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

RESIDENTIAL TENANCIES LEGISLATION AMENDMENT BILL 2022

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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RESIDENTIAL TENANCIES LEGISLATION AMENDMENT BILL 2022

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

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

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

OVERVIEW OF THE BILL

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

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

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

- modify sections 20 and 21 to require that any determinations or operational guidelines which relate to decisions to review a person's eligibility for housing assistance, require a transfer or provide temporary housing assistance be made disallowable instruments (rather than notifiable instruments);
- introduce a transitional provision which deems the existing *Housing Assistance Public Rental Housing Assistance Program (Review of Entitlement to Housing Assistance) Determination 2020 (No 1)* (NI2020-658) to be a disallowable instrument;
- introduce other minor and technical transitional provisions related to the deeming of existing legislative instruments under the HAA;
- insert a new definition of temporary housing assistance to support a new tenancy termination provision for housing assistance provided on a temporary basis; and
- alter the Housing Commissioner's current obligation under the HAA to always charge market rent for a property to instead allow the Housing Commissioner to decide to increase rent by an amount up to the prescribed amount for rent increases (as determined by the RTA and RTR) in circumstances where charging the market rent would result in a rent increase that is above the prescribed amount.

CONSULTATION ON THE PROPOSED APPROACH

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

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

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

A second round of community consultation was then undertaken on a Public Exposure Draft of the Bill (the **PEB Bill**). The purpose of releasing the Public Exposure Draft was to provide the ACT community with a further opportunity to comment on the specific provisions of the Bill before the Bill was introduced into the Legislative Assembly. The PEB Bill consultation has allowed for further refinement of the Bill in response to community feedback. The PEB Bill was available for consultation on the YourSay website (listed above) from 25 July to 26 August 2022.

Following the closure of the PED Bill consultation, additional targeted consultation was undertaken with key residential tenancy stakeholders to clarify feedback received during the public consultation process and to support the further refinement of the Bill.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Bill engages the following rights under the HRA:

- Right to privacy and reputation (Section 12, Section 47)
- Right to recognition and equality before the law (Section 8)
- Right to a fair hearing and procedural fairness (Section 21 (1))
- Right to be innocent until proven guilty (Section 22 (1))

Rights Promoted

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

Right to privacy

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

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

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

Right to a fair trial

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

The Bill introduces provisions which grant the Housing Commissioner the right to terminate a tenancy where the Commissioner has made a decision under the HAA or its subordinate legislation (**Housing Assistance legislation**) to cancel or withdraw housing assistance following a review of eligibility, to require a transfer, where the tenant holds two tenancies simultaneously or where they have been provided a short-term period of assistance following a breakdown of tenancy situation. In each of these circumstances, the right to terminate the tenancy under the RTA is connected to the Housing Commissioner's powers under Housing Assistance legislation. This means that there are clear and legislated criteria for the exercise of the termination provision. Further, in some circumstances where the Housing Commissioner makes decisions to cancel or withdraw assistance or require a transfer, tenants will have administrative review rights under Housing Assistance legislation before the tenancy can be terminated. This provides additional procedural safeguards before the right of tenancy termination can be exercised by the lessor, promoting the right to fair trial.

The removal of the 'without cause' termination provision means that any circumstances for tenancy termination need to be recognised as standalone grounds for termination under the RTA. The purpose of introducing new tenancy termination provisions into the RTA is to facilitate the removal of the more arbitrary 'without cause' ground for tenancy termination which currently permits lessors to end a tenancy without providing the tenant any reason for doing so. To ensure that the new termination grounds are only used as intended, the Bill requires landlords to evidence the genuineness of their reliance on the termination ground.

Rights Limited

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

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

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

The Bill engages and may limit:

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

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

Right to privacy and home

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

- new tenancy termination provisions;
- mandatory disclosure requirements for tenants and lessors; and
- expanded circumstances in which lessors can access a rental premises to comply with the minimum housing standards.

These issues will be addressed in turn.

Right to privacy and home – introduction of new tenancy termination provisions generally

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

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

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

The purpose of introducing new tenancy termination provisions into the RTA is to facilitate the removal of the more arbitrary ‘without cause’ ground for tenancy termination which currently permits lessors to end a tenancy without providing the

tenant any reason for doing so. Further, the introduction of new termination provisions recognises that there are legitimate grounds on which a lessor may need to end a tenancy which are not currently recognised as prescribed grounds under the RTA. The new terminations provisions support private landlords to utilise their property assets for lawful purposes other than as rental accommodation and also support public and community landlords to provide subsidised accommodation programs that are effectively targeted towards eligible tenants.

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

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

Proportionality (s 28 (2) (e))

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

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

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

may be considered retaliatory, that is, where a tenant has spoken in the media or posted on social media about their tenancy experience.

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

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

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

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

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

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

The purpose of this tenancy termination provision is to preserve the ability of lessors to manage their private property and utilise it as they see fit, within legal boundaries. This includes the lessor's entitlement to recover possession of the property to convert its use to a purpose other than a home (such as operating a business). There are existing provisions in the RTA which support lessors to regain possession of the premises when they want to utilise their property in a different way, including where they want to sell, renovate, reconstruct, or live in the property. The introduction of this new provision is consistent with the purpose of these existing provisions, providing for an additional circumstance where a lessor may have cause to terminate a tenancy to utilise their private property for any lawful purpose other than a residential lease.

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

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

Proportionality (s 28 (2) (e))

This provision contains a number of safeguards to ensure any potential interference with a tenant's right to privacy is reasonable and justified. First, the provision is drafted to apply only in narrow circumstances – that is, where the lessor wants to convert the use of the premises to a non-residential purpose. Second, the

termination provision can only be used during a periodic tenancy, not during a fixed term. This preserves the nature of a fixed term tenancy and narrows the operation of the provision. Third, the provision requires the lessor to provide the tenant with significant notice of the proposed tenancy termination – a 26 week notice period. This notice period provides the tenant with time to prepare for a move and to source alternative accommodation. Fourthly, the lessor must provide evidence that their reliance on the ground is genuine, such as having lodged a development application for the proposed conversion of use for the premises. Further, the termination provision requires that the proposed alternative use of the premises be lawful. This means, for example, that the proposed use must comply with zoning and unit titles rules. This would mean a property could not be converted to a commercial use if it was in a residential zone that prohibited a commercial venture of the nature proposed.

