ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Legislation, Policy and Programs
Justice and Community Safety Directorate
Via email to civilconsultation@act.gov.au

2 September 2022

Dear LPP team,

Public Exposure Draft of the Residential Tenancies Legislation Amendment Bill 2022

Thank you for the invitation to provide feedback on the Public Exposure Draft of *the Residential Tenancies Legislation Amendment Bill 2022* (**Draft Bill**).

Summary

While the ACT Human Rights Commission welcomes aspects of the Draft Bill, we cannot support it in its current form. The proposed termination provisions for social housing, community housing and supported accommodation tenancies[1] (**proposed termination provisions**) give rise to serious issues of incompatibility with the *Human Rights Act 2004* (**HR Act**). The Commission has a particular interest in ensuring that the obligations and powers afforded to lessors of such tenancies are compatible with rights to equality, family and children, privacy and fair trial, and that policies and procedures made under this new regime do not preclude the ability of public authorities to discharge their obligations to give proper consideration to these rights as required by s 40B(1) of the HR Act. We do not think that the Draft Bill strikes the appropriate balance required in this respect.

The Commission does welcome the introduction of minimum housing standards and the removal of private lessors' ability to evict their tenants without cause. These amendments strengthen the enjoyment of the rights of private tenants to adequate and secure housing and are therefore an important step for that group of tenants towards the realisation of the rights contained within Article 11 of the *International Covenant on Economic, Social and Cultural Rights*.

While the Draft Bill therefore promotes the rights of private tenants, paradoxically it reduces security of housing for those tenants in the ACT community with the most acute experiences of disadvantage. Tenants and residents whose human rights will be impacted by the Draft Bill include those with disabilities, older people, single parents, children and young people at risk, people escaping family or personal violence, tenants with backgrounds of trauma including refugees, and those reliant on social security payments. The groups most disadvantaged by the proposed termination provisions are those tenants least likely to be able to secure alternative accommodation and where eviction from home is therefore most likely to lead to homelessness.

We appreciate that supplementary grounds for termination are necessary to accommodate legitimate purposes for ending a tenancy that are not presently reflected in the RT Act. However, any new grounds must be narrowly circumscribed to their intended purpose so as to guard against misuse. The Draft Bill does

[1] We have adopted the definitions used in the Draft Bill. Other commonly used terms for these forms of housing are "public housing, community housing and affordable housing".

not contain such safeguards, but takes a blanket approach and prioritises efficiencies over the human rights of individual tenants whose rights are affected.

Our primary concern with the proposed termination provisions is that they confer broad and non-reviewable discretions on public, community and affordable housing lessors. This sits in direct contrast to section 28 of the HRA which states: "*Human rights may be subject only to reasonable limits set by laws"* [emphasis added]. The Draft Bill broadens the discretions provided to certain types of housing providers without the ability for those decisions to be reviewed and with limited powers of oversight given to the *Act Civil and Administrative Tribunal* (**the Tribunal**).

Any introduction of broad discretions conferring power to limit protected human rights must include a clear legislated framework for guiding such discretion and oversight mechanisms. The Draft Bill fails to incorporate our earlier recommendations for a proportionality test of general application across all grounds of termination, which would significantly ameliorate our concerns.

The Explanatory Statement attempts to justify the limitations on human rights by framing the new termination provisions as "*special measures, designed to protect the rights of individuals and reduce discrimination and inequality*".[2] We disagree with this framing. Although providing "*targeted accommodation assistance to eligible vulnerable community members*" is certainly a legitimate purpose and there may be a rational connection between the proposed provisions and that purpose, it is our view that the broad discretion to terminate tenancies without corresponding rights to be heard and to review decisions is disproportionate given the seriousness of the potential consequences for the tenant. Human rights compatibility requires consideration of whether or not there are less restrictive ways to achieve the same aim, whether there are effective safeguards and oversight to allow for consideration of individual circumstances (including review rights) and whether the measures provide sufficient flexibility to treat different cases differently. The proposed legislation does not address these considerations, but rather provides the lessor with disproportionate control without the required review or oversight safeguards.[3]

We also have concerns regarding the introduction of proposed section 51A which does not contain a requirement to issue either a notice to remedy or a termination notice before a lessor may bring action in the Tribunal. We are concerned about the disproportionate impact we see this clause having on social housing tenants, particularly those living with certain forms of disability. We articulate our concerns in this regard below.

