to terminate a tenancy where there has not been a breach of the SRTTs but where: a ground for termination exists; the appropriate notice has been served; and where the tenant has not vacated the property as required by the termination notice.

This clause inserts new section 47 (1A) and (1B) to address a situation specific to tenancies of the Housing Commissioner.

This Bill introduces new termination provisions which are specific to the Housing Commissioner (see Clause 42 which inserts new Schedule 2 – Additional terms for residential tenancy agreements, and new clauses 2.4 and 2.6 which are new terms specific to the Housing Commissioner). If a tenant did not vacate their tenancy in accordance with a NTV issued by the Housing Commissioner under new clauses 2.4 or 2.6, then the Housing Commissioner would need to bring an application under existing section 47 of the RTA for a TPO on the basis the tenant has not moved out in accordance with a NTV issued under a termination ground under the RTA.

For several of these termination provisions, including: termination if tenant no longer eligible for housing assistance; termination if tenant refuses transfer to alternate premises; and, temporary housing assistance termination clause, the grounds for termination or the tenancy termination ‘trigger’ is an administrative law decision by the Housing Commissioner made under an approved housing assistance program.

It is noted that when ACAT is hearing matters within its residential tenancies’ jurisdiction, ACAT does not have jurisdiction to undertake collateral merits review of administrative law decisions made the Housing Commissioner. New subsection 47 (1A) is intended to clarify this.

Specifically, new section 47(1A) clarifies that when an application is made to the ACAT in relation to a termination notice served in accordance with a relevant social housing termination clause, the ACAT must not review the Housing Commissioner’s reasons for their decision. The reason for this is that the ACAT is not permitted to conduct merits review of an administrative law decision when sitting in its residential tenancy jurisdiction.

However, it is also noted that section 40C (2) (b) of the HRA allows a person to bring a claim that a public authority has acted in contravention of its obligations under section 40B of the *Human Rights Act 2004* (HRA) when legal proceedings (unrelated to a human rights claim) are on foot. The Housing Commissioner is a public authority for the purposes of section 40B of the HRA.

In a residential tenancies context, this means a tenant of the Housing Commissioner can rely on section 40C (2) (b) to make a claim that the Housing Commissioner has acted in contravention of its obligations as a public authority when ACAT is hearing a TPO in its residential tenancies jurisdiction.

So as not to disrupt this existing statutory right, new subsection 47 (1B) clarifies that subsection (1A) does not limit the operation of the HRA, section 40C (2) (b) which enables a person to rely on their rights under the HRA in legal proceedings.

See *Commissioner for Social Housing v Cook (Residential Tenancies)* [2020] ACAT 36 at paragraphs 23 to 24 for an overview of the method ACAT has adopted to considering human rights issues in residential tenancy matters.

It is noted that ACAT will still be able to exercise its general discretion to consider the circumstances of each case when deciding whether to make a TPO.

#### **Clause 19 New section 51A**

This clause inserts new section 51A. New section 51A provides that if ACAT is satisfied that it is appropriate, it is empowered to make a TPO if a tenant engages in behaviour that is, or may be experienced as, threatening, harassing, intimidating or abusing behaviour towards a lessor, or permits another person to engage in such conduct.

Further discussion pertaining to the policy objectives of this provision can be found at clause 15, which introduces a similar provision that can be utilised by tenants.

Noting that new section 51A permits ACAT to make a TPO in circumstances where the tenant may not have previously received any notice that their tenancy may end (such as an NTV), new subsection 51A (3) empowers ACAT to suspend the operation of a TPO it has made under subsection 51A (2) (a) for up to three weeks if it is satisfied that the tenant would otherwise suffer significant hardship, that hardship would be greater than that suffered by the lessor, and it is appropriate to suspend the operation of the TPO.

As with new section 45A, to ensure that this new protection for lessors is appropriately balanced, subsection 51A (4) provides that ACAT must consider a range of factors in deciding whether it is appropriate to make a TPO including: the nature, frequency and duration of the conduct; whether the conduct was engaged in by the tenant, someone else living at the premises, or another person who does not ordinarily live at the premises; the circumstances of the conduct, including any behaviour of the lessor or related person; whether the conduct is likely to continue; whether the tenant has, or is likely to stop the conduct; any family violence order or protection order made against the tenant or another person living at the premises by the Magistrates court (or any order under a law of a State, another Territory or a foreign country that has the same effect, or substantially the same effect); the effect of the conduct on the lessor; whether any other order is reasonably available; and any other matters ACAT considers relevant.

To assist ACAT in determining whether any other order is reasonably available, this clause provides an example. The example refers the reader to the orders available under section 83, which relevantly include, an order restraining any action in breach of a residential tenancy agreement or occupancy agreement.

This clause also introduces ***related person*** as a defined term for the purposes of new section 51A.

**Related person** means – (a) an agent or representative of the lessor; (b) a family member of the lessor.

#### **Clause 20 Section 57**

This clause substitutes section 57, and by doing so, extends the circumstances in which a lessor’s application to ACAT for TPO may be recognised as retaliatory. It is noted that where ACAT finds a TPO application to be retaliatory, ACAT must decline to make the TPO.

Currently, if a tenant does not leave their rented premises in line with NTV, and the lessor applies to ACAT for a TPO, the tenant is able to present evidence that they had asserted their rights under the residential tenancy agreement (for example, the tenant had applied to ACAT) prior to the lessor issuing the NTV. ACAT is then open to find that the lessor issued the NTV in retaliation against the tenant asserting their rights under the agreement.

New subsection 57 (b) (i) (E) recognises that a tenant publishing information, allegations or opinions about their lessor or residential tenancy agreement may also be subject to retaliatory action from a lessor. For example, a tenant may share information about their experience as a tenant on social media.

To ensure that this new protection is appropriately balanced, subsection 57 (b) (i) (E) requires a tenant to not have knowingly or recklessly published or disclosed information that was false or misleading.

The term ‘**information**’ is defined so that it includes allegations, complaints and opinions and is not restricted to the publication or disclosure of fact.

The term ‘**publish**’ is defined so that it includes communicate.

The intention of this provision is to allow tenants to raise issues of concern about the operation of their tenancy (so long as they are not false or misleading) and to contribute to the public debate around tenancy issues, without having to fear that ‘going to the media’ about their concerns will lead to their eviction. See clause 22 for a case study example related to this amendment.

#### **Clause 21 Sections 58 to 60**

This clause substitutes section 58 – 60. Existing sections 58-60 set out the circumstances in which a lessor’s NTV or a tenant’s notice of intention to vacate are defective by providing that a NTV will be defective if it is not in the approved form under section 133 of the RTA. As there are currently no approved forms for NTVs under section 133 of the RTA these sections have been updated to reflect when a NTV will be considered to be defective.

It is noted that the amendments in clause 21 are connected to those in clause 44 which amends the Dictionary of the RTA to insert a new definition for **defective termination notice**.

A **defective termination notice** will now be defined as a notice that –

- (a) if there is a form approved under section 133 (Approved forms – Minister) for a termination notice – is not in the approved form; or
- (b) if there is no form approved under section 133 (Approved forms – Minister) does not contain the information required by the standard residential tenancy terms; or
- (c) is not given in accordance with this Act.

It is noted that a reference to an Act includes a reference to the Regulation (see the Legislation Act, s 104). This means that the requirements for service of a termination notice set out in section 5 of the RTR are captured within the definition of a defective termination notice.

Substituted section 58 provides that where a lessor gives a defective termination notice to a tenant, and the tenant complies with that notice, the residential tenancy agreement is terminated on the day the tenant vacates the premises.