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

Right to privacy and home – new termination provisions that impact public housing, community housing, subsidised accommodation and temporary housing assistance tenancies – overarching analysis

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

The Bill introduces new termination provisions that are specific to public housing, community housing, subsidised accommodation and temporary housing assistance tenancies (see clause 5 and schedule 2).

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

The overarching human rights impacts of this group of termination provisions as a whole is considered first. This is followed by analysis specific to terminations by the Housing Commissioner, community housing providers and subsidised accommodation providers (other than the Housing Commissioner).

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

Public housing, community housing, subsidised accommodation and temporary housing assistance programs provide targeted assistance and accommodation to eligible members of the community. Indeed, these programs have been designed to protect and promote the human rights of individuals experiencing complex and layered vulnerability, including people facing socio-economic disadvantage, living with chronic physical or mental illness or disability, or transitioning out of primary homelessness.

The effectiveness of these housing assistance programs is dependent on the relevant public or community lessor being able to both manage resources effectively and to ensure that tenancies offered under the program achieve their intended purpose. For example, if a tenant was previously eligible for community housing, but has now found greater financial security and can secure and maintain a private rental, allowing their public or community housing tenancy to continue would undermine the objectives of the program and limit its effectiveness within the broader community.

By introducing termination provisions that are specific to the objectives and management of each program, this Bill supports public and community lessors to manage tenancies effectively, and by doing so, ensures that these programs can continue to provide accommodation and support to those within our community who are most in need of assistance.

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

There is a rational connection between allowing a public or community housing lessor to terminate a tenancy under a housing assistance program, and the legitimate purpose of ensuring that the program can be managed effectively and for the benefit of members of the community who are most in need of assistance.

Proportionality (s 28 (2) (e))

For tenants reliant on public and community housing, security of tenure and the right to freedom from arbitrary interference with home is limited by their lessor's necessary ability to terminate tenancies for the benefit of the broader housing assistance program, rather than because of a breach of the tenancy agreement.

This Bill introduces several procedural protections to ensure that the new termination provisions that impact public and community housing tenants are used in limited and intended circumstances, rather than conferring a disproportionately broad discretion or power upon public and community lessors.

Currently, public and community housing lessors rely on without cause evictions to manage housing assistance programs and to ensure that they fulfil their intended purpose. In these circumstances, there is no requirement for the public or community housing lessor to communicate the reasons for the termination to the tenant or demonstrate that the termination was reasonable or necessary.

Under section 47 of the RTA, if a public or community housing lessor demonstrates that – (i) a ground for termination exists (including without grounds); (ii) they have issued a compliant termination notice on the basis of that termination ground; and (iii) the tenant has not vacated the property in accordance with that notice - then ACAT may make a termination and possession order (resulting in the tenant's eviction). In the context of without grounds evictions, which are by nature arbitrary and undefined, ACAT has shown a willingness to use its discretion to afford

significant weight to the impact of forced eviction on the tenant. That is, notwithstanding a public or community housing lessor's contractual right to terminate a tenancy without grounds, ACAT has been open to finding that a TPO is nevertheless inappropriate in the circumstances.

However, by introducing specific termination provisions, which apply in narrowly defined circumstances and explicitly contemplate scenarios in which a public or community housing lessor may need to terminate a tenancy to support the administrative management of the housing assistance program, there is a risk that ACAT may interpret its discretion narrowly.

To ensure that ACAT's discretion is not only retained, but is expanded to protect the rights of vulnerable tenants following the introduction of the new termination provisions, the Bill provides that where an application relates to a public housing, community housing, subsidised housing or temporary housing assistance termination clause, ACAT may only make a TPO if it is satisfied that the termination is reasonable and proportionate in the unique and complex circumstances of the application before it.

Under current section 47, ACAT's discretion is largely unrestrained (except in so far as there is an implied limitation on the factors ACAT may consider having regard to the language, purpose and scope of the RTA). To guide consistent and balanced decision making, the reasonable and proportionate test introduces several factors that ACAT must consider. These factors are drawn from the ACAT decision of *Commissioner for Social Housing v Cook 2020 [ACAT] 36*, but also expand the factors for consideration from that decision. They include: the history and length of the tenancy; the powers and functions of the lessor as a provider of public or subsidised housing; the conduct of the tenant and the lessor or owner in the circumstances giving rise to the application for a TPO; hardship to the tenant and any other factors that ACAT considers relevant. Further, inclusion of these factors is not intended to curtail ACAT's consideration of human rights under section 40 C (2) (b) of the HRA, which substituted section 47 explicitly confirms.

This safeguard prevents arbitrary interference with the home by ensuring that terminations are not enforced without consideration of the tenant's unique circumstances, including their experiences of vulnerability and disadvantage. By doing so, the reasonable and proportion test limits the circumstances in which a public or community housing tenant may be forced to vacate their home.

The individual termination provisions available to public and community lessors also contain additional safeguards to ensure the proportionality of any limitation on the right to privacy. These are outlined in detail below.

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

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

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

- where the Housing Commissioner cancels or withdraws housing assistance;
- where the tenant has two tenancies simultaneously;
- where the Housing Commissioner requires a transfer and has made an alternative premises available; and
- where a temporary period of housing assistance has ended.