Recommendation for an express proportionality test

Consistency with the HR Act will in our view turn on the Tribunal retaining a discretion to decline to grant a termination and possession order even when the grounds for termination have been established by the lessor.

We therefore repeat our recommendation in earlier consultation that a proportionality test of general application across all grounds of termination, akin to that introduced by the Victorian Parliament in 2018, merits consideration and adoption. The *Residential Tenancies Act 1997* (Vic) authorises the Victorian Civil and Administrative Tribunal to make a possession order only where satisfied, among other things, that it is reasonable and proportionate to do so in the circumstances of the particular application.[4] The intent of these provisions, introduced to accompany the removal of no cause terminations in Victoria, is to ensure

[2] See for example the language at page 14 of the Explanatory Statement.
[3] We note that there would be the possibility of judicial review of the relevant decisions of the housing commissioner, but such review requires application to the Supreme Court which in our view is a largely inaccessible remedy.
[4] *Residential Tenancies Act 1997* (Vic), s 330(1)(f).

that tenants are not evicted for trivial or easily remediable reasons.[5] Such assessment would provide a vital safeguard against disproportionate forced eviction.

We consider that the adoption of a similar clause would ameliorate many of our expressed concerns below.

General comment about proposal to introduce different types of tenancy agreements

The Draft Bill proposes a departure from the longstanding status quo whereby all tenancies include the same clauses no matter if the tenancy is with a private or social housing lessor. The Draft Bill proposes introducing a range of diverse "no breach" termination grounds, depending on the nature of the tenancy concerned. The proposal is that there will be six different types of tenancy agreements, being:

- private tenancies in general;
- private tenancies where the lessors may be posted away from or back to the ACT;[6]
- community housing provider tenancies including those sub-leased from the housing commissioner;
- social housing tenancies defined as being where the housing commissioner is the lessor;
- supported accommodation tenancies (including a very wide range of social, community and affordable housing tenancies); and
- temporary housing assistance tenancies where the housing commissioner is the lessor.

The Commission has long held concerns about whether the RT Act pays sufficient attention to the different obligations that apply to private and public authority lessors and whether it is appropriate for the RT Act to continue to treat public authority lessors in the same way as other lessors. However, the crux of our concern was for the RT Act to recognise that public authority lessors must be held to a higher standard of accountability commensurate with their obligations under the HR Act. In other words, it has been our concern to ensure there is adequate oversight of the obligation of public authorities to consider the human rights of tenants before making decisions, including a decision to terminate a tenancy. Additionally, in our view, positive discrimination between the rights of private and social housing tenants ought to be crafted in such a way as to make it clear that the purpose falls within the definition of section 27 of the *Discrimination Act 1991* as a measure intended to achieve equality.

Section 8(2) of the HR Act recognises that everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind and section 8(3) of the HR Act recognises that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. The Draft Bill now proposes to introduce a form of discrimination that sits uncomfortably with these protections. We note that the *Discrimination Act 1991* recognises "accommodation status" as a protected attribute, including "a tenant in receipt of housing assistance".[7]

"Ending" of tenancies without a Tribunal termination and possession order

The proposed termination clauses appear in proposed Schedule 2 under section 42 of the Draft Bill. They propose new "grounds" upon which a lessor can rely in section 47 of the RT Act to terminate a tenancy in circumstances where there has been no breach of the tenancy agreement by the tenant.

The proposed termination clauses differ from existing termination provisions in the RT Act which currently outline an authorised ground for termination and then empower the lessor to serve a Notice to Vacate on

[5] Victorian Parliament, *Parliamentary Debates,* Legislative Assembly, 9 August 2018, 2736.
[6] Draft Bill, s 42: Schedule 2, clause 2.3 "Posting termination clause"
[7] *Discrimination Act 1991*, s 7(1)(a)

that ground. The wording of the existing provisions does not purport to "end" a tenancy. Instead, the lessor is given the right to bring an action to the Tribunal to request a termination and possession order. The only exception to this is with respect to uninhabitable tenancies whereby the tenancy ends when the home becomes uninhabitable.

