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

EXPOSURE DRAFT RESIDENTIAL TENANCIES AMENDMENT BILL 2019 (No 2)

EXPOSURE DRAFT EXPLANATORY STATEMENT

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This explanatory statement relates to the Exposure Draft Residential Tenancies Amendment Bill 2019 (No 2) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the draft Bill and to help inform debate on it. It does not form part of the draft Bill and has not been endorsed by the Assembly.

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

Overview

Purpose of the draft Bill

The draft Bill proposes amendments to the *Residential Tenancies Act 1997* (the RTA), the *Human Rights Commission Act 2005*, the *Uncollected Goods Act 1996*, and the *Residential Tenancies Regulation 1998*. The purpose of these amendments is to give effect to specific legislative recommendations from the 2016 review of the RTA which relate to occupancy and share housing in the ACT.

The Bill proposes the following amendments:

- improve protections for occupants by introducing new occupancy principles and by making the occupancy principles a mandatory part of every occupancy agreement;
- clarify the difference between an occupancy agreement and a residential tenancy agreement;
- clarify the application of the occupancy framework to people who reside in residential parks; and
- modernise the legal framework for share housing.

Human rights implications

The proposed amendments engage a number of human rights under the *Human Rights Act 2004* (HRA) including:

- a) the right to equality and non-discrimination (sections 8[2]-[3], HRA); and
- b) the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily - section 12(a), HRA.

Equality and non-discrimination

The right to equality and non-discrimination is protected by sections 8(2)-(3) of the HRA. The HRA provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that everyone is equal before the law and entitled to the equal protection of the law without discrimination. 'Discrimination' under the HRA

encompasses a distinction based on particular grounds (for example, race, colour or sex), which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination), of adversely affecting human rights.¹ That is, not every differential treatment will amount to discrimination as it must be linked to a prohibited ground of discrimination.²

The amendments will provide greater clarity in the distinction between a residential tenancy and an occupancy agreement. The effect of this is that some residents in the ACT have the protections of a tenancy agreement, while others will have the lesser protections of an occupancy agreement. This distinction between residential tenancies and occupancy agreements is already drawn under the RTA. The fact that not all residents in the ACT benefit from this proposed amendment does not amount to discrimination on a prohibited ground. If the distinction were linked to a ground of discrimination such as 'other status,' either directly or indirectly, the treatment is nevertheless compatible with the right to equality and non-discrimination.

In particular, section 28 of the HRA, sets out the criteria for when human rights including the right to equality and non-discrimination may be reasonably limited such that they are compatible with the HRA. Applying the criteria, the purpose of the distinction between occupancy agreements and residential tenancies is to facilitate a wider range of housing options where a tenancy agreement may either be ill-suited or inappropriate. The measure is of importance as, without this measure, residential tenancy agreements may create an obstacle to the provision of flexible housing and related support services in appropriate circumstances. The current measure, by more clearly defining the distinction between an occupancy agreement and a residential tenancy agreement, will assist to achieve the stated purpose of the measure. The proposed amendments will improve the proportionality of any distinction overall, by increasing the protections contained in occupancy agreements.

Under the amendments, a presumption will remain in favour of a residential tenancy agreement in a range of circumstances. Under the proposed definitions, occupancy agreements arise where the agreement seeks to achieve a clearly defined outcome such that any differential treatment between occupants and residential tenants will be based on reasonable and objective criteria. Further relevant to the proportionality of the measure, is that parties to an agreement that purports to be an occupancy agreement will be able to challenge its status in the ACT Civil and Administrative Tribunal (the Tribunal).

¹ International Covenant on Civil and Political Rights (ICCPR) articles 2 and 26; *Althammer v Austria*, United Nations (UN) Human Rights Committee Communication no. 998/01 (2003) [10.2].

² The grounds of discrimination are not specifically or exhaustively defined under the HRA. However, the following examples of discrimination are provided in the HRA: 'race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.'

Right to privacy, family and home

Section 12 of the HRA protects the right to privacy, family, home or correspondence. Almost all of the proposed amendments, whether taken together or in isolation, engage and promote the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily. Having access to accommodation a space for individual tenants and occupants to develop their identity and to have personal security and mental stability. Where residents of a residential premises comprise a family, the proposed amendments also promote protections afforded to families in the ACT under section 11(1) of the HRA.

The right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily will be engaged by making the occupancy principles in Part 5A mandatory. Currently, Part 5A requires that grantors 'must have regard' to the principles listed within it, providing less certainty regarding the ability for occupants to enforce their rights outside of formal legal proceedings, processes which themselves lack clarity regarding the obligations of grantors towards occupants. Mandating these occupancy principles will provide grantors with clarity regarding the minimum requirements owed to occupants, provide occupants with a firmer basis to seek the enforcement of their rights through non-adversarial means, and provide stronger guidance to legal bodies such as the Tribunal to assist in their decision making on formal disputes. These outcomes result in greater protection of an occupant's privacy, family, home or correspondence by unlawful or arbitrary means through providing clarity regarding when rights under an agreement are interfered with, and a clearer basis for enforcing such entitlements.

The right to privacy and home will also be engaged and promoted by providing occupants with the ability to make an occupancy dispute complaint to the ACT Human Rights Commission (Schedule 1, Part 1.1 of the draft Bill). In conjunction with the mandating of the occupancy principles, providing direct access to this dispute resolution option will provide occupants with an additional mechanism to seek the enforcement of their rights..

The right to privacy and home will also be engaged and promoted by the inclusion of the new occupancy principle requiring a grantor to ensuring 24-hour access to the premises which is the subject of their occupancy agreement and associated hygiene facilities, and access to communal facilities during reasonable hours (clause 20, proposed new section 71EH). This will assist to ensure that occupants are always provided access to hygiene necessities such as toilets and showers, which ensuring that the use of shared facilities does not adversely impact on other occupants outside of reasonable hours.