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

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

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

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

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

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

Withdrawal or cancellation of assistance and requirement to transfer

The purpose of the proposed new termination provisions is to support the operation of the Program and enable access to housing for the most disadvantaged in the community. The termination provisions support the effective targeting of public housing by ensuring it can be made available to eligible individuals by withdrawing assistance from those who are no longer eligible or cancelling assistance if a tenant does not comply with their obligations to provide information when it is requested for the purpose of reviewing their housing assistance. The termination provisions also support the Housing Commissioner to require individuals to transfer to an alternative premises in certain circumstances. This allows the Housing Commissioner to manage limited resources to support the maximum number of people through an effective allocation of housing stock.

Termination where the tenant is a party to two tenancies

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

Termination due to a temporary period of housing assistance ending

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

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

ultimately assessed as ineligible for housing assistance, the compassionate assistance provided in these circumstances is intended to be of finite duration only.

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

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

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

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

Proportionality (s 28 (2) (e))

The new tenancy termination provisions for public housing are narrowly worded and carefully targeted towards achieving the goals of the public housing program. They are closely linked to the Housing Commissioner's powers under the Program - specifically the Housing Commissioner's powers to withdraw assistance upon loss of eligibility, to require a transfer, or to provide temporary assistance following a breakdown of tenancy. As outlined above, when considering an application for termination on any of these grounds, ACAT will need to consider if the termination is reasonable and proportionate in the circumstances.

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

The tenancy termination provisions are drafted such that the Housing Commissioner will have the power to end a tenancy where the Housing Commissioner takes action under the HAA (for example by deciding to withdraw assistance upon loss of eligibility, require a transfer or to provide temporary assistance following a breakdown of tenancy). In future, the Housing Commissioner may amend the Program or other Housing Assistance legislation in order to expand the

circumstances in which the Housing Commissioner may withdraw housing assistance or require a transfer. If the Housing Commissioner does this, it will expand the circumstances in which the tenancy termination provision is available to the Housing Commissioner. To ensure any amendments to Housing Assistance subordinate legislation which may create a tenancy termination pathway are reasonable and justified from a human rights perspective, the Bill puts additional safeguards in place through amendments to the HAA.

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

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

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

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

Termination due to cancellation or withdrawal of assistance or where tenant has refused a transfer to an alternate premises

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

This is a procedural safeguard which supports the tenant's right to receive a fair hearing. These provisions also require the Housing Commissioner to provide 26

weeks' notice of the proposed termination date, which gives the tenant time to prepare for a move and to source alternative accommodation (if required), thereby limiting any potential impacts on the right to privacy and home by providing an extended adjustment period to the tenant.

The exception to the 26 week notice period is where a tenant has been issued an initial 26 week notice to vacate due to a failure to provide the information required to review their eligibility but has subsequently had that notice withdrawn on the basis that the tenant provided the required information during the NTV period. Where a tenant is then assessed as ineligible for assistance (and has exhausted their appeal rights) the tenant can then be issued with a new NTV with a vacate date which is the *later of* the original 26 week NTV or 12 weeks after the notice is issued. The reason this notice period is shorter is to avoid creating an incentive for tenants to delay providing the requested information in order to remain in the property for longer.

Termination where tenant has refused a transfer to an alternate premises

With respect to the provision which allows for termination where the tenant refuses to transfer to an alternative premises, a procedural safeguard has been incorporated which prevents the Housing Commissioner from issuing a NTV until the tenant has failed to accept or has actively refused the offer of moving to an alternate premises. This ensures the tenancy termination provision is only available to the Housing Commissioner in circumstances where the operation of the Program (that is, the transfer of tenants) is hindered by the tenant's refusal of alternate accommodation. In addition, the provision requires that the offer that has been made, is made in accordance with the Program. The Program requires the Housing Commissioner to take into account the reasonable accommodation needs of the applicant, the preferences expressed by the applicant and whether the applicant has been identified as a special needs applicant with an entitlement to a special needs dwelling. This safeguard ensures that the offer made by the Housing Commissioner is appropriate to the tenant's needs.

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

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

The termination provision which allows the Housing Commissioner to terminate a tenancy where the tenant holds two tenancies simultaneously contains a procedural safeguard which prevents the Housing Commissioner from issuing the NTV for the original tenancy until *after* the commencement of the tenancy for the second premises. This safeguard ensures that this termination provision can only be utilised when the tenant is in a second property. The provision of at least 1 week's overlap between tenancies will support the tenant to undertake the move between premises.

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

Termination if Housing Commissioner decides tenant not eligible for ongoing assistance

This provision only applies in limited circumstances where a remaining resident has been offered a temporary period of housing assistance where there has been a tenancy break down. The termination of a tenancy on the grounds that the temporary period of housing assistance has ended and the tenant is not eligible to remain in the property will not be available in all public housing tenancies. It can only be used by the Housing Commissioner in circumstances where the Housing Commissioner has indicated they are providing temporary housing assistance. The provision also requires that the Housing Commissioner must have made a decision that the tenant is not eligible for ongoing assistance and, if the decision is made during the period of temporary assistance, the Housing Commissioner must provide a 26 week notice period, ensuring that the tenant has an extended period of time in which to prepare to move and to source alternative accommodation. The provision also allows the tenant to remain in the premises beyond the end of the period of temporary housing if the Housing Commissioner has not yet made a decision on an application for ongoing assistance. If the Housing Commissioner does then find that the tenant is ineligible for ongoing assistance after the period of temporary housing assistance has ended, the Housing Commissioner is nonetheless required to provide an additional 12 week notice to vacate. These safeguards ensure any potential limitation on the right to privacy is limited.

Right to privacy – Community housing provider termination clause

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

The Bill introduces a termination provision which will permit community housing providers (CHP) who are leasing a property under an agreement with the owner to

terminate a tenancy agreement when the CHP is required to return the premises to the owner for one of the reasons specified in the provision.

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

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

The purpose of the provision is to allow property owners who provide their property to a CHP to lease to a tenant as part of an accommodation program to recover the use of their property in the same circumstances as they would be able to if they were the lessor (i.e. for all the same reasons a lessor is currently able to terminate a tenancy under clause 96 of the Standard Residential Tenancy Terms (**SRTTs**) – sale of the property, renovation etc).