The different language used for the proposed termination provisions gives rise to uncertainty about how a tenancy can terminate. On the plain reading of the text, the words "*tenancy agreement ends*" mean a tenancy may terminate without an application by the lessor to the Tribunal. We are uncertain whether this language was intentional. The Explanatory Statement clearly contemplates a lessor being required to apply to the Tribunal to seek a termination of a tenancy. However, the new proposed termination provisions all introduce the words "*tenancy agreement ends*" after the expiry of the relevant notice period contained within the notice to vacate.

We strongly suggest that this language be reconsidered if the intention is, as expressed in the Explanatory Statement, that lessors must bring applications for termination and possession orders to the Tribunal before a tenant can be evicted. In addition to our serious concerns regarding the human rights implications of the proposed wording, we foresee issues arising similar to those that have now been resolved arising from a previous regime for automatic termination of tenancies as outlined in *Commissioner for Social Housing v Moffat.*[8] The proposed language removes security of tenure for all tenants in social, community and supported accommodation tenancies.

The idea that tenancies might end merely on the expiry of a termination notice gives rise to serious concerns about the potential for arbitrary eviction without any form of check on the legality of the process. This would constitute a direct limitation of the right to privacy contained in section 12(a) of the HR Act and in particular the right not to have one's home interfered with arbitrarily, as well as the right to a fair trial at section 21 of the HR Act: "*Everyone has the right to have …rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing".*

Absence of requirement to evidence ground for termination

The Draft Bill proposes a requirement that, for private lessors seeking to terminate a periodic agreement pursuant to clause 96, the notice to vacate must now be accompanied by "*written evidence supporting the lessor's reason for the notice*." There is no such parallel requirement for the clauses that the Draft Bill proposes to introduce for notices to vacate issued by social housing, community housing and supported accommodation providers. We recommend that all lessors be required to provide evidence of the ground for which they are seeking to terminate a tenancy.

Social housing termination clauses

There are three proposed termination grounds for Social Housing tenancies where there has been no breach by the tenant. These appear under unnumbered clauses beneath heading "Clause 2.4" in the Draft Bill. In addition, there is a further clause that appears under "clause 2.6" that we address here. The "social housing termination clauses" apply only to tenants receiving "housing assistance" under an approved "housing assistance program".

We address concerns with each individual termination ground below. First, we address our concerns regarding the purported protection in relation to "review rights" introduced by these provisions.

[8] [2015] ACTSC 4

I. Administrative review rights: section 47(1)(A), section 47(1)(B) and "no longer able to ask for a review"

It is our view that all of the social housing termination clauses provide for exercise of discretionary powers without mechanisms to ensure such power is appropriately circumscribed and absent adequate safeguards to prevent against abuse. The proposed interference with human rights, including those to privacy and home,[9] and those protecting family and children,[10] requires a rational connection to a legitimate purpose for which the home is being possessed. To be human rights compliant, the proposed termination clauses must also incorporate a proportionality consideration. There must be sufficient flexibility to treat different cases differently. The provisions must not impose a blanket policy which does not allow regard to the merits of each individual case.

There appears to have been an attempt to ensure tenants are permitted to pursue their administrative review rights prior to the lessor being able to bring action to terminate a tenancy in the Tribunal. However, there are currently almost no administrative review rights afforded to tenants to enable them to review the relevant decisions. The purported protection is therefore illusory.

If a right of a social housing tenant to seek review decisions of the housing commissioner is to be the path relied on to provide human rights protections, then that right must first exist. As that right does not currently exist, the proposed protection does not exist. The protection cannot be achieved without simultaneous amendment to both the *Housing Assistance Act 2007* (**the HA Act**) and the *Housing Assistance Public Rental Housing Assistance Program 2013 (No 1)* (**the Program**) to enshrine the rights of tenants to seek merits review of any decision to withdraw housing assistance.