The right to privacy and home will also be engaged by the amendment providing that a grantor may enter premises during the residential occupancy agreement where the grantor believes on reasonable grounds that the premises have been abandoned by the occupant (clause 20, proposed new section 71EL). However, this right may be subject to reasonable limitations under section 28 of the HRA. Applying the criteria under section 28, the overarching purpose of the measure is to protect the legitimate interests of grantors in circumstances where they reasonably believe that the premises have been abandoned. In order to ensure that this entry without consent is proportionate and not arbitrary in nature, the amendment will require a grantor to

satisfy certain requirements in order to enter the premises to ascertain if it has been abandoned. These requirements are that the grantor must be aware of the occupants not having had paid the occupancy fee for at least three consecutive periods, that the grantor has taken all reasonable steps to contact the occupant, and that the grantor reasonably believes that the occupant has abandoned the premises. Further, as an additional safeguard, the amendments will forbid the grantor entry to the premises, notwithstanding the above conditions, on Sundays, public holidays, and before 8am or after 6pm. These amendments represent a proportionate measure to allow grantors to mitigate loss and minimise the potential compensation liability of occupants who abandon premises by ensuring that the entry may only be exercised in circumstances where there is a clear indication that the premises have in fact been abandoned. Accordingly, the measure constitutes a reasonable limitation on the right to privacy and home under section 28 and, as such, is compatible with this right.

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the Residential Tenancies Amendment Act 2019 (No 2).

Clause 2 Commencement

This clause provides that the Bill has a delayed commencement to allow implementation work to occur. If the Bill has not commenced within 6 months beginning on the notification day, it automatically commences on the first day after that period.

Clause 3 Legislation Amended

This clause provides that the Bill amends the *Residential Tenancies Act 1997* (the RTA), the *Human Rights Commission Act 2005* (the HRCA), the *Uncollected Goods Act 1996* (the UGA), and the *Residential Tenancies Regulation 1998* (the Regulation).

Clause 4 New section 4A

This clause inserts an 'objects clause' into the RTA. An objects clause is a provision that outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity. Section 139 of the *Legislation Act 2001* states that an interpretation that would best achieve the purpose of the legislation is to be preferred to any other interpretation. The objects clause will expressly state the purpose of the RTA to aid interpretation. The clause does not create new rights or obligations.

This clause also provides an overview of the distinction between a residential tenancy agreement and an occupancy agreement. The RTA aims to define the rights and obligations of tenants and lessors under residential tenancy agreements, while the RTA only sets out the minimum contractual requirements for occupancy agreements. The minimum contractual requirements for occupancy provide the

flexibility for them to be adapted to the wide range of stakeholders who use occupancy agreements.

Clause 5 New section 6AA

This clause inserts a new class of tenant into the RTA: a co-tenant.

‘Share housing’ is an increasingly common way for people to live, especially for students. As residential tenancy law was not developed with the concept of tenants moving in and out of tenancy agreements, the legal status of a resident is often unclear in these circumstances. Currently, a person in a share house might be a co-tenant, a sub-tenant, an occupant, or a bare licensee.

This amendment seeks to reduce this ambiguity in the legal relationships that are created in share housing so that the legal framework is simpler, modernised, better reflects community behaviours and expectations, and ensures that those who have a reasonable expectation of the protections of a tenancy are afforded it.

Clause 6 What is a residential tenancy agreement? New section 6A (1)

This clause provides a new definition of a residential tenancy agreement to clarify the difference between it and an occupancy agreement.

It is the intention that, with only very few exceptions, every person who pays for a right to accommodation as their principal place of residence in the ACT is either a residential tenant or an occupant. The operation of new section 6A and new section 71C (which defines occupancy agreements) is that there is a presumption, in most circumstances, in favour of a residential tenancy unless there are clear reasons not to recognise a tenancy (including that the parties clearly intended not to create a tenancy).

The effect of this new section together with new section 71C is that all people, with very few exceptions, who pay for residential accommodation as their home are entitled to appropriate protections of their use of the residence either as a tenant or, if a clear exception applies, as an occupant.

Clause 7 Section 6A (4), third dot point

This clause removes a cross-reference to a section of the RTA that will be removed by clause 9 (below).

Clause 8 Certain people given right of occupation not tenants Section 6E (1) (b)

This clause removes a section of the RTA which stated that certain people were not tenants. As this contributed to confusion about their status as parties to an occupancy agreement, this section has been removed. This has been replaced by a functional definition of what constitutes an occupancy agreement (see clause 17, new section 71C below).

Clause 9 Certain kinds of premises mean no residential tenancy agreement Section 6F

This clause removes a section of the Act which stated that certain premises meant the residents were not tenants. As this contributed to confusion about the status of the residents as parties to an occupancy agreement, this section has been removed. This has been replaced by a functional definition of what constitutes an occupancy agreement (see clause 17, new section 71C below).

Clause 10 Rent or bond only New sections 15 (2) (aa) and (ab)

This clause makes it clear that landlords must not require or accept any consideration for consenting to a co-tenant leaving, or a new co-tenant joining, a residential tenancy agreement.

The RTA prohibits all fees for a residential tenancy agreement other than for rent or bond. This requirement exists in the ACT and other jurisdictions to keep the initial cost of obtaining rental accommodation at a reasonable level and to remove hidden costs, such as 'key money'. Fees in addition to rent and bond disadvantage low income earners.

Clause 11 New section 34F

This clause empowers the Territory to refer a matter to the Tribunal if a bond release application is made and the names of the tenants in the bond application do not match the names of the tenants on record.

The Territory holds bond moneys on trust for the tenant (RTA, s 27). As tenants move in and out of a tenancy agreement, the registered interest in that bond is not always kept current. Tenants need an efficient and effective way of being able to resolve discrepancies in the bond record, and the Territory needs a way to ensure that bonds are only released to the correct parties.

Where there is such a discrepancy, this new section 34F allows the Territory to refer the matter to the Tribunal so that the Tribunal can determine to whom the bond moneys are to be released.

Clause 12 New part 3A

This clause inserts a new part into the RTA to facilitate share housing.