For private property owners (i.e. owners who are not the Housing Commissioner) the provision also allows the CHP to end the tenancy where the property owner no longer wants to make their property available for use as part of the accommodation program. Here, the purpose of the provision is to incentivise private property owners to participate in accommodation programs by giving them confidence that they can recover the use of their asset if desired.

The provision also permits the Housing Commissioner to terminate a tenancy when they withdraw assistance from the CHP in accordance with a housing assistance program. This is explained further below.

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

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

In circumstances where the community housing organisation has a tenancy agreement in place with a tenant, the purpose of this termination provision is to allow the community housing organisation to end the tenancy with the tenant so that they can return possession of the property to the Housing Commissioner. In a similar way to the Program, the Asset Program can be conceptualised as a 'special measure'

aimed at making a more diverse range of housing supports available to vulnerable community members. The purpose of this termination provision is to support the Housing Commissioner to utilise public assets in the most effective way possible to address inequality of access to housing for disadvantaged groups.

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

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

Where the property is owned privately, allowing tenancy termination in circumstances where the property owner requires the property for an alternate purpose will support the broader success of community housing programs by removing any barriers to participation or disincentives that may arise if private lessors were concerned that they would not be able to regain the use of their asset if required.

Proportionality (s 28 (2) (e))

This termination provision has been crafted so that the tenant will receive the same notice periods as other tenants under clause 96 of the SRTTs (as applicable). For example, in the event the property is to be sold or renovated, the notice period is 8 or 12 weeks respectively. In cases not currently covered by clause 96 of the SRTTs, a 26 week notice period applies. The 26 week notice period provides the tenant with an extended period of time in which to prepare to move and to source alternative accommodation. The provision of this significant period of adjustment limits any potential impacts on the tenant's right to privacy. This ensures the limitation is proportionate to the overall aim of allowing public housing or community housing programs to operate effectively.

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

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

The Bill introduces a new tenancy termination provision which provides for the termination of a tenancy where the tenant is no longer eligible for a subsidised accommodation program (or where the tenant has failed to provide the information to demonstrate their ongoing eligibility). This termination provision engages and may limit a tenant's right to privacy by creating a new ground on which a tenancy may be terminated.

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

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

As with the termination provision which allows the Housing Commissioner to terminate a tenancy following a decision to withdraw or cancel housing assistance, the purpose of the termination provision on the grounds that the tenant is no longer eligible for subsidised accommodation (or where the tenant has failed to provide the information to demonstrate their ongoing eligibility) is to ensure that these subsidised accommodation programs can continue to be targeted to those most in need.

In the case of a failure to provide information, it is noted that many subsidised accommodation providers are subject to funding requirements whereby they must be able to demonstrate that they are providing assistance to people who meet certain eligibility requirements. As such, where the tenant fails to provide information required to demonstrate eligibility, the outcome for the owner or lessor is the same as if the tenant were ineligible – that is, they may lose funding. The legitimate purpose of this termination provision is to ensure the ongoing availability of subsidised accommodation programs by ensuring they can meet their funding requirements and remain financially viable.

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

There is a rational connection between any limitation on the right to privacy arising from the lessor's ability to terminate the tenancy and the purpose of the measure, which is to ensure the effective targeting and availability of subsidised accommodation programs. Allowing the termination of a tenancy for a person is either no longer eligible, or who does not positively demonstrate their eligibility, for subsidised accommodation allows the property to be made available for someone who *is* eligible for assistance. It also ensures the continued availability of subsidised accommodation by ensuring the program providers can remain financially viable.

Proportionality (s 28 (2) (e))

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

The Bill places a pre-contractual obligation on the lessor to provide the tenant with information about the eligibility requirements to remain in the property (as distinct

from initially being allocated the property). Further, if the requirements change during the course of the tenancy (for example, if the applicable income thresholds change) the lessor must update the tenant of any changed eligibility requirements within 2 weeks of the change occurring. This ensures that a tenant is made of aware *before* the tenancy commences of the possible bases on which their tenancy can be ended.

The provision also stipulates that a failure to provide information as required under the tenancy agreement is not taken to be a breach of the agreement. This prevents the lessor from electing to pursue the much faster termination pathway of breach of tenancy (which requires a 2 week notice to remedy, followed by a 2 week notice to vacate before an application to ACAT). It also ensures that if a TPO is sought on the basis of this ground, ACAT will need to consider if the termination is reasonable and proportionate in the circumstances.

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

In circumstances where the NTV is issued on the basis that the tenant has failed to provide the information required, the notice to the tenant must include a statement that the tenant did not give the lessor the required information, the name and contact details of a legal or advocacy service and a statement that the notice will be withdrawn if the tenant give the lessor the requested information before the end of the period. This ensures the tenant is aware of the reasons for the termination and alerts them that there is action they can take to prevent the tenancy ending.

In circumstances where the tenant does provide the required information, the NTV will automatically be withdrawn. If the tenant is subsequently assessed as ineligible, then the provision allows the lessor to issue a new notice to vacate for a date which is the later of the end of the original NTV period OR 12 weeks after the issue of the NTV. This provision balances the competing policy objectives of providing a reasonable time for the tenant to relocate against creating an incentive for ineligible tenants to be able to remain in the premises for longer by delaying the provision of information.

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

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

The Bill introduces new tenancy termination provisions which provide for the termination of a tenancy where one party to the agreement threatens, harasses,

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

A tenant may apply to ACAT on the grounds that the lessor has threatened, harassed, intimidated or abused them under section 45A. A landlord may make an equivalent application under section 51A. These provisions will be discussed in turn below.

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

The purpose of these termination provisions is to support an individual's ability to live free from intimidation, harassment or abuse. The provision provides both parties timely recourse – the ability to end the tenancy in a relatively short timeframe – in circumstances where they are subjected to inappropriate behaviour by the other party.