The HA Act only provides for review of one relevant decision and that is in circumstances where a tenant has housing assistance withdrawn on the basis that they have not provided relevant information.[11] We extract below some relevant clauses under the Program. These clauses indicate rather than a general right to review a decision of the housing commissioner to seek termination of a tenancy, the opposite is true. The power of the housing commissioner to evict derives from the RT Act itself. The Program and other delegated legislation made under the HA Act are structured in such a way that the housing commissioner is given broad and unreviewable powers to terminate a tenancy if the RT Act empowers her to do so. Almost all such decisions are not reviewable. We note the following clauses from the Program:

> Clause 22(1): The Territory may exercise any right given to the housing commissioner under a tenancy agreement.
>
> Clause 28(3): A decision of the housing commissioner to require a tenant to transfer under subclause 1(a) or (2) is not a reviewable decision.
>
> Clause 30(4): ... a decision by the housing commissioner to end a tenancy agreement entered into upon provision of rental housing assistance under this program on any ground which is lawfully available in relation to the tenancy agreement and any action by the housing commissioner in relation to the decision <u>is not a reviewable decision</u>, except in the case of a

[9] Section 12(a) of the HR Act.
[10] Section 11 of the HR Act.
[11] See section 25 together with Schedule 1 to the HA Act.

decision to terminate a tenancy as a result of a review under section 25 of the Housing Assistance Act[12] and clause 29B of this program[13].

The avenues of "review" available to tenants of the housing commissioner is judicial review by the Supreme Court pursuant to the *Administrative Decisions (Judicial Review) Act 1989* or possibly the *Human Rights Act 2004.* However, such actions are not accessible to most social housing tenants due to the cost, time and complexity barriers involved.

The proposed introduction of a new section 47(1B) to not affect the existing ability of a person to rely on their rights in legal proceedings under s 40C(2)(b) of the HR Act does little to ameliorate our concerns. The HR Act can only operate within the existing jurisdiction afforded to the Tribunal.[14] The Draft Bill emphasises this with the introduction of section 47(1A).

The current approach of the Tribunal outlined in *Commissioner for Social Housing v Cook*[15] is promoted in the explanatory statement as a form of protection against unfair or disproportionate action. To date, incorporation of human rights considerations into the Tribunal's decision to make a termination and possession order relies heavily on the word "may" in section 47 of the RT Act. The outcome in *Cook* was based on the discretion afforded the Tribunal in circumstances where the ground for termination was for "no cause" under the existing RT Act. However, the more specific the ground of the termination provision is worded, the narrower the discretion afforded to the Tribunal. The effect of narrowing the termination provisions is to curtail the Tribunal's discretion and, therefore, to narrow its ability to consider the HR Act and other discretionary considerations. We do not, therefore, see the existing jurisprudence or the existence of section 47(1B) as providing a sufficient check on public authorities' actions in seeking to terminate the tenancies of social, community and supported accommodation housing providers.

We turn now to the specific termination provisions being proposed.

II. Termination if tenant is no longer eligible for housing assistance

This clause allows for a broad and largely unreviewable discretion for the housing commissioner to seek termination when the housing commissioner "decides" that a tenant is no longer eligible to receive "housing assistance".

The definition of "housing assistance" in the HA Act is broad and includes, for example, eligibility for a rental rebate. Depending on how the clause is interpreted, there is a risk that a decision to cancel a rental rebate may be used as grounds to terminate a tenancy, contrary to existing policies in this regard.[16]

In addition to our previously articulated concerns as to lack of the right to review most such decisions, we are concerned that this provision is ambiguous in its wording. As outlined above, the housing commissioner is empowered to seek termination where the RT Act allows it pursuant to clause 22(1) of the Program. It is not clear to us whether or not the "decision" here is limited to current powers to withdraw housing assistance or if this provision in fact expands existing powers. The clause may therefore be interpreted in such a way that significantly broadens the power of the housing commissioner to evict tenants.