At common law, the rules around terminating co-tenancies and sub-tenancies are a highly complex mix of property law and contract law. Despite the widespread prevalence of share housing in the ACT, the law does not align with community behaviours or expectations. For example, the identity of the tenants is a fundamental term of a lease, and a change in the composition of tenants—and the way in which the tenants changed—will have implications for the ongoing existence of the lease. If a tenant in a 'share house' gives notice to vacate during a periodic tenancy, depending on their specific circumstances and the manner in which they gave notice, it is possible that the existing tenancy has ended and a new tenancy has commenced with new tenants (some of whom were on the previous lease) (see, for

example, *ACT Housing v Midgley* [2001] ACTRTT 7). Not only does this make it difficult to track the liabilities and obligations of former tenants, it may impact the ability of landlords to make deductions from the bond as a condition report was not undertaken at the start of the new tenancy.

Currently, there are a range of complexities about the rights and obligations arising under the lease (see, for example, *Hammersmith and Fulham London Borough Council v Monk* [1991] UKHL 6; *ACT Housing v Midgley* [2001] ACTRTT 7). The question of legal status under the lease is often not asked until relationships have broken down and respective rights and obligations become a source of conflict (*Lochrin v Jaiswal (Residential Tenancies)* [2018] ACAT 78).

The purpose of the new part 3A of the RTA is to amend the operation of the common law of property and contract so that share housing becomes simpler. It also creates a default position for resolving issues about status within a residential tenancy agreement: the legislative norm is that a tenant will enter into a tenancy agreement as a co-tenant unless the parties clearly intend otherwise.

New section 35A facilitates a co-tenant leaving a tenancy. A co-tenant must seek the consent of the other parties to the tenancy in order to withdraw from the agreement. The other parties to the tenancy agreement must not unreasonably withhold their consent if the agreement is periodic, but can withhold their consent on any lawful ground if the agreement is for a fixed-term. This distinction arises because the other co-tenants may decide to terminate the periodic tenancy if the leaving co-tenant was a significant factor for the tenancy continuing. For example, the remaining tenants might face financial difficulties if the co-tenant leaves, and therefore they might need to terminate the tenancy. Given termination of a tenancy is not as easy under a fixed-term agreement, consent is required from the other parties.

New section 35A also ensures that the agreement continues between the landlord and the remaining co-tenants. The leaving co-tenant's rights and obligations under the agreement end, with the result that their liability for the payment of rent will end and their liability for damage to the property will end. These liabilities continue with the remaining tenants, making it clearer for landlords to know against whom they can seek contributions for costs and damages.

New section 35B regularises the repayment of a leaving co-tenant's share of the bond. The RTA strictly regulates how bonds for residential tenancies are managed. Section 21 of the RTA states that the landlord may only require or accept one bond in relation to a residential tenancy agreement. New section 35B operates within this restriction: only one bond is held in relation to the residential tenancy agreement, but the interest in that bond may change.

The co-tenants themselves assess any damage attributable to the leaving co-tenant. Within 14 days after the day the leaving co-tenant stops being a party to the residential tenancy, the remaining co-tenants must pay to the leaving co-tenant an amount equal to the bond paid by the leaving co-tenant, but may deduct amounts for unpaid rent and for reasonable costs in relation to the premises. As the remaining co-tenants remain liable for all damage to the property (including the damage caused by the leaving co-tenant), this section allows co-tenants to manage those liabilities

privately without requiring an additional inspection by the landlord or real estate agent.

New section 35B contains protections for co-tenancy arrangements that are affected by protection orders. It is not intended that part 3A should interfere with the operation of division 6.5A.

New section 35C facilitates joining a co-tenant to an existing residential tenancy agreement. The section does not apply where the parties clearly intend not to create a co-tenancy—for example, where there is a clear attempt to create a sub-tenancy or where a bare licence was clearly intended.

When the existing tenant seeks the consent of the lessor and other existing tenants, their consent must not be unreasonably withheld. New section 35C(6) details the grounds upon which the landlord may refuse consent.

If consent has been requested, the landlord and existing tenants are taken to have consented if, within 14 days, they have not responded or applied to the Tribunal for an order to refuse consent.

New section 35D regularises the method for an incoming co-tenant to gain an interest in the bond being held in relation to the agreement.

New section 35E specifies powers of the Tribunal specific to disputes arising from co-tenancies. The Tribunal, upon application by a co-tenant, is empowered to make an order removing a co-tenant from the tenancy agreement. This power is deliberately out of alignment with the existing power of the Tribunal to terminate a tenancy as it will arise from a dispute between co-tenants rather than as a dispute between a landlord and the tenants. An application to remove a co-tenant from the tenancy agreement might arise if the co-tenant is jeopardising the entire tenancy agreement through their repeated non-payment of their share of rent or utilities, use of the premises for illegal activities, or repeated intentional damage to the property.

New section 35E also provides the power for the Tribunal to order that the landlord may refuse consent for a co-tenant to leave the agreement or for a new person to join the agreement as a co-tenant.

Clause 13 Section 54 heading

This clause changes the heading of section 54 of the RTA to align with the introduction of part 3A (clause 12 above).

A heading to a section of an Act is part of the Act (*Legislation Act 2001*, s 126(2)).

Clause 14 Section 54 (1) (a)

This clause clarifies the application of section 54 following the introduction of part 3A (clause 12 above). A tenant breaches the RTA if they purport to change the parties to a tenancy agreement or create a subtenancy except in accordance with the RTA.

Clause 15 Section 54 (1) (b) and (c)

This clause clarifies the application of section 54 in respect of purported assignment or subletting following the introduction of part 3A (clause 12 above).

Clause 16 Section 54 (2)

This clause clarifies the application of section 54 following the introduction of part 3A (clause 12 above).

Clause 17 Section 71C (1)

This clause inserts a new definition of an occupancy agreement into the RTA.

The policy intent is that people should be residential tenants unless there are strong policy reasons not to recognise a tenancy. The definition provides a more functional approach centred on those policy reasons to distinguish a tenancy agreement from an occupancy agreement. It will also make it clear that inconsistency with the standard tenancy terms in the RTA should, in the absence of countervailing reasons, be considered a breach of the lessor's obligations and not a reason in favour of reading an agreement as an occupancy agreement.