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

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

Proportionality (s 28 (2) (e))

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

- the nature, frequency and duration of the conduct;
- the circumstances of the conduct, including any behaviour of the other party to the agreement or related person;
- whether conduct is likely to continue;
- whether the person has stopped the conduct, or has agreed to stop and is likely to do so;

- any family violence order or protection order made against the tenant by the Magistrates Court (or a similar order made in a different jurisdiction);
- the effect of the conduct on the other party;
- whether any other order under the RTA is reasonably available (such as an order for specific performance under section 83); and
- any other matter the ACAT considers relevant.

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

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

Introducing these termination provisions will not impact lessors and tenants equally. Where a tenancy is terminated under section 51A, a tenant's right to privacy is significantly limited; they will be forced to vacate their home. However, where a tenancy is terminated under section 45A, a tenant is choosing to exit the tenancy and the impact on the lessor's right to privacy is limited to the financial burden of re-letting the property. In recognition of this, sections 45A and 51A are constructed differently.

In the interests of procedural fairness, section 45A incorporates the following procedural safeguards:

- a tenant must provide written notice of their intention to apply to ACAT at least 1 week before making any such an application;
- to ensure a lessor has a reasonable opportunity to respond to put their case, the written notice must include details of the alleged conduct; and
- the application must not be heard, and an order cannot be made by ACAT, unless at least 14 days has passed since the tenant has provided written notice.

Conversely, section 51A offers tenants additional safeguards in recognition of the disproportionate impact on their right to privacy and freedom from arbitrary interference with home. Specifically:

- a lessor must provide written notice of their intention to apply to ACAT at least 2 weeks before making any such application;
- to ensure that a tenant has a reasonable opportunity to put their case, the written notice must include details of the alleged conduct; and
- the application must not be heard, and an order cannot be made by ACAT, unless at least 21 days has passed since the lessor has provided written notice.

The provision of longer notice periods for tenants ensures that the tenant has a reasonable period in which to prepare a response to any allegations of inappropriate conduct, and also has time to consider alternative accommodation options should the tenancy breakdown. This limits the impact on a tenant's right to privacy.

It is noted that the tenancy termination in sections 45A and 51A contain significant additional protections when compared to existing sections 45 and 51 which do not provide ACAT with any discretion as to whether to terminate the tenancy (where the grounds for termination are made out) and also require that termination occur effective immediately. The timeframes and protections in these new sections create significant additional safeguards by comparison.

It is noted that these provisions were designed to give parties a faster pathway to termination in circumstances where they are experiencing relatively serious unwanted conduct from the other party. In circumstances where the conduct is not so egregious, it is open to both lessors and tenants to issue a notice to remedy and notice to vacate on the grounds of breach or to apply to ACAT for a specific performance order. However, this termination pathway was intended to be faster in acknowledgement of the serious conduct it contemplates.

These safeguards help to ensure that a tenancy is only terminated under this pathway when the nature of the conduct that has occurred warrants such an outcome, thereby limiting any potential impacts on the right to privacy.

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

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

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

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

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

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

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

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

Proportionality (s 28 (2) (e))

Any personal information collected by the Housing Commissioner or by Community Housing Organisations providing Government services under contract is subject to the Territory Privacy Principles (TPPs) as set out in the *Information Privacy Act 2014*. The TPPs set out standards, rights and obligations for the collection, use, disclosure, storage, accessing and correction of personal information (including sensitive information). These principles ensure there are appropriate safeguards for any personal information collected in connection with an eligibility assessment. This ensures that any limitation on the right to privacy that may arise in connection to an eligibility review is proportionate to the aim of the measure.

Right to Privacy and home – mandatory disclosure requirements

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

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

Right to privacy and home – access to premises

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

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

The expansion of the lessor's right of access will engage and may limit the right to privacy for tenants by creating additional circumstances in which the lessor can

attend the premises, potentially impacting on the tenant's quiet enjoyment of the premises.

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

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

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

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

Proportionality (s 28 (2) (e))

Although lessors will have an expanded right to access rental premises for the purposes of ensuring compliance with the minimum housing standard, there are safeguards in place for tenants to ensure any impacts on their quiet enjoyment of the premises are reasonable.

As is currently the case when the lessor seeks to exercise their right of access to undertake repairs, to obtain access for the purpose of complying with minimum housing standards, the lessor must provide the tenant with 1 week notice (or another agreed period) and may only enter the premises at a reasonable time, having regard to the interests of the tenant and the lessor.

In addition, to ensure that this expanded right of access does not unreasonably impact a tenant's quiet enjoyment of the premises a lessor's right of entry is only permitted if the access is reasonable and necessary, taking into account the nature of the intended inspection. These safeguards ensure that the lessor's right of access is narrowly circumscribed to the purpose of complying with minimum standards. They also ensure a tenant will have notice before access occurs and that they can arrange a mutually agreeable time for access to the property. There are no less restrictive means available for the lessor to ensure the premises complies with minimum housing standards. Together the safeguards ensure any limitation on the right to privacy is reasonable and justifiable.

Right to equality before the law

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

As noted above, the Bill will introduce new tenancy termination provisions which will allow the Housing Commissioner, community housing provider or subsidised accommodation providers to terminate tenancies in specified circumstances. These tenancy termination provisions will not apply to all tenancies - only to public housing, community housing or subsidised accommodation tenancies. Tenants of public housing or subsidised accommodation programs represent a category of persons in our community who are likely to be vulnerable and have protected attributes (such as experiencing socio-economic disadvantage) for the purposes of human rights law.

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

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

Tenants of public housing or accommodation assistance programs are often vulnerable members of our community that experience intersecting instances of disadvantage. Termination provisions that provide additional grounds for termination to the Housing Commissioner and subsidised accommodation providers will apply only to this category of tenants. Due to this level of hardship and vulnerability, legislation which applies only to tenants of public housing or subsidised accommodation programs will engage and may limit the right to equality before the law.