[12] Pertains to a person not providing required information requested by the Commissioner.
[13] Pertains to tenants where a decision to withdraw housing assistance on the basis that the income of the household is above the "sustainable household income" threshold: see *Housing Assistance Public Housing Rental Housing Assistance Program (Review of Entitlement to Housing Assistance) Determination 2020 No 1*
[14] *Director of Housing v Sudi* [2011] VSCA 266.
[15] [2020] ACAT 36
[16] A decision to cancel a rental rebate is a reviewable decision pursuant to clause 30(1)(b) of the Program.

III. Termination if tenant refuses transfer to alternate premises

This clause is again premised on the ability of a tenant to seek review of a decision of the housing commissioner that they must transfer, when in most circumstances such a right does not exist.

We are also concerned that the clause only includes reference to "an offer" of an "alternative premises". This implies that termination of the tenancy may be sought in circumstances where the tenant has not been offered a suitable alternative rental premises.

The current Housing ACT "Allocations policy" enables a tenant to consider two "valid" offers and does not oblige a tenant to take the first available premises or to oblige a tenant to accept a tenancy which does not meet their various needs – for example, a tenant with a disability may require an accessible premises, or a survivor of family and domestic violence may require certain security features or for the home to be located a certain distance from a perpetrator. However, the Allocations policy is not a legislated instrument and does not appear to govern the types of transfers contemplated. The HA Act and the Program do not provide such protections.

IV. Termination if tenant is party to two tenancies

Although, at first blush, this clause seems to meet a legitimate purpose, we foresee circumstances where tenants will appropriately hold two tenancies and again emphasise the importance of ensuring that blanket approaches are not adopted that exclude consideration of individual circumstances. An example might be where a tenant is transferred to another home for an extended period while their own home is being repaired but where the intention is for the tenant to return to their primary place of residence and where their belongings remain in their primary place of residence. It would be appropriate for such a tenant to retain two tenancies and allow the tenant the certainty of knowing they can return to their original home while renting temporarily in another home.

V. Termination if tenant's temporary housing assistance ends

We recognise there are legitimate reasons for the housing commissioner to provide short term or temporary tenancies (as illustrated in the example provided under the heading above). As such, we would have considered that this proposed termination ground is largely a proportionate limitation because the measure in question is rationally and proportionately connected to a legitimate aim. However, we cannot support this clause for three reasons.

Our first concern is that - unlike the provisions above - the decision of the housing commissioner in proposed clause 2.6(1)(b) as to whether or not to provide ongoing housing assistance <u>is</u> a reviewable decision.[17] We do not understand why this proposed termination provision was extracted from the other "social housing termination clauses" thereby disconnecting it from proposed section 47(1A). By doing so, it means that the protections provided in those clauses regarding being able to seek a review of decision will not apply to the one social housing decision that is actually reviewable under the Program.

Our second concern relates to the way proposed clause 2.6(1)(b) is drafted. There appears to be no requirement for the housing commissioner to actually make a decision before the end of the "temporary housing assistance period". The jurisdictional limits on the Tribunal means it is unlikely that the Tribunal would entertain a tenant's argument that they were eligible for ongoing housing assistance but that the housing commissioner had simply not yet made a timely decision as to eligibility. We suggest that, if this clause is included, it be reframed to require the housing commissioner to have determined a tenant's eligibility within a limited timeframe.

[17] Clause 30(1)(a) of the Program.

Our third concern again relates to the imposition of a blanket clause without the ability of the Tribunal to have regard to the merits of the myriad variety of circumstances that might arise. It is impossible to predict what these might be, and it is for this reason that we recommend including a "reasonable and proportionate" test to enable the Tribunal sufficient flexibility to treat different cases differently and to consider the merits of the individual case.

Community housing provider termination clauses

The Draft Bill proposes a new termination ground for "community housing providers" in a new clause 2.2 of Schedule 2. It proposes to allow a community housing provider to terminate a tenancy if the housing commissioner requires the premises either because the premises are:

(a) to be sold;

(b) to be reconstructed, repaired or renovated where that cannot be reasonably done with the tenant living in the premises; or

(c) "*for any other purpose*".

Although in common parlance "community housing provider" has a broader meaning, this clause is intended to only apply to those providers who manage housing owned by the housing commissioner or another Territory entity. This has the effect that all lessors to whom this clause might apply are unambiguously "public authorities" within the meaning of section 40(1)(g) and 40A of the HR Act.