The reasons to have an occupancy are:

1. if the person is occupying a room within the grantor's primary place of residence.
2. if exclusive possession interferes with legitimate goals to support vulnerable or at-risk residents, such as those where the grantor is required to provide support or assistance.
3. if restrictions on termination of an agreement interferes with legitimate goals to provide accommodation on a needs-basis. For example, there are good policy reasons not to grant tenancies in respect of short term refuge and crisis accommodation: accommodation is needs-based rather than a durable solution that should be offered under alternative forms of agreement. For mid-term stay, the RTA already provides a pathway for declared crisis accommodation providers to terminate a tenancy agreement with four weeks notice (section 36 (1) (k)).
4. if the accommodation is within a residential college affiliated with a university, within a boarding house, or within part of a club.

People who reside in a residential park either reside in a dwelling which they own (such as a manufactured home that they have placed on a site) or they occupy a premises which is owned by the owner of the residential park. In the former case, it is intended that the agreement to occupy a site will be an occupancy agreement. In the latter case, the agreement to occupy the premises will also be an occupancy agreement. This resolves inconsistency and ambiguity about the application of the RTA to these residents. Owners of residential parks and residents may still elect to enter into a residential tenancy by clearly stating that intention (section 6B).

The new definition shifts away from category-based classifications of occupancies to an inquiry about the function and purpose of the agreement. If an agreement

purports to be an occupancy agreement but does not match the function and purpose of an occupancy agreement, it is intended that inconsistency with the standard tenancy terms in the RTA should, in the absence of countervailing reasons, be considered a breach of the landlord's obligations and not a reason in favour of reading an agreement as an occupancy agreement instead (contrary to the analysis in *Wicks v Hurst-Meyers Charity* [2019] ACAT 92).

An agreement to reside in a room within another person's principal place of residence will ordinarily be an occupancy agreement unless the parties have stated that they intend to create a residential tenancy agreement. This is because residential tenancy law should not create an unreasonable burden on a person's right to manage who may stay in their principal place of residence.

An agreement to reside in a residential college associated with, or on the campus of, an educational institution will ordinarily be an occupancy agreement unless the parties have stated that they intend to create a residential tenancy agreement. Some residential colleges are not on the campus of the university, so this definition has been expanded to clarify the status of those residential colleges.

Dormitories and boarding houses are another way for people to reside in the ACT, especially where they have recently relocated and require transitional accommodation, or otherwise require lower-cost accommodation. Despite their ubiquity, there is no clear definition of a boarding house or a dormitory, except not constituting a tenancy. New section 71C(1)(b)(iii) proposes to resolve the issue of ambiguity in this definition by describing the function of a dormitory or boarding house: the exclusive use of a sleeping space in a building with other sleeping spaces, with related access to shared facilities or provision of domestic services. In order to satisfy this definition, the agreement must state that it is an occupancy agreement.

Occupancy agreements are sometimes used to provide emergency accommodation for people in crisis. A tenancy is not desirable because tenancy protections might interfere with requirements to seek long-term housing actively, to move out of the premises when no longer eligible for the services provided by the grantor, or to take part in a grantor's case management program. Given the legitimate and rational policy intent of making emergency housing available, these agreements should not be characterised as residential tenancy agreements if they fulfil this function and the agreement states that it is an occupancy agreement for emergency accommodation for people in crisis. Where a declared crisis accommodation provider wishes to use residential tenancies instead of occupancy agreements, they may do so and utilise the termination provisions section 36 (1) (k).

Housing support programs funded by the Territory often require the grantor to have access to the property more regularly than residential tenancy agreements permit. For example, the grantor might provide accommodation as part of a program to provide welfare or health support services. New section 71C(1)(b)(v) proposes to clarify that an agreement to provide accommodation as part of a housing support program will be an occupancy agreement if it states that it is an occupancy agreement for a housing support program.

Some clubs and other membership entities in the ACT provide accommodation to their members. Tenancy law is poorly suited to this form of accommodation as protections against eviction conflict with the resident's requirement to have ongoing membership of the club or entity in order to be eligible for the accommodation. It also conflicts with the club's ability to manage their accommodation stock for the benefit of all members of the club. If the agreement provides accommodation because of membership in a club or other entity, it will be an occupancy agreement if it states that it is an occupancy agreement.

The flexibility and adaptability of occupancy law makes it an attractive option for providing accommodation in the ACT for specific policy goals. The Minister may, by regulation, prescribe additional agreements that will meet the definition of an occupancy agreement.

Clause 18 Section 71C (4) and note

This is a consequential amendment to clause 18 above.

Clause 19 New sections 71CA and 71CB

This clause states that certain types of agreements are not occupancy agreements. This provides greater clarity about the scope of occupancy agreements and avoids unintended legislative outcomes.

This clause inserts a new requirement for a grantor to ensure that premises have smoke alarms installed. This requirement does not apply where the occupancy agreement is for a site-only residential park occupancy agreement as the occupant owns the dwelling on the site.

For boarding houses and dormitories, it might not be appropriate for a smoke alarm to be installed in every bedroom. Section 71CB(1)(a) states that the grantor must not enter into an occupancy agreement with an occupant in relation to a premises unless smoke alarms are installed for the premises. 'For' in this provision is intended to extend to a smoke alarm that is installed in a hall for the safety of a group of rooms (and not necessarily in each room of the boarding house).

For the avoidance of doubt, the grantor's obligation to install smoke alarms does not apply to an agreement for a site-only residential park occupancy agreement, as it is the resident's responsibility to install smoke alarms for their dwelling.

Clause 20 Section 71E

This clause introduces the mandatory occupancy principles to the RTA.

Section 71E states that an occupancy agreement for a premises is taken to contain the occupancy principles and may contain rules about occupying the premises and additional terms. The occupancy principles are not terms of the occupancy agreement in the way that the standard residential tenancy terms (schedule 1 of the RTA) are under section 8. It is intended that the occupancy principles provide enough flexibility to be adapted to the specific needs of each type of occupancy agreement while still providing a minimum level of protection for occupants. For example, it is an occupancy principle that the grantor may enter the premises at

a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes. What would constitute a reasonable time on reasonable grounds to enter a boarding room may be very different from what would constitute a reasonable time on reasonable grounds to do a welfare check on an occupant in emergency accommodation.

