ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

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ACT Legislative Assembly
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CC: Mr Andrew Snedden, Committee Secretary
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12 March 2020

Dear Mrs Jones

Residential Tenancies Amendment Bill 2020

We write with a view to contributing to the Committee's examination of the Residential Tenancies Amendment Bill 2020, as introduced in the ACT Legislative Assembly on 13 February 2020. As you know, the bill will introduce a new regulatory framework for dealing with occupancy agreements in the ACT.

The Commission welcomes the bill in so far as it seeks to 'improve protections for occupants by introducing new occupancy principles and by making the occupancy principles a mandatory part of every occupancy agreement'.[1] We support the overarching objectives of these reforms, which are aimed at ensuring that 'grantors will be provided with clear guidance regarding their obligations towards occupants, and occupants will be able to seek the enforcement of a more robust set of rights'.[2]

However, we have some concerns with the bill as introduced. As the Committee will be aware, the bill was first tabled as an exposure draft on 28 November 2019 and went through a period of public consultation prior to being introduced in the Legislative Assembly in its current form. The bill as introduced contains several changes from the exposure draft version. A key difference is that the bill now includes specific provisions, which will exempt certain education providers from being subject to the full requirements of the scheme.

The Commission's interest in contributing to the Committee's examination of the bill relates specifically to these select provisions which, in our view, raise potential issues of concern with the *Human Rights Act 2004* (HR Act). We are also concerned that the human rights implications of these new provisions have not been identified or addressed in the explanatory materials accompanying the bill.

In this regard, we hope to assist the Committee by setting out the methodology and the type of evidence that we consider would be relevant to the Committee's assessment of whether the proposed exemptions impose limitations on rights that satisfy the criteria set out in s 28 of the HR Act. We acknowledge that the Committee is already ably assisted by its own advisers on the assessment of these types of matters. However, in this instance we have taken the step of writing to the Committee to share our views, particularly in light

[1] Explanatory Statement, p 1.

[2] Introduction speech by the Attorney-General, Gordon Ramsay MLA, 13 February 2020, *Hansard*, p 212, available at: http://www.hansard.act.gov.au/hansard/2020/pdfs/200213.pdf.

of your recent comments about improving opportunities for alternative viewpoints to be put to the Committee in its assessment of whether a bill is compatible with human rights.[3] We trust that our contribution will be accepted in that spirit.

Overview of key exemptions applicable to certain education providers

The definition of an occupational agreement under the bill encompasses 'an agreement to occupy premises in a residential facility associated with, or on the campus of, or provided under an arrangement with, an education provider'.[4] The Explanatory Statement observes that:

> 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. Some residential colleges are operated by third parties, so this definition is also intended, for example, to capture those arrangements where an education provider outsources the management of accommodation.[5]

The Commission welcomes this definition because, as acknowledged by the Attorney-General in his introduction speech, 'the student accommodation sector is … a significant user of occupancy agreements in the ACT'.[6]

However, we are concerned that the bill as introduced includes exemptions for certain education providers in key areas that could reduce the protections afforded to occupants in the student accommodation sector. Specifically, the bill contains provisions that will disapply or suspend some of the central safeguards of the proposed scheme insofar as they apply to occupants of residential student accommodation at the Australian National University (ANU) and University of Canberra (UC):

- **Clause 27, new subsection 71EA(2)** – The bill introduces in new s 71EA(1) a series of minimum protections in the form of occupancy principles. These include s 71EA(1)(g), which provides that that any penalty or consequence for breaching an occupancy rule must be reasonable and proportionate to the seriousness of the breach and must not impose unreasonable hardship on the occupant. New s 71EA(2), however, disapplies this minimum guarantee to penalties or consequences under a statute, rule or policy about student discipline made under the *Australian National University Act 1991* (Cwth) or the *University of Canberra Act 1989* (ACT) (ie 'a university disciplinary requirement').

- **Clause 27**, **new subsection 71EK(4)(a)** – The bill governs termination of occupancy agreements by means of new s 71EK. Subsection 71EK(2) allows a party to terminate an occupancy agreement only in circumstances that are reasonable having regard to the nature of the occupancy. Subsection 71EK(4)(a), however, disapplies this protection insofar as a university disciplinary requirement permits or requires the termination of the agreement.

- **Clause 27**, **new subsection 71EK(4)(b)** – Subsection 71EK(4)(b) clarifies that termination as permitted or required by a university disciplinary requirement forms an additional, discrete ground for termination of an occupancy agreement under s 71EK(3).

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[3] Giula Jones MLA, ACT Legislative Assembly, Standing Committee on Justice and Community Safety, *Public Hearings on the Human Rights (Workers Rights) Amendments Bill 2019: Transcript of Evidence* (6 February 2020) p x, available at: http://www.hansard.act.gov.au/hansard/2017/comms/justice24.pdf.

[4] See, new s 71C(1)(b)(ii). An 'education provider' is defined by reference to s 9A of the *Education Act 2004*: see new dictionary definition at Item 42.