We have a number of concerns with this clause. Privity of contract between the community housing provider and the housing commissioner means that there is no ability for the tenant to review the reason the premises are required to be returned. Although both the housing commissioner and the community housing provider are public authorities and bound by the HR Act, there is no opportunity for the tenant to seek reasons for, or to seek review of, the decision to terminate the tenancy. As the housing commissioner is not a party to the residential tenancy agreement, the Tribunal has no power to consider the behaviour of the housing commissioner in requiring the return of the home nor whether (for example) the community housing provider themselves requested the housing commissioner to "require" the premises back in order to avoid having to seek termination of a tenancy on other grounds.

As discussed above, there is also no requirement for the lessor to evidence the basis for the termination. As currently drafted, the clause requires the tenant and the Tribunal to take on trust representations made by the community housing provider lessor when it seeks to evict a tenant due to action initiated by the housing commissioner.

Notable too is the fact that proposed clause 2.4(1)(a)(c) is a "without grounds" clause and sits uncomfortably with the intent to remove such clauses from the RT Act and with the human right to equality. Unlike the current "without cause" provision in the RT Act, this new clause may remove the Tribunal's discretion to consider the broader circumstances surrounding the tenancy, as it is premised on actions by a third party outside of the jurisdictional reach of the decision maker.

Human rights compliance requires that proportionality considerations be deliberated for each individual's circumstances and that safeguards are in place to ensure against arbitrary exercise of power. There is a complete absence of such safeguards. We would recommend that a proportionality ground be introduced to this and other clauses as one way of ameliorating this problem. Another possible solution would be to introduce a provision to enable the tenant to join the housing commissioner to proceedings where it is the housing commissioner's actions that are the triggering mechanism for the ground for termination.

Supported accommodation clauses

"Supported accommodation provider" has a broad definition in the Draft Bill and proposes to incorporate all housing providers who lease their premises and who receive some form of government funding or assistance. If this definition includes tax concessions, which is likely as the National Rental Affordability Scheme (NRAS) is cited as an example, then there are very broad range of community and affordable housing tenancies which will be captured by these provisions.

It is likely that a large number of the community and affordable housing providers empowered by the proposed provisions are "public authorities" within the meaning of section 40 and 40A of the HR Act due to the public funding they receive and due to the nature of the services they provide.

It is our view that the supported accommodation provisions are incompatible with the obligations required by the HR Act. There are two proposed unnumbered clauses which appear in the Draft Bill at Schedule 2, clause 2.5. We address each of the proposed provisions below.

I. Tenant agrees to provide information to lessor

The Draft Bill proposes introducing a requirement to require tenants to provide to the lessor "any information that the lessor reasonably believes is relevant" to the eligibility of the lessor to seek funding or assistance or to ensure the tenant meets eligibility requirements for the premises.

Although this provision engages the tenant's right to privacy, we would have considered it was proportionately crafted in respect of a legitimate aim and therefore largely human rights compliant, except for two concerns. Our first concern with this provision is that there is no requirement for the lessor to evidence why requested information is needed to enable an assessment of whether the request is reasonable. For example, if there is a request for financial information to ensure a tenant is eligible for the premises then the lessor should be required to provide to the tenant the relevant information pertaining to eligibility requirements for that premises.

Our second and more pressing concern is that the remedy for non-compliance with this provision is for the lessor to serve a notice to vacate and then to terminate the tenancy. We do not see eviction as being a proportionate remedy in this instance and means that the otherwise legitimate aim of the lessor is not human rights compatible. In our view to make this provision human rights compliant requires a more proportionate remedy, for example an ability for the lessor to apply to the Tribunal for an order that the tenant provide the requested information.

II. Termination if tenant no longer eligible to live in premises

Our concern with this provision mirrors many of our concerns expressed in relation to the termination provisions above. The proposed clause would empower a very wide range of lessors to evict tenants in a very wide range of circumstances with no ability to review their decision and limited discretionary oversight afforded to the Tribunal.