An occupancy rule or additional term in an occupancy agreement is void if it is inconsistent with the occupancy principles, the RTA, or another territory law. Of particular note are section 19 of the *Discrimination Act 1991* and section 100 of the *Utilities Act 2000*.

Section 71EA lists the occupancy principles. Most of the occupancy principles are linked to other sections of the RTA, and explanations for those principles are provided with the descriptions for those sections below.

The grantor must provide premises that are reasonably clean, in a reasonable state of repair, and reasonably secure. This corresponds with clause 54 (1) (b)-(d) of the standard terms (schedule 1) for residential tenancy agreements.

The grantor must ensure that the occupancy agreement is in writing if the agreement is for a term longer than six weeks. Some occupancy agreements only come into existence if the agreement states that it is an occupancy agreement and, as such, these agreements will already be in writing. Where an occupancy agreement is for a term shorter than six weeks and the agreement is not in writing, the grantor may comply with any requirement to provide information by giving the occupant the information, in writing, in any other appropriate way before the agreement begins (section 71EA(2)). Examples of this might be through a leaflet or through a poster in a highly visible place in a common area.

An occupancy rule must be reasonable and proportionate to the outcome sought by the imposition of the rule. This 'reasonable and proportionate' test is adapted from other areas of law including human rights law. It is intended to ensure that the occupancy principle under the RTA is compatible with the HRA. Similarly, penalties or consequences for breaching an occupancy rule must be reasonable and proportionate to the seriousness of the breach of the rule, and must not impose unreasonable hardship on the occupant. The provision uses the term 'penalty or consequences' to reflect breaches of the rules might not result in a financial penalty, but might result in a loss of a privilege or some other restriction to the occupant's access to shared services.

A grantor may enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes. This provision was discussed above.

An occupant must not behave in a way that detracts from the rights of others (including another occupant) to live and work in the premises in a safe environment, free from harassment or intimidation. This provision makes it clear that occupants will have obligations to other occupants within the premises, even though those occupants might not be a party to the same occupancy agreement. Occupants, especially those in emergency accommodation or in housing support programs, may have particular vulnerabilities and a greater need for accommodation that is free

from harassment and intimidation. Where co-tenants under a tenancy agreement will be required to apply to the Tribunal for orders to remove a co-tenant in a situation where the relationship has broken down, occupancy agreements might require grantors to have the flexibility to remove an occupant from a premises, or relocate them within the premises, if they are interfering with the rights of another occupant.

An occupant must vacate the premises at the end of the occupancy agreement. This provision makes it clear that the occupant's obligation to vacate the premises at the end of an occupancy agreement is not effected through issuing notices, as it is with a residential tenancy agreement.

An occupant must, at the end of the occupancy agreement, ensure that the premises are reasonably clean, in a reasonable state of repair (allowing for fair wear and tear), and reasonably secure. It is intended that this is a standard that should be read with reference to the cleanliness, state of repair, and security at the start of the occupancy agreement.

Section 71EA(3) adapts the occupancy principles so that they apply to a site-only agreement (that is, such as in a residential park where there is no agreement for a premises). As the grantor does not have any property rights over the dwelling, the grantor has an additional requirement to provide reasonable notice to enter an occupant's manufactured or mobile home.

New section 71EB introduces a new requirement for a grantor to provide a condition report to the occupant. The grantor must sign the report and give the occupant a reasonable opportunity to check the content of the condition report, but the occupant is not required to sign the condition report. This is to allow additional flexibility in the context of occupancy agreements. The consequence of not providing a condition report is provided in subsection (3): if the grantor does not provide a condition report the state of repair or general condition of the premises is taken to be the same at the end of the occupancy agreement as they were at the start of the agreement, unless there is evidence to the contrary.

Section 71EC relates to the occupancy principle about requiring a security deposit to be paid. This section creates three possible outcomes. If the agreement is for 14 days or fewer, then the grantor must not require the occupant to pay a security deposit. If the agreement is for greater than 14 days, then the amount that may be requested is capped at either the amount payable for the first two weeks of the occupancy if the agreement has a term of less than six months, or the amount payable for the first four weeks of the occupancy if the agreement is for six months or longer. This provision provides an incentive for grantors to create occupancy agreements with longer terms as it enables a larger security deposit. As with bonds under residential tenancy agreements, the section restrains a grantor from requiring or accepting more than one security deposit for an occupancy agreement.

Section 71ED requires a grantor to lodge the security deposit with the Territory. This section requires the Territory to manage the security deposit as if it were a bond under a residential tenancy agreement. This has the effect that an occupant has an increased capacity to dispute a claim against a security deposit by a grantor, as the deposit will be held on trust by the Territory until the dispute is resolved in a process applied from section 35 of the RTA.

Section 71EE permits a grantor to deduct from a security deposit certain costs attributable to breaches of the occupancy agreement. This aligns with section 31(a)-(c) of the RTA.

Section 71EF relates to the occupancy principle about the requirement of a grantor to provide written receipts for payments made under the occupancy agreement. Under the Australian Consumer Law,³ a person must give a consumer a proof of transaction if the person supplies good or services to a consumer and the total price (excluding GST) of the good or services is \$75 or more. Section 71EF is a simplified version of that requirement.

Section 71EG relates to the occupancy principle that restricts the ability of grantors to impose occupancy rules, fees, charges, or penalties. This section should be read consistently with the occupancy principle that an occupancy rule must be reasonable and proportionate to the outcome sought by the imposition of the rule, and the occupancy principle that any penalty or consequence for breaching an occupancy rule must be reasonable and proportionate to the seriousness of the breach of the rule and must not impose unreasonable hardship on the occupant. Section 71EG provides that a grantor will not be permitted to impose occupancy rules, fees, charges, or penalties unless prescribed information is included in the occupancy agreement. This requirement includes prescribed information about fees or charges payable under the agreement for utility costs, including the method for calculating how the fee or charge is calculated. As these rules must be reasonable and proportionate to the outcome sought by the imposition of the rule, it is intended that charges for utility costs relate to the actual cost incurred by the grantor.