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

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

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

The measures are rationally connected to the objective of supporting housing assistance programs, as the new tenancy termination provisions allow the Housing Commissioner, community housing providers or subsidised accommodation provider

to recover possession of the premises from a tenant who is no longer eligible for assistance or where the tenancy is no longer operating in a way that supports the overarching goals of the housing assistance program. This then allows the Housing Commissioner, community housing provider or subsidised accommodation provider to make the premises available to someone who is eligible for assistance.

Proportionality (s 28 (2) (e))

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

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

Right to equality before the law – length of notice periods

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

- Termination when the community housing provider is required to return the premises to the owner. (Notice period varies from 8 to 26 weeks' notice) (New SRTT 103);
- Termination where the tenant has two tenancies (1 weeks' notice) (New SRTT 106);
- Termination on the grounds of ineligibility (following the earlier provision of a NTV on the grounds of a failure to provide information (the later of the original 26 week NTV day or 12 weeks after the new notice) (New SRTTs 104 and 111); and

- Termination on the grounds of ineligibility where a temporary period of housing assistance has already ended (12 weeks) (New SRTT 107).

From a human rights perspective this may be considered a potential limitation on the right to equality as it will result in a disadvantage to tenants in circumstances where they may previously have received a 26 week notice to vacate under the 'no cause' ground for tenancy termination. Further, the termination provisions with shorter notice periods only apply to tenants in public, community or subsidised accommodation who, by virtue of their eligibility to live in these forms of accommodation, are more likely to experience vulnerabilities or to have protected attributes than the general population.

The notice periods for these tenancy termination provisions have been shortened in accordance with the nature of the respective tenancy termination provisions and are discussed in more detail below. The purpose of the shorter termination provision and the safeguards to ensure the measures is proportionate are also discussed.

Termination by community housing provider where premises is required by the owner

Under this termination provision, the lessor is required to provide the tenant with 8 weeks' notice if the owner wishes to sell, move in (or have someone close to them move in) to the property, 12 weeks' notice if the owner wishes to reconstruct, renovate or make major repairs to the premises and, in all other circumstances, 26 weeks' notice must be provided. This means the notice period is only shorter than the 26-week without cause provision where the property is to be sold, renovated or where the owner (or someone close to them) wants to move in. Here, the notice periods align with the notice periods for all other lessors (who own the property themselves) in the same circumstances.

The purpose of this variable notice period is to enable the property owner to recover the premises in the same timeframe as they would be able to if they were managing the property directly and to ensure that they have the same ability to recover the premises in the event of sale or renovation as any other landlord. A further purpose for these variable notice periods is to support the continued availability of community housing by incentivising property owners to make their properties available to community housing providers to provide accommodation programs. Where it is unduly arduous to regain possession of a property, this may create a disincentive to participation. The safeguard associated with this change is that where the owner requires the lessor to return the use of the premises in any other circumstance, the notice period will be 26 weeks.

Termination where the tenant has two tenancies

Under this termination provision the lessor is required to provide the tenant with 1 weeks' notice of the tenancy termination only. It is noted that the 1 week notice period provided in this section is designed to align with the time period for tenancy transfer provided in the current Program (section 22 (4)) which allows a tenant 7 days to transfer between premises). This notice period also needs to be viewed in the context in which the availability to terminate the tenancy can arise, that is, where the tenant holds two tenancies simultaneously (most likely due to the tenant having transferred from one premises to another).

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

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

Termination on the grounds of ineligibility (following the earlier provision of a NTV on the grounds of a failure to provide information (the later of the original 26 week NTV day or 12 weeks after the new notice) and Termination on the grounds of ineligibility where a temporary period of housing assistance has already ended (12 weeks)

New SRTTs 104, 107 and 111 allow for 12 week NTV instead of at 26 week NTV to be issued in certain circumstances.

In the case of termination on the grounds of ineligibility (SRTTs 104 and 111) the shorter notice period is only permitted in circumstances where the tenant had previously been issued with a NTV on the grounds of a failure to provide information. The permitted notice period is the later of the end date of the original 26 week or 12

weeks after the NTV is issued. In this circumstance it is noted that the tenant will have already been put on notice of the potential end to their tenancy due to the prior notice to vacate so the new notice to vacate will give them at least as much time as they would have had originally, if not longer. The 12 week notice period is designed to balance the competing policy objectives of providing a reasonable time in which to locate alternative accommodation and prepare for a move whilst also not creating a significant incentive for the tenant to delay the provision of information in response to the lessor's request in order to extend the period of time an ineligible tenant can remain in the property.

As noted above, the purpose of the temporary tenancy is to give a person the temporary ability to remain in a property following the breakdown of the previous tenancy for that property and to allow a period of time for the Housing Commissioner to assess their ongoing eligibility to remain in a public housing property. When a person is provided with a period of temporary housing assistance they must be advised that the that the assistance they are being provided with is temporary at the start of the tenancy. As such, the tenant will have already been on notice as to the temporary nature of their tenancy and that their ability to remain in the property is contingent upon them demonstrating establishing eligibility for housing assistance. As such, it is expected that, where a person who is receiving temporary housing assistance wishes to remain in the property they will have submitted an application for housing assistance. Where a person is found to be ineligible during the temporary housing assistance period, the Commissioner must give them at least 26 week NTV. However, in circumstances where the Housing Commissioner does not determine ineligibility until after the temporary period of housing assistance has ended then the Housing Commissioner will be able to issue a 12 week NTV.

In a similar way, SRTT 107 allows for a shorter 12 week notice period in circumstances where a person's period of temporary housing assistance has already ended (but where a decision as to their ongoing eligibility for housing assistance was not made during the period of temporary housing assistance). The policy rationale here is that the person will have already been on notice as to the temporary nature of their tenancy. The 12 week NTV period balances the competing policy aims of allowing a person a reasonable of time to move following a decision of ineligibility against not providing an extended additional period (after a temporary period of housing assistance has already been provided) for an ineligible tenant to remain in a public housing property.