However, substituted section 58 clarifies that if a tenant vacates a premises in accordance with a notice, and it was defective for any reason (other than it was not given to the tenant in accordance with the Act), the former tenant may apply to ACAT for an order for compensation for wrongful eviction, or an order for reinstatement as tenant. ACAT must not make an order reinstating the applicant as a tenant unless the premises is vacant, the lessor has not entered into a residential tenancy agreement with another tenant, and it is appropriate to make the order.

Substituted section 59 applies where a lessor purports to give a termination notice to a tenant, and that notice is defective for any reason (other than it was not given to the tenant in accordance with the Act). It provides that a lessor may apply to ACAT for a TPO and an order correcting the defect. However, ACAT may only make such an order where it is satisfied that the defective termination notice has not, and is not likely to, place the tenant in a significantly worse position than they would have been had they received a notice that was not defective.

Substituted section 60 applies where a tenant purports to give a termination notice to a lessor, but that notice is defective. This section clarifies that if the tenant vacates in accordance with the defective notice, the residential tenancy agreement terminates on the day the tenant vacates. However, the lessor may apply to ACAT for an order for compensation for the former tenant's abandonment of the premises. The section also provides that if receiving a defective notice has not left the lessor in a significantly worse position, ACAT must not make a compensation order.

## **Clause 22 New 64AD**

This clause inserts new section 64AD, which confers a new power on ACAT to disallow retaliatory notices to vacate.

This clause together with the amendments at clause 20 are intended to extend and compliment the retaliatory eviction protections at existing section 57 of the RTA.

Under existing section 57, when a tenant wishes to argue that the termination of their tenancy is in retaliation against them asserting their rights under the tenancy agreement, they must wait for their lessor to commence ACAT proceedings for a TPO on the basis they have not vacated the property in accordance with the NTV. In this scenario, if ACAT finds the NTV was not retaliatory, a tenant may be granted very little time to vacate and secure alternative accommodation (at most they can be given 3 weeks' notice if ACAT suspends the TPO for the maximum time allowed under legislation).

As noted above, new section 64AD confers a new power on ACAT to disallow retaliatory notices to vacate at the time the notice is received, rather than having to wait until the TPO hearing. This allows a tenant to obtain certainty as to whether they can continue to live in the premises or will be required to vacate prior to the expiration of the notice period.

For example, if a tenant received a termination notice requiring them to vacate the property in twelve weeks, and the tenant believes that this is a retaliatory termination notice, the tenant would be able to apply to ACAT for an order disallowing the notice to vacate any time prior to the expiration of the notice period, rather than having to wait until the expiration of the notice period and for the lessor to apply for a termination and possession order. This scenario would allow a tenant very minimal time to vacate the property and secure alternative accommodation.

Further to the above, both clause 20 and clause 22 are intended to support the policy objectives of removing without cause evictions. By requiring a lessor to rely on prescribed, justifiable grounds for terminating a tenancy, a tenant has increased rental security, and in the circumstances envisioned by this provision, is empowered to engage in public debate and discussion about issues relevant to tenants without fear of eviction or conflict.

### *Example*

Frankie is a tenant. Frankie was approached by a journalist from a local news station and was asked to talk about their experience renting in the ACT. The journalist explained that the interview may be used for a segment about the increasing pressures faced by tenants in the ACT. Frankie explained to the journalist that they had recently received a rent increase notice from their landlord. Frankie talked about how this notice had impacted their family, disclosing their concern about their family's wellbeing and financial security. Frankie told the journalist that they believed

the rent increase notice was “totally unreasonable” given the size and condition of the property. The interview was aired during the evening news broadcast.

Shortly after the interview aired, Frankie received a termination notice on the grounds that the lessor wished to renovate the property. Frankie believed that their landlord was angry that they had spoken openly about their concern about the rent increase notice.

Frankie applied to ACAT for an order disallowing the termination notice under section 64AD. During the hearing, Frankie presented evidence that prior to the lessor issuing the NTV, they disclosed information that was published about the premises, the residential tenancy agreement and the lessor.

If ACAT was satisfied that the tenant had published information about their tenancy agreement (by speaking to the media about their rent increase) and the lessor was motivated by this circumstance in issuing the NTV, ACAT would be required to disallow the NTV, offering immediate rental security for Frankie and their family.

If ACAT was not satisfied that the lessor was motivated by Frankie’s conduct to issue the NTV, Frankie and their family would have the remainder of the 12 week notice period to secure alternative accommodation and vacate the property.

It is noted that if Frankie did not rely on new section 64AD to challenge the NTV on the basis it was retaliatory, Frankie could still wait until the TPO hearing to challenge the TPO as retaliatory under existing section 57. However, waiting until the TPO hearing could leave Frankie and their family with only a few days to find alternate accommodation if ACAT found the NTV was not retaliatory and allowed the termination of the tenancy.

### **Clause 23 Waiver of notice requirements Section 65 (2)**

Existing section 65 (2) refers to a tenant giving their lessor a notice in the approved form under section 133 of the RTA. This section has been updated to reflect that there are currently not approved forms under section 133 of the RTA.

It is noted that this amendment is connected to the amendments in clause 44 which inserts a new definition for **defective termination notice** into the Dictionary of the RTA and to the amendments at clause 21 which substitute the defective termination notice provisions at sections 58-60 of the RTA.

This clause substitutes existing subsection 65 (2) with new subsection 65 (2) and (3), which collectively, empower ACAT to make an order correcting a tenant’s defective termination notice if it was prompted by an increase in rent, and the tenant has vacated in accordance with that notice. Prior to making the order, ACAT must be satisfied that correcting the defective termination notice would not put the lessor in a

significantly worse position than they would have been if the tenant had originally issued a compliant termination notice.

#### **Clause 24 New section 71AA**

Clause 24 inserts new section 71AA into the RTA which empowers a tenant to apply to ACAT for a rent reduction due to their lessor's failure to comply with minimum housing standards.

While some tenants may wish to terminate the tenancy where a lessor has failed to comply with any minimum housing standards, it is likely that others, once the tenancy has commenced, will want to remain in the premises but be compensated in another way.

Currently, section 71 allows a tenant to apply to ACAT for a rent reduction. ACAT must order a rent reduction if it considers that the tenant's use of enjoyment of the premises has diminished significantly as a result of a range of scenarios listed in the RTA, including a failure to maintain the premises in a reasonable state of repair. However, it is unlikely that this provision will permit ACAT to order a rent reduction to tenants impacted by a lessor's failure to comply with minimum standards. For example, it is unlikely that a tenant residing in a premises that never complied with any minimum housing standards is able to satisfy ACAT that their 'use of enjoyment of the premises has diminished significantly.'

New section 71AA allows a tenant to apply to ACAT for a **rent reduction order**, which is an order requiring a reduction in the rent payable under a residential tenancy agreement, where a lessor has failed to comply with minimum housing standards under new section 19B.

This section indicates that a rent reduction order will take effect from the day the premises stopped complying with the minimum housing standard, or any later date stated by the ACAT. However, the section also provides the limitation that a rent reduction order cannot be in place for more than 12 months.

This section also allows ACAT to order the lessor to pay the tenant the difference between the rent that the tenant has paid and the rent that would have been payable as a result of the rent reduction order – that is, if the tenant has paid more in rent than the reduced rent amount, the amount overpaid is a debt that the lessor owes to the tenant. It also provides that if a lessor purports to increase the rent for the premises in order to work around the rent reduction order, the purported rent increase will be void (that is, of no effect) and any amount of rent paid by the tenant which is above the rent reduction order amount will also become a debt that the lessor owes to the tenant.