Section 71EG(2) restricts the grantor's ability to change the occupancy rules. The grantor must provide at least eight weeks prior written notice about changes to the rules. This provides the occupant reasonable time to relocate if the change to the rules is unacceptable to them.

Section 71EG(2)(b) includes a requirement that a grantor must give reasonable notice about imposing a penalty for breach of an occupancy rule included in the occupancy agreement. It is intended that what is considered reasonable will vary depending upon the nature of the rule and the breach. For a breach which interferes with the safety of another occupant, for example, a very short notice period might be reasonable in the circumstances; a short notice period for the breach of a rule for the convenience of other occupants (such as rostered cleaning requirements, for example) would likely be considered unreasonable.

Section 71EH relates to the occupancy principle about providing the occupant with quiet enjoyment of the premises. As an occupancy agreement is for the use of a premises as a home, an occupant should be entitled to have access to the shared facilities. For hygiene reasons, an occupant should have 24-hour access to a toilet and a bathroom. Rules restricting access to other shared facilities, such as the kitchen, games room, or outdoor areas, might be, in the circumstances, reasonable. For example, a house rule might restrict access to reasonable hours if the noise interferes with the quiet enjoyment of other occupants.

³ *Competition and Consumer Act 2010*, sch 2, s 100.

Section 71EI relates to the occupancy principle which requires grantors to provide information about dispute resolution processes that apply to the occupancy agreement. This section is intended to ensure that occupants are aware of options to have disputes resolved.

Section 71EJ relates to the occupancy principle which restricts the ability of parties to terminate an occupancy agreement. This section ensures that the grounds for termination of an occupancy agreement must be included in the agreement itself, requires a party to provide notice if they seek to exercise their right of termination under the agreement, and restrains a grantor from terminating an occupancy agreement only because the occupant sought to enforce their rights.

Section 71EK empowers the Tribunal to issue a warrant for the eviction of an occupant from a premises if the Tribunal has made an order to vacate the premises and the occupant has failed to comply with the order. This is consistent with the regime for residential tenancy agreements.

Section 71EL provides a right to the grantor to ascertain if the premises subject to an occupancy agreement have been abandoned. The provision only authorises the grantor to enter the premises to confirm whether they have been abandoned. It does not authorise the grantor to take any further steps that are not otherwise authorised by the RTA. In addition, section 71EL(3) provides that the grantor may only enter the premises at a reasonable time. The grantor must not enter the premises on Sunday, on a public holiday, before 8am or after 6pm. This provision is proposed with the intention of minimising inconvenience to the occupant in the event that the premises have not been abandoned. The provision is similar to section 61A of the RTA, except that this provision includes a higher threshold of the occupancy fee not being paid for at least three consecutive periods. It is intended that a grantor who continues to receive money from the occupant cannot form the belief that the premises have been abandoned.

Clause 21 Occupant may deposit bond with Territory Section 71GA

This clause removes section 71GA as security deposits must now be deposited with the Territory by the grantor.

Clause 22 New part 5B

This clause inserts a new part into the RTA to provide additional provisions for occupancy agreements in residential parks.

Section 71H provides the definitions that operate within part 5B of the RTA. Where residential tenancy agreements and occupancy agreements attach to the premises, a person residing in a residential park might own the dwelling but not the site on which the dwelling is erected. A person in a residential park might also have a residential tenancy agreement if the operator of the park owns the dwelling. To avoid the problems that arise from these variations, the RTA attaches requirements to the site agreement such that a resident in a residential park enjoys similar rights to an occupant regarding their access to shared facilities.

Section 71I states that a tenant or occupant under a residential park agreement must have access at reasonable hours to shared park facilities. Restriction on access might be reasonable if the use at certain hours interferes with the quiet enjoyment of other users of the residential park.

Section 71J defines assignee and assignor for the purposes of division 5B.3 so that there is a consistent definition for the following provisions. Division 5B.3 facilitates the assignment of interests in a residential park agreement. This might be done, for example, so that an owner of a manufactured home might sublet a room in their home to another person. An owner of a dwelling might also want to have their partner live with them on a permanent basis. In these cases, the assignor is the original resident and the assignee is the original resident and the new resident together.

Section 71K provides that this assignment may only occur with the consent of the operator of the park. The assignor must provide specified information to the owner of the park when seeking their consent.

Section 71L provides how the operator of the park may give or refuse consent to the request. If the operator does not take any action within seven days of the request, they are taken to have consented.

Section 71M ensures that the residential park agreement survives the assignment of interests. It prevents a new deposit from being required, and ensures that the assignor is still liable for liabilities incurred prior to the assignment.

Division 5B.4 of the RTA facilitates the sale of manufactured homes and mobile homes that are owned by residents of residential parks.

Section 71N details the process that must be followed by the owner of the premises and the operator of the park in relation to a sale. The operator of the park is restrained from interfering with the sale of the premises, and the section states some grounds upon which an operator might be taken to have interfered with the sale. Subsection (5) states that the operator will not be taken to have interfered with the sale only because they imposed reasonable conditions relating to potential buyers entering or remaining in the park that are reasonable in the circumstances (for example, potential buyers arriving very late at night and disrupting other users of the park). It also states that the operator will not be taken to have interfered with the sale only because they reasonably refused to consent to a proposed assignment of the person's interest in the site agreement. This situation might occur if the operator of the park reasonably believes that the premises presents a risk to other users of the park and has been initiating processes to effect a removal of the premises.

Section 71O operates where there has been a sale of a premises to another person. If the buyer of the premises has no right to keep the premises on the site, they must remove the premises. If the buyer requests it, the operator of the park must not unreasonably refuse to enter into a site agreement with the buyer. This section strikes a balance between the rights of a park operator and a buyer of a premises.

Clause 23 *Meaning of tenancy dispute*
Section 72 (1) (a)

This clause clarifies that disputes between co-tenants are a form of tenancy dispute.

**Clause 24 ACAT to have regard to occupancy principles
Section 74**

This clause removes section 74 as a result of the occupancy principles being mandatory. It inserts a new provision, section 74A that clarifies that an occupant is not required to exhaust their other options under the RTA prior to making a complaint under the *Human Rights Commission Act 2005*.