As noted above, the purpose of these shorter notice periods are to ensure that ineligible tenants are not given significant additional time to remain in the premises in certain specific situations where the tenant has already had been put on notice that their tenancy may end. The safeguards associated with these provisions are that they shorter notice periods cannot be used unless the tenant has already received a NTV on due to a failure to provide information or the tenant has already been notified

of the temporary nature of the assistance being given to them. It is considered there is no less restrictive means available of achieving this purpose.

Right to equality before the law – sections 51A

As noted above, the bill introduces new grounds to terminate a tenancy agreement when one party to the agreement threatens, harasses, intimidates, or abuses the other party (sections 45A and 51A). Circumstances where a tenant acts in this manner towards their landlord are covered by section 51A. As discussed above in relation to the right to privacy, the outcomes of section 45A and 51A are different for lessors and tenants as the outcome of a lessor engaging in inappropriate conduct under section 45A is simply an end to the contractual relationship with the tenant, whereas the outcome for a tenant under section 51A is that they can be made homeless at short notice.

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

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

Disability is considered a protected attribute for the purposes of human rights law. It is noted that for people who live with a disability or mental health issue that impacts on their emotional regulation, impulse control, understanding of social situations or their communication skills, section 51A may have a disproportionate impact on them as it may make them more likely to engage in the conduct described in section 51A. As such, this provision may engage and limit the right to equality before the law for some people living with a disability.

The purpose of these termination provisions is to support an individual's ability to live free from intimidation, harassment or abuse. The provision provides both parties timely recourse – the ability to end the tenancy in a relatively short timeframe – in circumstances where they are subjected to inappropriate behaviour by the other party.

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

The purpose of these termination provisions is to support an individual's ability to live free from intimidation, harassment or abuse. The provision provides the lessor timely recourse – the ability to end the tenancy in a relatively short timeframe – in circumstances where they are subjected to inappropriate behaviour by the tenant.

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

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

Proportionality (s 28 (2) (e))

As noted above in the section on the right to privacy, this provision incorporates a number of safeguards to ensure any limitation on the right to privacy or the right to equality before the law are proportionate to the legitimate aim. Those safeguards are relevant to the limitation to the right to equality before the law as well. In particular it is noted that the provision expressly grants ACAT a discretion as to whether to end the tenancy, providing that it may only end the tenancy in these circumstances where it is appropriate to do so. The provision gives ACAT significant guidance as to factors it must consider when determining if tenancy termination is appropriate in the circumstances, which includes 'any other matter the ACAT considers relevant.' In circumstances where a tenant's behaviour towards their lessor is impacted by a disability or mental health issue, then the disability or mental health issue would be among 'other relevant matters' ACAT could consider when determining if the tenancy termination is appropriate in the circumstances.

The safeguards discussed in this section and above in the right to privacy help to ensure that a tenancy is only terminated under this pathway when the nature of the conduct that has occurred warrants such an outcome, thereby limiting any potential impacts on the right to equality before the law.

Right to be presumed innocent until proven guilty

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

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

These new strict liability offences are designed to deter non-compliance with the minimum housing standards and strengthen consumer protections for renters by ensuring renters are not asked to engage in rent bidding. These offences address consumer risks for tenants arising out of the power and information asymmetry that favours lessors and their agents in the ACT rental market.

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

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

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

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

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

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

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

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

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

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

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

Proportionality (s 28 (2) (e))

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

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

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

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

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

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

Residential Tenancies Legislation Amendment Bill 2022

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Residential Tenancies Legislation Amendment Bill 2022**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

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

Clause 2 Commencement

This clause sets out the scheme of commencement for the provisions of the Act. It provides that the Act (other than the specified provisions, listed below) commence on 1 April 2023.

Schedule 1, sections [1.2] and [1.3] will commence on the day after the Act's notification day.

The following sections will commence on a day fixed by the Minister by written notice:

- section 4 and 5;
- section 9;
- section 11;
- sections 13;
- sections 15 to 18;
- sections 20 to 26;
- sections 29 to 35;
- sections 43 to 49;
- sections 51 to 53;
- sections 55 to 60;
- schedule 1 (other than amendment 1.2)

The clause also contains notes which explain:

- that the naming and commencement provisions automatically commence on the notification day. This note also refers the reader to the *Legislation Act 2001 (ACT)* (the **Legislation Act**), s 75 (1) for more detail about automatic commencement.
- that when the Minister fixes a day for commencement, a single day or time may be fixed or different days or times may be fixed for the commencement of different provisions. The Legislation Act at section 77(1) provides more detail on this.
- that if a provision has not commenced within 6 months beginning on the notification day, it automatically commences on the first day after that period. The Legislation Act at section 79 provides more detail on this.

Clause 3 Legislation amended

This clause provides that the Act amends the *Residential Tenancies Act 1997* (**RTA**) and the *Residential Tenancies Regulation 1998* (the **RTR**). This clause also includes a note which explains that the Act also amends the *Housing Assistance Act 2007* (ACT) (the **HAA**). It refers the reader to schedule 1 for further details.

Clause 4 Legislation repealed

This clause provides that the *Housing Assistance Public Rental Housing Assistance Program (Review of entitlement to housing assistance) Operation Guideline 2013 (No 1)* (NI2013 534) is repealed.

Part 2 Residential Tenancies Act 1997

Clause 5 Section 8

Clause 5 substitutes section 8 to clarify when and how the standard residential tenancy terms (the **SRTTs**) are intended to operate. As the Bill introduces new tenancy terms that apply in some circumstances but not others, section 8 has been reworked to indicate when a tenancy agreement is taken to contain certain tenancy termination provisions.

Section 8 provides that a fixed term residential tenancy agreement is taken to contain the SRTTs set out in schedule 1, as in force on the day the lessor and tenant(s) enter the agreement. However, this section also clarifies that any amendments to the Act that effect the operation (rather than substantive content) of the SRTTs will apply to a fixed term agreement.