**Clause 25 Orders by ACAT**  
**New section 83 (1) (da)**

New subsection 83 (1) (da) confers a power on ACAT to make an order requiring a lessor to compensate a tenant for loss they have suffered because of the lessor's failure to comply with any minimum housing standards in accordance with section 19B. The intention of this amendment is to strengthen and extend the remedies available to a tenant, recognising the cost, inconvenience and stress a tenant is likely to experience if a lessor fails to comply with any minimum housing standards.

For example, if a tenant applies to ACAT to terminate a tenancy because of the lessor's failure to comply with any minimum housing standards, new section 83 (1) (da) allows the tenant to also seek compensation for other costs they have, or are likely to incur, for example, those associated with moving.

**Clause 26 Section 83 (1) (f) (ii)**

This clause is consequential to the introduction of a new definition of a **defective termination notice** at clause 44. It substitutes subsection 83 (1) (f) (ii), and by doing so, removes references to forms approved by the Minister under section 133 and replaces it with a reference to the new definition of defective termination notice.

**Clause 27 Section 83 (1) (k)**

This clause is a consequential amendment, and substitutes subsection 83 (1) (k) so that it refers to the newly defined term, 'defective termination notice' (clause 44).

**Clause 28 Section 83 (2)**

This clause is a consequential amendment and substitutes subsection 83 (2) so that it refers to the newly defined term, 'defective termination notice' (clause 44).

**Clause 29 Notice of intention to vacate – award of compensation**  
**Section 84 (1) (b)**

This clause is a consequential amendment, and substitutes subsection 84 (b) so that it omits the phrase 'break lease clause' and substitutes it with the defined term 'break lease fee clause' to align with the new definition of **break lease fee clause** introduced by clause 30.

**Clause 30 Section 84 (6), definition of *break lease clause***

This clause substitutes the term 'break lease clause' with **break lease fee clause**.

This clause also introduces **break lease fee clause** as a defined term for the purposes of section 84, referring the reader to schedule 2, section 2.1.

### **Clause 31 Section 85**

This clause substitutes section 85, and by doing so amends the definitions for the terms **protected person** and **respondent**.

For the purposes of division 6.5A, **protected person** means – (a) in relation to a protection order under the *Family Violence Act 2016*, refer to that Act, dictionary; or, (b) in relation to a protection order under the *Personal Violence Act 2016*, refer to that Act, dictionary.

For the purposes of division 6.5A, **respondent** means – (a) in relation to a protection order under the *Family Violence Act 2016*, refer to that Act, dictionary; or, (b) in relation to a protection order under the *Personal Violence Act 2016*, refer to that Act, dictionary.

### **Clause 32 New tenancy agreement – family violence and protection orders Section 85A (4), definition of exclusion condition**

This clause substitutes the definition of the term **exclusion condition**.

For the purposes of section 85A, **exclusion condition** means – (a) of a condition under the *Family Violence Act 2016*, refer to that Act, section 39 (4); and (b) of a condition under the *Personal Violence Act 2016*, refer to that Act, section 31 (4).

### **Clause 33 Regulation-making power Section 136 (2) (d)**

This is a consequential amendment to clause 11. As noted above, the minimum standards regulation-making power has been omitted from section 136 (2) (d) and reinserted at section 19A of the Act so that sections relevant to minimum housing standards can be grouped together in new division 2.5 of the RTA.

### **Clause 34 Section 136 (3) and (4)**

As above, this is a consequential amendment to clause 11. The regulation-making power has been omitted from section 136 and reinserted at section 19A of the RTA.

### **Clause 35 Schedule 1 New clause 62A**

This clause inserts a new heading and a new SRTT which indicates that the lessor must comply with any minimum housing standard that applies to the premises.

This clause also contains a note which explains that a regulation may prescribe minimum housing standards to physical accessibility, energy efficiency, safety and security, sanitation or amenity (as per new section 19A).

This amendment acknowledges that tenants are unlikely to refer to the RTA or the Regulations when entering a tenancy agreement and therefore, may not be aware of

the lessor's obligation to comply with any minimum housing standards that are in force at the time.

The intention of this section is to ensure that tenants are aware of a lessor's obligations to comply with any minimum housing standards by making it a term of their residential tenancy agreement. This equips tenants to assert their rights should the lessor fail to comply with their obligations.

**Clause 36 Schedule 1, heading before clause 82**

This clause is a consequential amendment to clause 37 below which broadens the scope of the lessor's right of access to include access for the purpose of complying with minimum standards. This clause inserts a new heading which reflects the amended scope of the lessor's right of access.

**Clause 37 Schedule 1, clause 82 (1)**

This clause extends the reasons a lessor is permitted to access a tenanted property.

Currently, clause 75 of the SRTTs prevents a lessor from requiring access to a premises during a tenancy except as provided by the law, the residential tenancy agreement or an order of ACAT.

While clause 82 of the SRTTs allows a lessor to require access to the premises for the purpose of making or inspecting repairs, under the current legislative framework, it is unlikely that compliance with minimum housing standards would fall within the scope of a repair to the property.

Given this, and with the intention of supporting the introduction of any minimum housing standards, new clause 82 (1) seeks to clarify that a lessor can require access to a tenanted premises for the purpose of:

- 1) inspecting the premises to ensure it complies with any minimum housing standards;
- 2) completing work to ensure the property complies with any minimum housing standards; and
- 3) undertaking work, or inspecting work undertaken, to ensure the premises comply with any minimum housing standards.

**Clause 38 Schedule 1, clause 83 (1)**

This clause omits the word 'the' in clause 83 (1) of the SRTTs and substitutes it with 'a'. This is a minor change to improve phrasing in the SRTTs.

**Clause 39 Schedule 1, clause 85**

This clause omits the phrase 'the notice to vacate' from clause 85 of the SRTTs and substitutes it with the phrase 'a notice to vacate'. This is a minor change to improve phrasing in the SRTTs.

## **Clause 40 Schedule 1, clauses 94 and 95**

Under the current legislative framework, the SRTTs permit a lessor to terminate a tenancy by issuing a without cause NTV with 26 weeks' notice. If it is a fixed term agreement, the tenancy end date specified in the notice must be after the end of the fixed term.

This clause removes a lessor's ability to terminate a tenancy without grounds. The intended consequence of this provision is that a lessor will be required to provide the tenant with a reason for the tenancy termination by relying upon the prescribed grounds to terminate a tenancy under the RTA.

The removal of a lessor's ability to terminate a tenancy without grounds is intended to give tenants confidence and assurance that their tenancy can only come to an end for a legitimate reason, rather than at the unfettered discretion of a lessor. With this significant improvement in a tenant's rental security, a tenant can assert their rights, such as requesting repairs and maintenance, under a residential tenancy agreement, without fear that this may lead to their eviction.

## **Clause 41 Schedule 1, clause 96 and heading**

This clause substitutes both the heading and substance of clause 96 of the SRTTs, and by doing so, creates a new ground for the termination of a periodic residential tenancy agreement.

Under new clause 96 (1) (f), a lessor may terminate a periodic tenancy if the lessor genuinely requires the premises for a lawful use other than as a home but must provide a tenant 26 weeks' notice. This notice period is intended to match the notice period that a lessor would currently need to provide to a tenant if they were relying on the without cause termination provision.

The notice periods for the existing section 96 termination provisions have not been changed.