**Clause 25 Jurisdiction of ACAT under this Act etc
Section 76 (1) (c), except note**

This clause clarifies the jurisdiction of the Tribunal as a result of making the occupancy principles mandatory.

**Clause 26 Extended jurisdiction of ACAT with agreement of parties
Section 78 (1) (a) (iii), except note**

This clause clarifies the jurisdiction of the Tribunal as a result of making the occupancy principles mandatory.

**Clause 27 Orders by ACAT
Section 83 (j)**

This clause provides additional powers to the Tribunal where a premises are abandoned and the premises are a manufactured home or a mobile home in a residential park.

Part 1.2 (below) introduces changes to the *Uncollected Goods Act 1996* to streamline the provisions applicable where a mobile home or manufactured home is abandoned. Section 83(j) is amended to prevent a situation where an operator of a park is required to sell premises that are not fit for human habitation. This provision allows the Tribunal to order the disposal of the premises through, for example, destruction.

Clause 28 Section 127

This clause updates section 127 to align with the terminology used in part 3A.

Clause 29 Section 128

This clause updates section 128 to align with the terminology used in part 3A.

**Clause 30 Standard residential tenancy terms
Schedule 1, new clause 24 (aa)**

This clause updates the standard terms to align with part 3A.

Clause 31 Schedule 1, new clauses 72A and 72B

This clause updates the standard terms to align with part 3A.

Clause 32 Dictionary, note 2

This clause inserts 'human rights commission' as a defined term.

Clause 33 Dictionary, new definitions

This clause makes consequential amendments to the dictionary arising from the above amendments.

Clause 34 Dictionary, definition of *mobile home*

This clause inserts 'mobile home' as a defined term consequential to the above amendments.

Clause 35 Dictionary, definition of *occupancy principles*

This clause inserts 'occupancy principles' as a defined term consequential to the above amendments.

Clause 36 Dictionary, new definitions

This clause makes consequential amendments to the dictionary arising from the above amendments.

The definition of 'residential park' is intended to include caravan parks, camping grounds, and manufactured home villages, but is not intended to include a backyard in which a caravan or manufactured home is erected.

Clause 37 Section 1B

This clause updates the Residential Tenancies Regulation 1998 to extend the requirements about smoke alarms to premises subject to an occupancy agreement.

Clause [1.1] New section 41A

This clause provides a new right to complain to the Human Rights Commission (the Commission) about an occupancy dispute.

An occupancy dispute is defined by section 73 of the RTA as a dispute that is between the parties to an occupancy agreement and is about, or relates to, the agreement.

Clause 6 (below) states that an occupant under the occupancy agreement may make a complaint to the Commission, and clause 8 (below) states that complaints about occupancy disputes can only be made about grantors. The effect of the new section 41A is an occupant may make complaints arising from occupancy agreements about the grantor.

Occupants continue to have existing rights to make complaints to the Commission under other provisions of the HRCA, but those rights depend upon the complaint matching the description of a complaint in section 42 of the HRCA. This new

provision means that occupants, as of right, will be able to make complaints to the Commission.

Clause [1.2] What complaints may be made under this Act?
New section 42 (1) (g)

This clause is consequential upon clause 4 (above) and inserts occupancy disputes into the list of complaints that can be made to the Commissioner.

Clause [1.3] Who may make a complaint under this Act?
New section 43 (1) (h)

This clause is consequential upon clause 4 (above) and states that an occupant may make a complaint to the Commission about an occupancy dispute.

Clause [1.4] Commission's obligation to be prompt and efficient
New section 45 (2) (ea)

This clause inserts a provision specific to occupancy disputes into the section requiring the Commission to be prompt and efficient. Section 45 of the HRCA provides that the Commission has an obligation to be prompt and efficient in dealing with complaints. This includes:

- Deciding which commissioner will consider each complaint as soon as possible after the complaint being received;
- Writing to tell the person who made the complaint and the person complained about that the commission is going to consider the complaint;
- If the complaint has been made by someone other than a person aggrieved by the action complained about, tell the person who made the complaint that the commission is going to consider it;
- Write to the complainant every six weeks about the progress of the complaint; and
- Write to the person who made the complaint and the person complained about within four weeks of the complaint being closed by the commission to explain why the complaint was closed.

When dealing with an occupancy dispute and the Commission decides not to refer the complaint for conciliation, the Commission must inform to complainant of the decision in writing and include an occupancy dispute referral statement.

New section 88B of the HRCA provides guidance about the content of occupancy dispute referral statements. This is discussed in relation to Clause 12 of the Bill.

Clause [1.5] New division 4.2C

This clause inserts new division 4.2C, consisting of new sections 53 – 53Y, into the HRCA. Division 4.2C provides access to an enforceable conciliation process which can be used to manage complaints arising from occupancy disputes. This conciliation process is similar to the Commission's current processes for managing discrimination complaints under division 4.2A of the HRCA and for managing

complaints by certain older people about retirement villages under division 4.2B of the HRCA.

New section 53P defines the term 'person complained about' and 'occupancy dispute complaint' for the purpose of division 4.2C. For the purposes of division 4.2C, the 'person complained about' means the grantor under an occupancy agreement. The effect of this, in concert with new sections 41A and 43(1)(h) is that grantors are unable to bring occupancy dispute complaints against occupants.

New section 53Q makes it clear that division 4.2C applies to occupancy dispute complaints.

Where an occupancy dispute complaint is made to the Commission and the Commission decides not to refer the complaint for a conciliation process under division 4.2C, they must provide a written statement to the complainant reflecting this advice and advising the complainant that they can seek to have the Commission refer the complaint to the Tribunal within 60 days, or, after the 60 day period has elapsed, they may individually apply to the Tribunal for the complaint to be heard (an occupancy dispute referral statement). If these circumstances apply, the Commission must include an occupancy dispute referral statement in its final report about the complaint. New section 53R provides that where the above circumstances apply, and the complainant requires the Commission to refer to the complaint to the Tribunal within 60 days of receiving the statement, the Commission must refer the complaint to the Tribunal and advise the parties to the matter, in writing, that the referral has been made. If the Commission refers a complaint to the Tribunal under s53R, it must close the complaint in accordance with section 78 of the HRCA.