[5] Explanatory Statement, p 15.

[6] Introduction speech by the Attorney-General, Gordon Ramsay MLA, 13 February 2020, *Hansard*, p 211.

Human rights issues

We note that the human rights assessment contained in the Explanatory Statement for the bill is silent about the human rights implications of these provisions.

In our view, the proposed exemptions are likely to limit the right to equality and non-discrimination (s 8, HR Act) and the right to privacy and home (s 12, HR Act). Preserving scope for the ANU and UC to prescribe and administer penalties, consequences or terminations of occupancy agreements without regard to proportionality may also disproportionately impact international students, including those whose visa status relies on continuity of accommodation.

We note that the exemptions are provided within the context of a protective legislative scheme, which is intended to ensure that there are essential basic minimum protections provided to all occupants. The effect of the exemptions is that occupants of residential student accommodation in the ACT may have fewer protections than occupants in other accommodation sectors in the ACT. The Commission recognises that it is permissible to enact legislation relating to particular types of housing options. However, singling out a particular group of occupants in a specific housing sector and expressly subjecting them to a lesser range of safeguards may give rise to human rights concerns.

The right to equality and non-discrimination in s 8 of the HR Act guarantees equal protection under the law. This requires that legislative distinctions not discriminate between people on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'. We consider that being a person who is an occupant of residential student accommodation would constitute an 'other status' within the meaning of this right.[7] As noted above, these provisions may also engage the right to equality and non-discrimination on the basis of nationality, if it disproportionately impacts international students.

These provisions are also likely to engage and limit the right to privacy and home in s 12 of the HR Act. The meaning of 'home' is to be interpreted broadly in human rights law.[8] The term 'home' is not limited to 'domestic notions of title, legal and equitable rights, and interests'.[9] Instead, the expression 'home' is an autonomous concept in human rights law that depends on the existence of sufficient and continuing links between a person and property used as a residence.[10]

Suggested points for consideration by the Committee

In accordance with s 28 of the HR Act, limitations on rights must pursue a legitimate objective and there must be a rational and proportionate connection between the means employed and the objective sought to be realised. In essence, therefore, the inquiry into any restrictions on rights is three-fold:

(i) Whether the measure is aimed at achieving a legitimate objective;

(ii) Whether there is a rational connection between the measure and the objective; and

(iii) Whether the measure is proportionate to that objective.

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[7] For support of the proposition that 'other status' should be interpreted broadly for the purposes of human rights law, see, for example, *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, where the majority of the UK Supreme Court took a wide approach to the question of 'other status', finding that the status did not have to exist independently of the treatment that was the subject of the complaint.

[8] See *Director of Housing v Sudi* [2010] VCAT 328 at [32]-[34].

[9] *Kay v Lambeth London Borough Council* [2006] UKHL 10, [27] (Lord Stein). See also *Sudi*, *ibid*, at [32].

[10] *Marckx v Belgium* (1979) 2 EHRR 330; *Gillow v United Kingdom* (1986) 11 EHRR 335; *Buckley v United Kingdom* (1996) 23 EHRR 101.

These three criteria are cumulative. In other words, in order to find that a particular limitation is compatible with human rights, all three limbs of the test must be satisfied. It should also be noted that although s 28 of the HR Act outlines a more detailed test based on the nature of the right, importance of the purpose of the limitation etc., this construction, comprising the three limbs, manifests its essential character.

The question of compatibility in this instance will invariably depend on the extent to which the different treatment of occupants of residential student accommodation proposed in the bill is justifiable. This in turn requires the Committee to have sufficient evidence before it to assess whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim are based on reasonable and objective criteria and are not disproportionate in its adverse impact. We consider that these are fundamentally qualitative judgements that the Committee is well equipped to make - and should make – in its own right.

While legal advice will usually be conclusive in circumstances where a bill gives rise to *technical* issues of non-compliance with the HR Act, such issues do not arise here. Therefore, legal advice in this instance would only be necessary for the accurate identification of the relevant rights engaged, and to assist the Committee with the correct application of the relevant legal tests (as required by s 28 of the HR Act) against which the evidence must be assessed. Such advice is important to enable the Committee to identify and focus on the discrete questions that require deliberation and decision. However, legal advice on its own cannot provide any final answers about human rights compatibility in these circumstances. That role, in our view, must be properly retained by the Committee.

(i) Legitimate objective

A legitimate objective is one that is necessary and addresses an area of public or social concern that is pressing and substantial enough to warrant limiting the right. The existence of a pressing and substantial concern goes beyond preventing outcomes that are simply undesirable or inconvenient. For example, mere administrative convenience is unlikely to be considered a sufficiently pressing and substantial concern for limiting rights.

As noted above, the bill will exempt certain education providers from having to comply with the minimum protections guaranteed to occupants under the scheme if a particular penalty, consequence, or termination of an occupancy agreement arises under a university disciplinary requirement. A university disciplinary requirement is defined in new s 71EA(5) to mean a statute, rule, or policy about student discipline made under, or authorised by, the *Australian National University Act 1991* (Cwth) or the *University of Canberra Act 1989*.