As discussed above, the removal of a lessor's ability to terminate a tenancy without grounds is intended to give tenants confidence and assurance that their tenancy can only come to an end for a legitimate reason, rather than at the unfettered discretion of a lessor. This new termination provision recognises that there is an additional circumstance where a property owner may wish to end a tenancy that is not currently recognised as a standalone tenancy termination provision – that is where the lessor genuinely intends the premises for a lawful use other than as a home. For example, the lessor may wish to convert the premises to a business use.

It is noted that this provision specifies that the lessor's proposed conversion of use for the premises must be a *lawful* use. This would mean, for example, that a lessor would not be able to propose to convert the use of a premises to a commercial purpose where such a purpose was prevented by the zoning requirements for the

property or if the proposed use of the property was prevented by any other legal requirements.

This clause also removes clause 96 (1A) of the SRTTs, which currently requires a lessor to give a tenant a statutory declaration about their intention to reside in the premises, an immediate family member's, or an interested person's, intention to reside in the premises, if they intend to rely on those grounds to terminate the residential tenancy agreement (as per clause 96 (1) (a) – (c)).

Existing clause 96 (1A) is replaced with new subclause 96 (2) which extends the requirement for the lessor to provide evidence to support their reliance on the nominated tenancy termination ground, such as a statutory declaration, a development application or quotes from a tradesperson for renovations. This is intended to ensure that these prescribed grounds for termination under the RTA are not misused by requiring the lessor to provide evidence to the tenant that their reliance on the nominated ground is genuine.

Substituted clause 96 retains the existing definitions for *immediate relative* and *interested person* contained in existing clause 96 but now inserts those definitions in subclause (3) of the provision.

The reinserted definition of *immediate relative* is: a son, daughter, son-in-law, daughter-in-law, mother, father, mother-in-law, father-in-law, brother, sister, brother-in-law or sister-in-law.

The reinserted definition of *interested person*, for a lessor, means a person who is not an immediate relative of the lessor but who has a close family or personal relationship with the lessor and who has a reasonable expectation arising from that relationship that the lessor would provide accommodation for that person.

## **Clause 42 New schedule 2**

This clause inserts new schedule 2. Schedule 2 creates the new additional tenancy terms for residential tenancy agreements which will be incorporated into ACT tenancy agreements in the manner set out in amended section 8 of the RTA (see clause 4 of this Bill). Section 8 sets out the way in which particular tenancy terms can be included in a residential tenancy agreement. Some tenancy terms may be incorporated automatically whilst others will be incorporated by agreement between the tenant and the lessor. Schedule 2 contains the definition tenancy terms referred to in amended section 8 of the RTA.

The new terms inserted in schedule 2 will still be considered 'standard residential tenancy terms' (referred to throughout this Explanatory Statement as SRTTs) – see the new definition of *standard residential tenancy terms* substituted in the RTA Dictionary by clause 54 of this Bill.

### **Schedule 2, 2.1 Break lease fee clause**

This provision relocates the existing break lease tenancy term from the definition of the term formerly found in section 8.

This tenancy term provides a standard break lease fee clause which can be included in a residential tenancy agreement by agreement between a tenant and a lessor.

The substance of this provision remains unchanged by its relocation, however this amendment renames the provision from 'break lease clause' to '*break lease fee clause*'. This clarifies the intent of the clause which is to provide a framework for determining what fee is payable by a tenant to a lessor when they end a fixed term agreement before the end of the fixed term and are not relying on any of the permitted grounds for terminating a residential tenancy agreement.

### **Schedule 2, 2.2 Community housing provider termination clause**

Clause 2.2 inserts a new community housing provider termination clause to enable the termination of a tenancy by a community housing provider if the premises is required by the Housing Commissioner or another Territory entity (the **housing owner**) and the housing owner requires the community housing provider to return the premises to them.

The [Housing Assistance Asset Program 2008 \(No 1\)](#) ('**the Asset Program**') is a housing assistance program operated by the Housing Commissioner. The object of the Asset Program is to make available public housing assets to eligible organisations for the provision of services within the social housing and human services system. In other words, the Asset Program allows the Housing Commissioner to make publicly owned properties available to community housing organisations so that they can, in turn, provide accommodation support programs to vulnerable community members. However, the Asset Program also allows the Housing Commissioner to withdraw assistance from the organisation in a range of circumstances including where the property is no longer being used for the intended purpose, where the Housing Commissioner requires the property for another purpose or where the organisation is in breach of its obligations to the Housing Commissioner.

In circumstances where the community housing organisation has a tenancy agreement in place with a tenant, the purpose of this termination provision is to allow the community housing organisation to end the tenancy with the tenant so that they can return possession of the property back to the Housing Commissioner.

This termination provision has been crafted so that the tenant will receive the same notice periods as other tenants would in the event the property is to be sold or renovated (8 and 12 weeks respectively), or, in any other case where the Housing Commissioner requires the return of the property, a 26 week notice period.

The 26 week notice period is intended to align with the 26 week no cause termination provision which is being removed by this Bill.

See the human rights section above for more discussion of this termination provision.

### ***Schedule 2, 2.3 Posting termination clause***

Clause 2.3 replicates and renames the 'fair clause for posted people' which is currently found in section 8 of the RTA. This relocated provision has been renamed the 'Posting termination clause'.

The substance of this provision remains unchanged by its relocation to Schedule 2, other than its change of name and the replacement of references to 'Canberra' with a reference to the 'ACT'. The purpose of replacing the word 'Canberra' with the word 'ACT' is to more accurately describe where a person must be posted from or to for the posting termination clause to apply.

### ***Schedule 2 2.4 Social housing termination clauses***

Clause 2.4 inserts several new social housing termination clauses. Social housing tenancies are managed to provide support to vulnerable members of our community. To ensure these tenancies can continue to be available to those who are most in need, there may be circumstances when the tenancy agreement needs to be terminated by the Housing Commissioner.

The new termination clauses inserted at new clause 2.4 are:

- termination if tenant is no longer eligible for housing assistance,
- termination if tenant refuses transfer to alternate premises, and
- termination if tenant is party to 2 tenancies.

These are discussed further below and in the human rights section above.

#### ***Termination if tenant no longer eligible for housing assistance***

##### ***Background***

The objects of the HAA include facilitating the provision of housing assistance for those most in need and maximising the opportunities for everyone in the ACT to have access to housing that is affordable, secure and appropriate to their needs. To this end, section 19 of the HAA empowers the Minister to approve housing assistance programs, including the [\*Housing Assistance Public Rental Housing Assistance Program \(2013 \(No 1\)\*](#) ('**the Program**') which set out the kinds of assistance that can be provided, eligibility criteria for the assistance and how decisions of the Housing Commissioner can be reviewed.

The purpose of this new termination provisions is to support the operation of the Program and enable access to housing for the most disadvantaged in the

community. The termination provision supports the effective targeting of social housing by ensuring it can be made available to eligible individuals by withdrawing assistance from those who are no longer eligible.

Section 29B of the Program currently allows the Housing Commissioner to periodically review the housing assistance being provided to a tenant. This provision also allows the Housing Commissioner to take action to withdraw the assistance being provided and to terminate the tenancy (subject to the requirements of the RTA) upon finding that the household income of the tenant (and their domestic partner if applicable) is sufficient for them to access and sustain alternative tenure.

Currently the Housing Commissioner uses the 'without cause' termination provision to terminate at tenancy in this circumstance. This clause is intended to provide the Housing Commissioner with the ability to terminate a tenancy in circumstances where a review of the tenant's entitlement to housing assistance has led to a decision to withdraw housing assistance from them.