If a complainant fails to have the complaint referred to the Tribunal within 60 days of receiving a retirement village referral statement, new section 53S provides that they may make an application to the Tribunal to have the complaint heard. The Tribunal may grant this application where it is satisfied upon reasonable grounds that exceptional circumstances prevented the complainant from meeting the timeframes for referrals to the Tribunal prescribed in section 53R. If the Tribunal grants an application under section 53S, the complaint is considered to have been referred to the Tribunal.

New sections 53T – 53X outline procedural processes to be followed where a complaint is referred to the Tribunal. Section 53T provides that the Commission may apply to the Tribunal to be joined to the complaint referred. If this application is granted, the parties to the complaint will be the complainant, the person complained about, and the Commission. Section 53U provides that the Tribunal has, and may exercise, the same jurisdiction as provided for in the RTA in proceedings where relief is sought in relation to an occupancy agreement between a grantor and an occupant.

Section 53V provides guidance about the documents which the Commission can provide to the Tribunal when it refers a complaint to the Tribunal under division 4.2C. Certain documents, such as communications providing evidence of settlement negotiations, will be inadmissible before the Tribunal in accordance with the *Evidence Act 2011*. Section 131(2) of the *Evidence Act 2011* provides further guidance about circumstances which would allow communications about settlement negotiations to be admitted before the Tribunal. Consideration of this provision's

impact on the right to privacy and reputation under the *Human Rights Act 2004* has been addressed above in the human rights analysis of this explanatory statement.

If a complaint is referred to the Tribunal and it is satisfied that the person complained about has engaged in an unlawful act, new section 53W provides that the Tribunal may make one or more orders in accordance with section 83 of the RTA. In making these orders, new section 53X provides that division 4.2C does additionally restrict the amount of money that the Tribunal may order be paid as a result of the order being made. The existing limitations under the RTA apply.

New section 53Y provides that complainants are not required to make an attempt to resolve a complaint prior to making an occupancy dispute complaint under the HRCA. This recognises that the conciliation process offered under division 4.2C is an optional process which can be utilised by occupants at a time that is right for them.

Clause [1.6] Conciliated agreements Section 62 (3) (b)

This clause provides that if an occupancy dispute complaint is resolved by conciliation processes conducted by the Commission, the agreement reached is deemed enforceable as if it were an order of the Tribunal. This clause places an obligation on the Commission to provide a copy of the written agreement formed through the conciliation process (conciliation agreement) to the parties to the complaint and the Tribunal. Complainants may seek an order in the ACT Magistrates Court to enforce an order of the Tribunal. Section 71 of the *ACT Civil and Administrative Tribunal Act 2008* provides guidance about the process to be followed to enforce orders which have been made by the Tribunal.

Clause [1.7] When complaints can be closed Section 78 (2) (d)

This clause provides that the Commission must close occupancy dispute complaints where the complaints have been referred to the Tribunal.

Clause [1.8] New section 82B

This clause provides guidance about the contents of final reports made by the Commission relating to occupancy dispute complaints. All reports must include an occupancy dispute referral statement, unless the complaint has been resolved by a conciliation process under division 4.2C. These requirements are in addition to the other requirements placed upon the Commission for a final report which are detailed within section 81 of the HRCA.

Clause [1.9] New section 88B

This clause inserts a definition of ‘occupancy dispute referral statement’ into part 4 of the HRCA. Occupancy dispute referral statements must be provided to complainants and included in final reports which close complaints within the Commission where the Commission had decided not to refer the complaint for conciliation under division 4.2C.

Occupancy dispute referral statements must include:

- a statement to the effect that the Commission has closed the complaint;
- a statement advising that the complainant may ask the Commission to refer the complaint to the Tribunal within 60 days of receiving this advice; and
- a statement advising that, if the 60 day period elapses, the complainant may apply to the Tribunal under section 53S for the complaint to be heard.

Clause [1.10] Dictionary, new definitions

This clause inserts relevant definitions into the dictionary. The terms defined are:

- occupancy agreement;
- occupancy dispute;
- occupancy dispute complaint; and
- occupancy dispute referral statement.

These definitions cross reference the relevant sections the RTA to ensure coherence between the two Acts.

Clause [1.11] Dictionary, definition of person complained about

This clause amends the definition of 'person complained about' in the dictionary and is consequential upon the amendments in clause 8 (above).

Clause [1.12] Section 22 (a)

This clause is consequential upon clause [1.15] below.

Clause [1.13] Section 23 (a)

This clause is consequential upon clause [1.15] below.

Clause [1.14] Section 24 (a)

This clause is consequential upon clause [1.15] below.

Clause [1.15] New section 24A

This clause inserts a new section into the *Uncollected Goods Act 1996* (the UGA) specific to manufactured homes and mobile homes abandoned in residential parks. The UGA categorises uncollected goods according to their value and prescribes the method by which the person in possession of the uncollected good may dispose of it.

This framework creates challenges for operators of residential parks who are in possession of abandoned dwellings. The timeframes contained within the UGA are in addition to timeframes in the RTA for declaring a dwelling to have been abandoned, resulting in significant delays in being able to regain use of the site upon which the dwelling is erected. A strict reading of the UGA entails that a park owner might be required to sell, as a home, a dwelling that is not fit for human habitation.

This clause and the preceding three clauses exempt mobile homes and manufactured homes from the ordinary operation of the UGA. A park operator is required to obtain an order from the Tribunal declaring that the premises has been abandoned. The Tribunal may make an order about how the premises is to be disposed but, if it does not, the operator of the park may dispose of the manufactured home or mobile home by public auction after 14 days from the date of the Tribunal order.

Section 25 of the UGA details the process that must be followed for a public auction of uncollected goods. Section 30 of the UGA states that the possessor may retain various costs from the proceeds of sale, but that any balance remaining must be paid to the Territory. To deposit the proceeds of the sale of uncollected goods, contact Access Canberra (as the Office for Fair Trading) on 13 22 81.