The Explanatory Statement states briefly that the purpose of the exemption is to avoid potential inconsistencies between the two statutory regimes where a penalty or consequence or termination of an occupancy agreement arises from the university statutes, but could be prevented by the *Residential Tenancies Act 1997*.[11]

The Committee may wish to consider if sufficient evidence has been provided to demonstrate that the purpose of the exemptions is directed at a pressing and substantial concern.

(ii) Rational connection

The key issue here is whether the measures in question are likely to be effective in achieving the objective being sought. It is not sufficient to put forward a legitimate objective if the measure limiting the right will not make a real difference in achieving that aim. In other words, the objective might be legitimate but unless the

[11] Explanatory Statement, pp 19, 22.

proposed measure is rationally connected to that objective, the limitation of the right is likely to be impermissible.

As noted above, the bill provides exemptions only for the ANU and UC. In view of its purpose of avoiding inconsistencies between distinct statutory regimes, it is unclear why similar exemptions have not been extended to other universities, such as the Australian Catholic University (ACU), which would appear to also operate managed student housing in Canberra and have relevant university disciplinary requirements authorised under statute.[12] In the absence of information justifying the selective application of these provisions, it appears unclear whether they are rationally connected to preventing statutory inconsistencies.

The Committee may wish to consider whether sufficient evidence has been provided to show that these measures are based on reasonable and objective criteria, which are rationally connected to their stated objective of avoiding inconsistencies between statutory regimes.

(iii) Proportionality

Proportionality requires that even if the objective of the limitation is of sufficient importance and the measures in question are rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups. The justification for such limitations must also be accompanied by a reasoned (and evidence-supported) explanation of why a less restrictive alternative would not be available.

On the information available, we are concerned these exemptions may appear to presuppose that university disciplinary processes and rules, as in force from time to time, contain adequate safeguards to guarantee their proportionality with rights under the HR Act. In the absence of such a guarantee, the effect of the exemptions would be to expose occupants of residential student accommodation at particular universities in the ACT to a lesser standard of protection compared to that afforded to other occupants covered by the scheme. It is also not apparent how enshrining an additional ground for termination, where required or allowed under an ANU or UC disciplinary requirement, is the least restrictive approach given the bill already enables a broad range of grounds for termination to be contemplated in an occupancy agreement.

In assessing whether the measures are proportionate, the Committee may wish to consider whether it is satisfied that:

- **these measures are unlikely to impact disproportionately on particular groups or individuals; and**
- **that sufficient safeguards have been provided to ensure that affected students will not be unfairly disadvantaged.**

Insufficient evidence to assess compatibility

We consider that the explanatory materials accompanying the bill have failed to include the type of information and evidence that would be necessary for the Committee to undertake an assessment of the human rights compatibility of these provisions. Moreover, on various occasions, the explanatory statement makes assertions or statements of fact that are not demonstrated by reference to supporting evidence.

We consider that the government must show that there are objective and reasonable grounds for exempting particular education providers from having to fully comply with the protections afforded by the scheme and that it is a rational and proportionate measure in pursuit of a legitimate objective. The exemptions are based on the claim that they are necessary to avoid potential inconsistencies where a penalty, consequence or the

[12] The authorising statute for the ACU is the *Australian Catholic University (Victoria) Act 1991* (Vic).

termination of the occupancy agreement arises from the university statutes, but could be prevented by these changes. Assessment of compatibility involves an assessment of whether the asserted factual basis for the differential treatment is supported by evidence, whether the measures in the bill are reasonably tailored to addressing those distinctive features of the sector in question, and whether the measures appear overall to be a proportionate measure.

Accordingly, to assist the Committee with its assessment, it may be helpful for the Committee's response to seek further information from the bill's proponent as to:

- **The bill's rationale for selectively exempting on a blanket basis the disciplinary statutes, rules and procedures of the ANU and UC from the operation of section 71EA(1)(g) and section 71EK(2), including:**
  - **Whether this approach is likely to have a disproportionate impact on international students; and**
  - **Whether any less restrictive approaches were considered, and if they were, why they were rejected;**
- **The existence of commensurate safeguards within existing ANU and UC disciplinary statutes, rules and procedures so as to ensure the proportionate application of penalties or consequences for breaching occupancy rules and regard to undue hardship when terminating an agreement; and**
- **The extent to which university disciplinary requirements are subject to effective oversight as to their consistency with human rights.**

Other issues

We note that the description on page 26 of the Explanatory Statement for new s 41A needs to be updated, as it incorrectly points to the definition in s 73 of the *Residential Tenancies Act 1997*, instead of the new definition to be inserted into the *Human Rights Commission Act 2005* (see Item 1.10].

We will be happy to provide further information about these matters, should that be of assistance to the Committee.

Yours sincerely

Dr Helen Watchirs OAM
President and Human Rights Commissioner