As with the other proposed termination clauses in schedule 2, there is no requirement for the lessor to evidence the grounds on which it is seeking to terminate the tenancy. It is very difficult for a tenant to challenge his or her eligibility to live in a premises if unaware of the eligibility requirements. Such requirements are not always publicly available as they pertain to requirements from third parties, such as government funders, or requirements that may be contained in contracts to which the tenant is not a party.

In addition, even where a tenant is no longer eligible under the rules of the relevant government funding, it may sometimes be a disproportionate action to evict the tenant considering the entirety of the circumstances.

The following provides a hypothetical example by way of illustration. The largest community housing provider in the ACT currently requires a minimum gross household income of $65,676 for a couple with two children and $58,760 for a single person with two children.[18] If a couple signs a tenancy with a combined income of $75,000 and that couple separates with the woman remaining in the family home with the two children, she may now no longer be eligible to live in the premises. That is because her total gross household income might only be $55,000. Even if she is fully meeting her obligations to pay rent, the Draft Bill now proposes to introduce a termination clause enabling the housing provider to evict her and her children with 26-weeks' notice.

It is our view that this provision is not human rights compatible because it removes the ability to consider the tenants' rights under the HR Act and empowers public authority lessors to take action which may limit the human rights of tenants without adequate oversight. It is essential for any such provisions to be crafted in a way that enables the Tribunal to have access to all relevant information, and to be able to fully consider the totality of the situation in order to make a decision about the proportionality of the termination and possession order being sought.

We reiterate our earlier recommendation to consider a standalone clause that allows the Tribunal to consider whether terminating a tenancy would be reasonable and proportionate in all the circumstances.

Threats, harassment, intimidation or abuse by lessors and tenants

The Draft Bill proposes introducing two new termination clauses that mirror each other in section 45A and section 51A. While we recognise that the provisions seek to address a legitimate aim, we have serious concerns about the human rights compatibility of both these provisions.

Our first concern is that no notice to remedy or termination notice is required for these provisions before Tribunal action is commenced. We do not see this as a proportionate response to the types of behaviour on which the termination would be grounded. The RT Act already contains sections 45 and 51 to enable tenants or lessors to bring termination proceedings without prior notice for the more serious forms of behaviour which would warrant urgent action. It is our view that a more proportional response in the circumstances would be to require the party seeking to terminate a tenancy to issue notices, which allow for the possibility of remedy, as is contained within section 48 of the RT Act.

Our second concern is that the way the provision is drafted creates the possibility of termination based on the subjective perception of the lessor (or tenant) that behaviour is "abusive" or "intimidating". The proposed clause includes the possibility of seeking termination for behaviour the tenant is "likely" to engage in. In addition, we are concerned that proposed clause 51A(1)(b) may capture the behaviour of partners, friends or children of tenants over which they have limited control.

We are concerned that this proposed section requires lessors and their agents to make determinations about the behaviours of individuals who may be in mental health crisis or experiencing trauma. We are also concerned for women in situations of family or domestic violence where the behaviour of the perpetrator may be used as a justification to evict a tenant where the perpetrator of violence continues to reside in the home, but where the victim survivor may have no actual control over the person's behaviour against third parties. We draw your attention to family violence being a protected attribute under the *Discrimination Act 1991*.

[18] CHC Eligibility Guidelines accessed on 1/9/22 at https://chcaustralia.com.au/rent/eligibility-guidelines/

We recognise the protections embedded into the provisions, such as those at section 51A(4)(b) directing the Tribunal to consider a wide range of appropriate circumstances before making a decision whether or not to terminate the tenancy, and we consider these provisions appropriate and proportionate. However, the drafting of the provision means that it may swiftly be brought to the Tribunal without any formal notices to remedy or termination notices, which then places the burden on the tenant to evidence these types of factors.

We recommend that if proposed section 45A and 51A remain that they include a requirement for the tenant or lessor to first issue a notice to remedy and a termination notice. We further recommend redrafting the provisions to remove the words "is likely" to avoid parties to a tenancy seeking to terminate on subjective perceptions rather than actual behaviour.

We would be pleased to further discuss this submission with you.

Yours sincerely,

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