It is noted that the termination provision is drafted to refer to approved housing assistance programs generally, rather than the existing Program. This is to capture any future versions of the Program should the Housing Commissioner decide to amend the Program. This does mean that it would be open to the Housing Commissioner to decide to amend the existing Program to expand the circumstances in which the Housing Commissioner can review a tenant's eligibility for ongoing housing assistance. To ensure there are appropriate safeguards connected to changes to tenancy termination circumstances made through amendments to a housing assistance program, this Bill incorporates amendments to the HAA to increase the level of scrutiny on the creation of legislative instruments related to decisions of the Housing Commissioner that could lead to tenancy termination (see the HAA amendments at Schedule 1 of this Bill for further detail).

#### *Operation of the tenancy termination provision*

This provision allows the Housing Commissioner to terminate a tenancy by giving the tenant 26 weeks' notice to vacate the premises on the ground the Housing Commissioner has decided the tenant is no longer eligible to receive housing assistance under a housing assistance program. In circumstances where the Housing Commissioner's decision is a reviewable decision under the housing assistance program, the Housing Commissioner must wait until either the appeal period for the tenant seeking a review of decision has passed or, if the tenant seeks review of decision – until any review has been finalised, before the Housing Commissioner can issue the NTV.

The provision allows a tenant to end the tenancy at any time during the 2 weeks before the date stated in the notice where they give the Housing Commissioner 4 days' notice of their intention to vacate.

The tenancy will end 26 weeks after the notice was received by the tenant or, if a later date is stated in the notice – on the stated day, or if the tenant moves out in the final 2 weeks of the tenancy after giving the required 4 days' notice – on the day the tenant vacates the premises.

If the tenant does not move out in accordance with the NTV then the Housing Commissioner would need to follow the existing tenancy termination pathway at section 47 of the RTA and apply to ACAT for a TPO on the basis the tenant has not vacated the premises in accordance with a termination notice issued under the Act.

This Bill also amends existing section 47 of the RTA to clarify that when hearing a TPO application on this ground, ACAT may not undertake merits review of the administrative law decision by the Housing Commissioner to withdraw housing assistance from the tenant upon finding the tenant is no longer eligible for assistance. See clause 18, above, for more detail on this amendment. ACAT will still be able to exercise its general discretion to consider the circumstances of the case when deciding whether to grant a TPO.

### *Termination if tenant refuses transfer to alternate premises*

#### *Background*

The purpose of this new termination provisions is to support the operation of the Program by supporting the Housing Commissioner to require a transfer. This termination provision supports the effective targeting of social housing by ensuring the Housing Commissioner can allocate limited housing stock effectively and can also regain possession of a property where the Housing Commissioner wants to sell or renovate the property.

Under section 28 of the Program, the Housing Commissioner has the power to require a tenant to transfer to another public housing dwelling for of the following reasons:

- Where the physical condition of the property is likely to cause harm to a member of the household or the public,
- In the interests of community harmony, or
- Where the property is required for repair renovation, disposal or redevelopment.

Whilst the HAA gives the Housing Commissioner the power to require a transfer, from a tenancy perspective, this involves ending the person's tenancy in relation to one premises and offering them a tenancy at an alternative premises. While tenancy legislation can support a lessor to end a tenancy, it cannot compel a person to enter into a new tenancy agreement.

As such, this provision is designed to support the Housing Commissioner to require a transfer by allowing the Housing Commissioner to terminate the tenancy of a tenant who has refused an offer of an alternate premises. In this sense, the tenancy

termination provision will only operate in circumstances where the effective operation of the Program (the requirement to transfer) is impeded. However, it is noted that the operation of this tenancy termination provision does not prevent the Housing Commissioner from exercising their discretion under the Program to make subsequent additional offers of alternate accommodation to the tenant during the NTV period, should the Housing Commissioner choose to do so. This will allow the Housing Commissioner to continue to offer housing assistance to the tenant (in the form of an alternate premises) where it is appropriate to do so.

It is noted that this termination provision is drafted to refer to approved housing assistance programs generally rather than the existing Program. This is to capture any future versions of the Program should the Housing Commissioner decide to amend the Program. This means that it would be open to the Housing Commissioner to decide to amend the existing program to expand the circumstances in which the Housing Commissioner can require a transfer. To ensure there are appropriate safeguards connected to any changes to tenancy termination circumstances made through amendments to a housing assistance program, this Bill incorporates amendments to the HAA to increase the level of scrutiny on the creation of legislative instruments related to decisions of the Housing Commissioner that could lead to tenancy termination (see the HAA amendments at Schedule 1 of this Bill for further detail).

#### *Operation of the provision*

Where the Housing Commissioner wants to recover possession of a property and the tenant remains eligible for ongoing housing assistance, the Commissioner may make a decision under a housing assistance program to require that tenant to relocate to another property. Where the Commissioner makes an offer of a tenancy agreement at an alternate property which the tenant actively rejects or simply fails to accept, the Housing Commissioner will be able to issue a 26-week NTV to the tenant.

Where the Housing Commissioner's decision is a reviewable decision, the Housing Commissioner must wait until either the appeal period for the tenant seeking a review of decision has passed or, if the tenant seeks review of decision – until any review has been finalised, before the Housing Commissioner can issue the NTV.

The provision allows a tenant to end the tenancy at any time during the 2 weeks before the date stated in the notice where they give the Housing Commissioner 4 days' notice of their intention to vacate.

The tenant will end 26 weeks after the notice was received by the tenant or, if a later date is stated in the notice – on the stated day, or if the tenant moves out in the final 2 weeks of the tenancy after giving the required 4 days' notice – on the day the tenant vacates the premises.

If the tenant does not move out in accordance with the NTV then the Housing Commissioner would need to follow the existing tenancy termination pathway at section 47 of the RTA and apply to ACAT for a TPO on the basis the tenant has not vacated the premises in accordance with a termination notice issued under the Act.

The Bill also amends existing section 47 of the RTA to clarify that when hearing a TPO application on this ground, ACAT may not undertake merits review of the administrative law decision by the Housing Commissioner to withdraw housing assistance from the tenant upon finding the tenant is no longer eligible for assistance. See clause 18, above, for more detail on this amendment. ACAT will still be able to exercise its general discretion to consider the circumstances of the case when deciding whether to grant a TPO.

### Termination if tenant is party to 2 tenancies

There are circumstances where existing tenants voluntarily agree to move to an alternate property. These may include where a tenant has applied for a voluntary transfer, if the tenant's circumstances change (e.g. they require a disability modified property or their housing composition has changed), or if the Housing Commissioner has allocated an individual a transit property and they will not return to their original tenancy. When the transfer occurs, there may be a period of time where the tenant holds two tenancies with the Housing Commissioner.

This termination provision will enable to Housing Commissioner to terminate the original tenancy with 1 weeks' notice (or any longer period as the Housing Commissioner may decide) *after* the tenant has commenced occupation of the second premises. This will ensure the Housing Commissioner can take possession back of the original premises to manage it appropriately and make it available for use.

### **Schedule 2, 2.5 Supported accommodation clauses**

New Sch 2, 2.5 inserts two new tenancy terms that apply to tenants in supported accommodation.

These new tenancy terms are:

- Tenant agrees to provide information to lessor
- Termination if tenant no longer eligible to live in premises

These are discussed further below and in the human rights section above.

### Tenant agrees to provide information to lessor

#### *Background*

Some tenancies are provided and managed under supported accommodation programs for the provision of housing and other supports for vulnerable community

members. These programs may include social housing, affordable housing, supported accommodation, specialist disability accommodation, or community housing. Where housing is provided for a particular purpose, the tenant will need to meet eligibility criteria to access the supported accommodation. To ensure the programs continue to target those most in need, tenants may need to demonstrate an on-going eligibility to continue living in the supported accommodation. To maintain the effective operation of these programs, supported accommodation providers need the ability to terminate tenancies where the tenant is no longer eligible for accommodation assistance.

The Housing Commissioner has a legislated ability to require a tenant to provide them with the information reasonably necessary to review that person's ability for ongoing housing assistance (see section 25 of the HAA). However, supported accommodation providers may not always have a legislated ability to require the tenant to provide them with information. Despite this, the conditions of Government funding for the supported accommodation provider may require them to demonstrate that their tenant meets the eligibility criteria for the program.

#### *Operational of the provision*

This clause makes it a term of a supported accommodation tenancy agreement that the tenant agrees to provide information reasonably necessary to assess the lessor's eligibility for government funding or assistance for the premises or the tenant's eligibility to live in the premises within the timeframe requested by the lessor. However, the provision also stipulates that the lessor must provide the tenant with a reasonable period in which to provide the information.

This provision is designed to support a lessor's ability to review the tenant's ongoing eligibility to receive supported accommodation. It is noted that some supported accommodation programs base the lessor's eligibility for funding assistance on the lessor demonstrating they have an eligible tenant in the property, whereas other programs are designed simply by reference to the tenant's eligibility directly. For this reason, the requirement to provide information is phrased both in relation to the lessor's eligibility and the tenant's eligibility in that the lessor's ability to participate in the supported accommodation program may be contingent upon the tenant's eligibility.

The privacy implications of this provision are discussed in more detail in the right to privacy section of the human rights analysis provided at the start of this explanatory statement.

#### Termination if tenant no longer eligible to live in premises

The purpose of this termination provision is to allow supported accommodation providers to end a tenancy for a tenant who is unable to establish their ongoing eligibility for supported accommodation. The provision will apply where:

- The tenant does not give the information required to establish their ongoing eligibility to their lessor after the lessor has requested the information;
- After the tenant has provided the required information, the lessor considers that the tenant has stopped being eligible or will stop being eligible for funding or assistance for the premises, or
- After the tenant has provided the required information, the lessor has stopped or will stop being eligible for funding or assistance for the premises.

The notice period for this termination may vary. It is expressed to be the later of:

- A 26 week period after the lessor gives the notice to vacate to the tenant;
- The day the tenant stops being eligible to live in the premises; or
- The day the lessor stops being eligible for funding assistance for the premises.

The 26 week notice period is designed to align with the current 26 week without cause termination provision which would be currently be utilised in this circumstance. However, it is noted that the provision is expressed to include circumstances where a tenant has stopped or will stop being eligible for assistance. The notice to vacate is designed to account for circumstances where it is anticipated that a tenant will cease eligibility in the future.

For example, the current [National Rental Affordability Scheme Regulations 2020 \(NRAS regulations\)](#) provides that a tenant will cease to be an eligible tenant if the combined gross household income exceeds the income limit for their household by 25% or more in two consecutive eligibility years (see section 41 (3) (b)). In the case of an NRAS accommodation provider, the provider may be able to anticipate that the tenant will become ineligible where their income will exceed the income limit. In this situation, the accommodation provider could anticipate the tenant becoming ineligible and issue the NTV on the basis the tenant has exceeded the income limit by 25% or more and will stop being eligible for supported accommodation at the end of the 2 year period. The tenant would then be required to vacate the property either at the end of the two-year period in which they have exceeded the income limit by 25% or more OR 26 weeks after they received the NTV – whichever is the later.

As part of this new provision, for the NTV to be valid it must include particulars of why the notice to vacate has been issued. Such particulars include if the tenant did not provide sufficient information to establish their eligibility, the reason the tenant has or will become ineligible, the reason the lessor has or will become ineligible for funding or assistance for the premises. This means that if the tenant disagrees with the grounds for the tenancy termination (such as the reasons they have been assessed as ineligible), the tenant could bring a tenancy dispute to ACAT on the basis of the particulars contained in the NTV.

The NTV is also required to contain the name and contact details of a legal or advocacy service that may be able to provide the tenant with advice about the tenant's legal rights with respect to their tenancy.

It is noted that supported accommodation tenants may be considered more vulnerable than tenants in the private accommodation market (due to their need for accommodation support). The requirement to include contact details for an advice or advocacy service as part of the NTV is designed to give these more vulnerable tenants the maximum opportunity to receive advice and assistance in relation to understanding and asserting their tenancy rights and complying with their tenancy obligations.

## **Schedule 2,2.6      *Temporary housing assistance termination clause***

### *Background*

This clause inserts a new termination clause which gives the Housing Commissioner the power to end a tenancy after a temporary period of housing assistance has ended. It is noted that the concept of a 'temporary period of housing assistance' is not one that is currently contemplated under the HAA or the Program.

The Program does however allow the Housing Commissioner to offer (on a discretionary basis) a person who has been residing in a public housing property, housing assistance outside of the normal allocation process following a tenancy breakdown situation. A tenancy breakdown occurs when a tenant dies or no longer occupies the property (for example because they need to move into aged care or where they leave due to a relationship breakdown). Instead of requiring any remaining residents to immediately vacate the premises following the death or departure of the tenant, the Program supports the Housing Commissioner to act with compassion by allowing remaining residents to stay in the premises for a bit longer, thereby giving them a period to adjust to their changed circumstances.

At present when this situation arises, the Housing Commissioner may offer a person being provided housing assistance following a tenancy breakdown a fixed term tenancy and then utilise the current without cause tenancy termination provision to end the tenancy at the end of the fixed term. As this will no longer be an option with the removal of the without cause termination provision a replacement termination provision was required. Accordingly, this termination provision creates the concept of a temporary period of housing assistance which will allow the Housing Commissioner to terminate a tenancy on the grounds that the temporary period of housing assistance is ended.

It is noted that this Bill introduces a new definition for temporary housing assistance which will sit within the HAA and be cross referenced in the RTA (see clause 55 which inserts the new definition in the Dictionary of the RTA and Schedule 1 clause 1.4 which inserts the new definition in the Dictionary of the HAA).

As with the above termination provisions that apply to the Housing Commissioner, this termination provision is drafted to refer to approved housing assistance programs generally rather than the existing Program. This is to capture any future versions of the Program should the Housing Commissioner decide to amend it. An

amendment to the current Program may be required to introduce the concept of temporary housing assistance following a tenancy termination breakdown. To ensure there are appropriate safeguards connected to changes to tenancy termination circumstances made through amendments to a housing assistance program, this Bill incorporates amendments to the HAA to increase the level of scrutiny on the creation of legislative instruments that are related to decisions of the Housing Commissioner that could lead to tenancy termination (see the HAA amendments at Schedule 1 of this Bill for further detail).

#### *Operation of the provision*

For this provision to be utilised, the ability to terminate the tenancy is connected to the term of the temporary assistance provided by the Housing Commissioner. It is noted that this tenancy provision will not be incorporated in all social housing tenancies with the Housing Commissioner – only those where it is explicitly stated that the tenant is receiving a temporary period of housing assistance (see clause 4, amended section 8 which indicates the provision is only taken to be contained in a tenancy agreement when the tenant is receiving a temporary period of housing assistance). This narrows the operation of the provision and ensures it can only be utilised in limited circumstances.

The policy intention of this provision is to cover circumstances where the Housing Commissioner has used their discretion to offer temporary or short-term housing assistance due to a tenancy breakdown (such as when a tenant dies or is no longer able to occupy the dwelling). The Housing Commissioner may use this provision if before the end of the temporary period of housing assistance they have decided the tenant is no longer eligible for ongoing assistance. If this termination provision is used, the notice must be for at least 26 weeks.

The provision allows a tenant to end the tenancy at any time during the 2 weeks before the date stated in the notice where they give the Housing Commissioner 4 days' notice of their intention to vacate.

The tenancy will end 26 weeks after the notice was received by the tenant or, if a later date is stated in the notice – on the stated day, or if the tenant moves out in the final 2 weeks of the tenancy after giving the required 4 days' notice – on the day the tenant vacates the premises.

If the tenant does not move out in accordance with the NTV, then the Housing Commissioner would need to follow the existing tenancy termination pathway at section 47 of the RTA and apply to ACAT for a TPO on the basis the tenant has not vacated the premises in accordance with a termination notice issued under the Act.

See the human rights section above for more discussion of this termination provision.

#### **Clause 43 Dictionary, notes**

This is a technical provision, that updates the notes in the Dictionary of the RTA in accordance with current drafting practice.

#### **Clause 44 Dictionary, new definitions of *defective termination notice* and *family violence order***

This clause inserts a new definition for the terms ***defective termination notice*** and ***family violence order***.

A ***defective termination notice*** is defined as a notice that –

- a) if there is a form approved under section 133 (Approved forms – Minister) for a termination notice – is not in the approved form; or
- b) if there is no form approved under section 133 (Approved forms – Minister) does not contain the information required by the standard residential tenancy terms; or
- c) is not given in accordance with this Act.

It is noted that a reference to an Act includes a reference to the Regulation (see the Legislation Act, s 104). This means that the requirements for service of a termination notice set out in section 5 of the RTR are captured within the definition of a defective termination notice.

The definition of the term ***family violence order*** refers the reader to the *Family Violence Act 2016*, dictionary.

#### **Clause 45 Definition of *FV Act***

This clause is consequential to clause 31 which replaces the definitions for division 6.5A of the Act. The new definitions remove the term FV Act and instead refer to the *Family Violence Act 2016*.

This clause omits the term FV Act from the Dictionary as the term no longer used in the RTA.

#### **Clause 46 Dictionary, new definition of *housing assistance***

This clause inserts a new definition for ***housing assistance*** into the Dictionary of the RTA.

The new definition of ***housing assistance***, in relation to a tenant refers the reader to section 7 of the *Housing Assistance Act 1997*.

#### **Clause 47 Dictionary, new definition of *minimum housing standards***

This clause is consequential to the changes at clause 11 which inserts new Division 2.5 in relation to minimum housing standards. Clause 11 also inserts new section 19A which relocates the regulation making power previously at section 136 (2) (d)

and amends the wording of the provision slight to make ***minimum housing standards*** a defined term.

This clause inserts a new definition for ***minimum housing standards*** into the Dictionary of the RTA.

The new definition of ***minimum housing standards*** inserted in the Dictionary refers the reader to new section 19A of the RTA, which provides the new definition: a ***minimum housing standard*** is a minimum standard prescribed by regulation for a premises made available for occupation under a residential tenancy agreement in relation to physical accessibility, energy efficiency, safety and security, sanitation and amenity.

#### **Clause 48 Dictionary, new definition of *personal protection order***

This clause inserts a new definition for the term ***personal protection order***.

The reader is referred to the dictionary of the *Personal Violence Act 2016* for the definition of a ***personal protection order***.

#### **Clause 49 Dictionary, definition of *protected person***

This clause is a consequential amendment and omits a reference to section 85 (1) within the definition of ***protected person*** and substitutes it with a reference to section 85.

#### **Clause 50 Dictionary, definition of *protection order***

This clause substitutes the definition of the term ***protection order***.

The amended definition of the term ***protection order*** is – (a) protection order under the *Family Violence Act 2016*; or (b) a personal protection order under the *Personal Violence Act 2016*.

This clause also contains a note, which explains that the definition of ***protection order*** includes, among other things, an interim or final protection order (see the *Family Violence Act 2016*, dictionary).

#### **Clause 51 Dictionary definition of *publish***

This clause inserts a new definition of the term ***publish***.

The definition of ***publish*** for the purposes of division 2.2, refers the reader to section 10A.

#### **Clause 52 Dictionary, definition of *PV Act***

This clause is consequential to clause 31 which replaces the definitions for division 6.5A of the Act. The new definitions remove the term *PV Act* and instead refer to the *Personal Violence Act 2016*.

This clause omits the term *PV Act* from the Dictionary as the term no longer used in the RTA.

#### **Clause 53 Dictionary, definition of *respondent***

This clause is a consequential to clause 31 which replaces the definitions for division 6.5A of the Act. This amendment omits a reference to section 85 (1) within the definition of ***respondent*** and substitutes it with a reference to section 85.

#### **Clause 54 Dictionary, definition of *standard residential tenancy terms***

Clause 51 substitutes the definition for the term ***standard residential tenancy terms***, referred to throughout this Explanatory Statement as SRTTs.

This is a consequential amendment to clause 4 above which amends section 8 of the RTA to clarify when particular tenancy terms will be incorporated into a tenancy agreement.

The new definition provides that ***Standard residential tenancy terms*** means (i) the standard residential tenancy terms mentioned in schedule 1; and (ii) any additional terms in schedule 2 that, under section 8 (1) (b) to (g), is taken to be included in a residential tenancy agreement. It further clarifies that standard residential tenancy terms do not include a term mentioned in section 8 (1) (h), which is any other term that the lessor and tenant have agreed to include that: (i) is consistent with the standard residential tenancy terms; or (ii) that is inconsistent with the standard residential tenancy terms but has been endorsed by ACAT under section 10.

#### **Clause 55 Dictionary, new definitions of *supported accommodation* and *temporary housing assistance***

This clause inserts ***supported accommodation***, and ***temporary housing assistance*** as defined terms for the purposes of the RTA.

***Supported accommodation*** means premises made available by a lessor, other than the Housing Commissioner, for which the lessor receives government funding or assistance to provide the premises to the tenant.

To support this definition, this clause also inserts three examples: (1) affordable housing provided or managed by a community housing provider; (2) accommodation provided in accordance with the National Rental Affordability Scheme; and (3) specialist disability accommodation.

The definition for ***temporary housing assistance*** refers the reader to the dictionary of the *Housing Assistance Act 2007*.

#### **Clause 56 Dictionary, definition of *Termination notice***

This clause substitutes the definition of ***termination notice***

The substituted definition of *termination notice* provides that a **termination notice** means a written notice that – (a) if there is a form approved under section 133 (Approved forms – Minister) for a termination notice – is in the approved form; and (b) if there is no form approved under section 133 (Approved forms – Minister) – contains the information required by the standard residential tenancy terms; and (c) is served in accordance with the RTA.

### **Part 3      *Residential Tenancies Regulations 1998***

#### **Clause 57    *New section 5B***

This clause inserts new regulation 5B which clarifies that some garden modifications can be considered ‘minor modifications’ for the purposes of sections 71AA – 71AD and 71AG of the RTA.

This amendment is intended to support the ACT Climate Change Strategy 2019 – 2025, by strengthening a tenant’s ability to grow food for personal use and reduce waste by composting.

While it is likely that the existing provisions pertaining to minor modifications would reasonably include some gardening and composting modifications, this amendment explicitly confirms this position.

New regulation 5B provides that upon written application, a tenant may plant vegetables, fruit, flowers, herbs or shrubs (under 2 meters) in a garden if existing vegetation or plants do not need to be removed. In regard to composting, tenants will be permitted to use a portable composting tumbler or bin where there is sufficient space to do so. A lessor is unable to withhold their consent for a tenant’s application to make minor modifications unless they have obtained ACAT’s prior approval.

However, the new regulation acknowledges that there are circumstances where it would be inappropriate to limit a lessor’s ability to refuse an application to make gardening or composting modifications in this way.

Under the *Unit Titles (Management) Act 2011*, any modifications to either the common area of a units plan or the balconies of class A units are subject to the rules of the owners’ corporation. These areas are also required to be maintained by the owners’ corporation. In these circumstances, the power to consent to any gardening or composting modifications does not sit with the lessor, but the owners’ corporation. As such, the above-described gardening or composting activities are not minor modifications if they impact a common area for class A or B units, or the balconies of class A units.

Further, the effect of paragraphs (c) and (d) is that a tenant may not make any other minor modification in a units plan unless the owners’ corporation rules allow for such a modification, and where required, the appropriate permission has been obtained from the owners corporation.

This section also introduces **class A unit**, **class B unit**, **common property**, **owners corporation** and **rule** as defined terms for the purposes of this section:

- **class A unit** refers the reader to the *Unit Titles Act 2001*, section 10.
- **class B unit** refers the reader to the *Unit Titles Act 2001*, section 11.
- **common property** refers the reader to the *Unit Titles Act 2001*,
- **owners corporation** refers the reader to the *Unit Titles (Management) Act 2011*, dictionary.
- **rule**, in the context of an owners' corporation, refers the reader to the *Unit Titles (Management) Act 2011*, dictionary.

## **Schedule 1 Housing Assistance Act – Other amendments**

### **[1.1] Sections 20 and 21**

This clause substitutes sections 20 and 21 of the HAA. The amendments to sections 20 and 21 are consequential amendments as a result of new termination provisions for social housing, and temporary housing assistance being inserted into the RTA (see clause 4 of the amendment bill and schedule 2, section 2.4 and 2.6).

The amendments to sections 20 and 21 require that any determinations or operational guidelines made under the HAA that deal with a **relevant matter** are required to be disallowable instruments rather than notifiable instruments. **Relevant matter** includes: the review of a person's entitlement to housing assistance, requiring a person receiving housing assistance to move to an alternate premises, or a person's eligibility for temporary housing assistance. The purpose is to provide an appropriate level of scrutiny to legislative instruments which provide guidance on circumstances that may lead to a tenancy termination. Disallowable instruments, unlike notifiable instruments, must be tabled in the Legislative Assembly. They also require an explanatory statement (which includes a human rights compatibility statement) when they are made. This provides policy transparency and ensures human rights are explicitly considered and any impacts explained when the instrument is made.

See the human rights section above for further detail on this provision.

### **[1.2] New part 11**

This subclause inserts new part 11 into the HAA. New part 11 contains transitional provisions to clarify the status of existing notifiable instruments following the amendments to sections 20 and 21 of the HAA which provide that some determinations and operational guidelines will be notifiable instruments while others will be disallowable instruments. This is to allow existing instruments to continue in effect without needing the instrument to be remade as a disallowable instrument.

Part 11      *Transitional – Residential Tenancies Legislation Amendment Act 2022*

New section 111      *Meaning of commencement day - pt 11*

This clause clarifies that for new Part 11 of the HAA **commencement day** means the day the *Residential Tenancies Legislation Amendment Act 2022*, schedule 1, amendment [1.1] commences.

The purpose of this provision is to align the commencement of the transitional provisions with the amendments to sections 20 and 21 of the HAA introduced by clause 1.1 above.

New section 112 *Housing assistance program determinations*

This clause provides that the [\*Housing Assistance Public Rental Housing Assistance Program \(Review of Entitlement to Housing Assistance\) Determination 2020 \(No 1\) \(NI2020-658\)\*](#), as in force immediately before the commencement day, is taken to be a disallowable instrument made under section 20. This ensures that this existing determination can continue in force without needing to be re-made as a disallowable instrument for the purpose of amended section 20 (see clause 1.1 above).

To this end, subsection (2) also provides that Chapter 7 of the *Legislation Act 2001* (which sets out the requirements for the presentation amendment and disallowance of disallowable instruments) does not apply the [\*Housing Assistance Public Rental Housing Assistance Program \(Review of Entitlement to Housing Assistance\) Determination 2020 \(No 1\) \(NI2020-658\)\*](#). This is so the instrument can be deemed as a disallowable instrument without needing to follow the usual disallowance process.

This clause also clarifies that all other instruments listed which were in force immediately before the commencement day are taken to be notifiable instruments made under section 20 (as they do not deal with relevant matters for the purposes of amended section 20 (see clause 1.1)). The listed instruments are:

- *Housing Assistance Public Rental Housing Assistance Program (Community Rental Housing Assistance – Modified Eligibility Criteria) Determination 2012 (No 1) (NI2012-254)*
- *Housing Assistance Public Rental Housing Assistance Program (Exempt Income and Assets) Determination 2020 (No 1) (NI2020-113)*
- *Housing Assistance Public Rental Housing Assistance Program (Exempt Income and Assets) Determination 2020 (No 2) (NI2020-173)*
- *Housing Assistance Public Rental Housing Assistance Program (Housing Needs Categories) Determination 2011 (No 2) (NI2011-507)*
- *Housing Assistance Public Rental Housing Assistance Program (Residency Time Limits—Exemptions) Determination 2020 (No 1) (NI2020-521)*  
*Housing Assistance Public Rental Housing Assistance Program (Special Needs Applicants and Dwellings) Determination 2012 (No 1) (NI2012-358).*

New section 113 *Operational Guidelines*

Subclause (1) repeals the [\*Housing Assistance Public Rental Housing Assistance Program \(Review of Entitlement to Housing Assistance\) Operation Guideline 2013\*](#)

[\(No 1\) \(NI2013-534\)](#). This is because this operational guideline makes reference to the Housing Commissioner utilising the without cause termination provision to terminate a tenancy in circumstances where the Housing Commissioner takes action to withdraw housing assistance from a tenant upon finding they are no longer eligible for assistance after a review of entitlement. As this Bill repeals the without cause termination provision, this instrument will need to be remade. As this instrument deals with a relevant matter for the purposes of amended section 21 (see Clause 1.1 above) and amended version of this guideline will need to be remade as a disallowable instrument for when this Bill commences.

Subclause (2) provides that all other guidelines made under section 21 as in force immediately before the commencement day are taken to continue in force.

#### New section 114 Expiry-pt 11

This clause clarifies that the transitional period will expire 1 year after the commencement day.

The clause also contains a note which advises the reader that a transitional provision is repealed on its expiry but continues to have effect after it repeals. The note refers the reader to section 88 of the Legislation Act for further information.

#### **[1.3] Dictionary, notes**

This clause inserts a reference to the definitions for *Executive*, *may* and *must* in the notes section of the Dictionary for the HAA. As these additional references were required, this clause substitutes the entire note to update the note in line with current drafting practice.

#### **[1.4] Dictionary, new definition of *temporary housing assistance***

This clause inserts a new definition of ***temporary housing assistance*** into the HAA. This definition is then cross referenced in the RTA (see clause 55 for the insertion of the new definition in the RTA).

It provides that ***temporary housing assistance*** means housing assistance identified as temporary housing assistance in an approved housing assistance program.