Section 8 also provides that a periodic agreement is taken to contain the SRTTs in schedule 1, as in force from time to time. This means that if the standard terms are updated, the updated terms will automatically be incorporated into an existing periodic tenancy agreement.

Section 8 also clarifies that where a periodic residential tenancy agreement has commenced at the expiry of a fixed term residential tenancy agreement, it is taken to contain the SRTTs that are in force at any given time.

This section also clarifies when particular residential tenancy agreements are taken to contain additional SRTTs. A tenancy agreement:

- includes the **public housing termination clauses** if the lessor is the Housing Commissioner;
- includes the **temporary housing assistance termination clause** if the lessor is the Housing Commissioner and the tenant is receiving temporary housing assistance for the premises;

- includes the **community housing provider termination clause** if the lessor is a registered community housing provider that leases a property that is owned by another person by agreement with the owner; and
- includes the **subsidised accommodation clauses** if neither of the circumstances described above apply, the lessor (or entity acting on the lessor's behalf) is either a registered community housing provider, or the lessor or owner of the premises receives government funding or assistance to provide the premises to the tenant.

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

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

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

This section also includes examples to clarify what is meant by government funding or assistance for the purposes of the subsidised accommodation clauses. This includes: affordable housing provided or managed by a community housing provider, accommodation provided in accordance with the National Rental Affordability Scheme, and specialist disability accommodation.

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

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

Clause 6 New section 10A

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

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

Clause 7 Energy efficiency rating – advertising

Section 11A (7)

This is a consequential amendment to clause 6 above. It removes a definition of '**publish**' that was specific to section 11A. Clause 6 applies the definition to the whole division.

Clause 8 New section 11AB

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

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

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

The maximum penalty for both offences is 5 penalty units.

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

Clause 9 New sections 11AC and 11AD

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

New section 11AC introduces **rental rate** as a defined term for the purposes of this section. **Rental rate** is defined as either a single amount, or 2 or more single amounts if each single amount relates to an inclusion that may come with the premises. For example, a lessor or agent may publish an advertisement for a rental premises with two fixed, but alternative rental rate prices – one amount would reflect the fixed rental rate should a tenant wish to have the premises fully furnished, while the alternative amount would reflect the fixed rental rate should a tenant wish to rent the premises unfurnished. However, **rental rate** does not include a range of amounts, or a minimum or maximum amount.

This section also introduces **inclusion** as a defined term for the purposes of the section. **Inclusion** is defined as meaning property or a right or entitlement that

relates to the premises. Examples include access to a basement car park, and partial or full furnishing of the premises.

The maximum penalty for this offence is 5 penalty units.

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

The maximum penalty for this offence is 20 penalty units.

The provision does not prevent a lessor from accepting a tenant's offer to pay rent that exceeds the advertised price provided the offer was made by the tenant without solicitation or invitation from the lessor, or another person.

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

Clause 10 Lessor's obligations **New section 12 (3) (g) and (h)**

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

Similar to clause 8, the policy intent is to ensure that tenants are aware whether their prospective rental complies with minimum housing standards. By requiring a lessor to provide a written statement, new subsection 12 (3) (g) will also ensure there is a written record of the representations made to a tenant, which may be relied upon should any dispute pertaining to minimum housing standards arise.

Where a tenant requests additional information about the compliance of a premises with any minimum housing standards in force, new subsection 12 (3) (h) requires a lessor to provide a copy of any record required to be kept by the lessor in accordance with section 19C. Section 19C relates to the requirement on a lessor to keep records about minimum housing standards.

Clause 11 Section 12 (3) (i)

New subsection 12 (3) (i) requires the subsidised accommodation provider to provide a tenant with information about any criteria against which the tenant may be assessed and, if found ineligible, have their tenancy terminated before the tenancy commences. This ensures the tenant is aware of the eligibility criteria against which they may be assessed during their tenancy.

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

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

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

- (a) if a regulation prescribes a period in which the premises must comply—the end of the period; or
- (b) in any other case 1 month after the residential tenancy agreement for the premises is entered into.

The intention of this provision is, in circumstances where a rental premises does not comply with a minimum housing standard at the start of the tenancy, to make the tenant aware of the date by which the lessor is required to ensure the premises comply the minimum housing standard. If the premises do not comply by the proposed compliance date, then the tenant may choose to seek a rent reduction or compensation in accordance with new sections 71AAA and 83 (1) (da) introduced by clauses 27 and 28.

Clause 13 Section 12 (4), new definition of *subsidised accommodation eligibility requirements*

This clause inserts a new definition for the term '*subsidised accommodation eligibility requirements*' and thereby, supports the interpretation of a lessor's obligations introduced by new section 12 (3) (i) - clause 11.

A *subsidised accommodation eligibility requirement* in relation to premises under a residential tenancy agreement, means any rule or requirement against which —

- (a) the tenant's eligibility to live in the premises will be assessable during the tenancy; or
- (b) the lessor or owner's eligibility to receive the government funding or assistance in relation to the premises will be assessable during the tenancy.

Clause 14 New division 2.5

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

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

New division 2.5 is intended to support the implementation of future minimum housing standards. As such, provisions relating to minimum housing standards are grouped together in this division.

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

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

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

New section 19A also provides that a regulation made in relation to minimum housing standards may apply, adopt or incorporate a law or instrument as in force at a particular time.

This clause also includes a note, which provides that the text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or at a particular time, is taken to be a notifiable instrument if the operation of subsections 47 (5) or (6) of the Legislation Act are not disapplied. It refers the reader to section 47 (7) of the Legislation Act for further guidance.

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

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

Similar to clauses 8 and 10, the policy intent of section 19C is to ensure that there is a written record of the representations made to a tenant, which may be relied upon should any dispute pertaining to minimum housing standards arise.

Clause 15 Termination Section 36 (1) (b)

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

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

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

To correct this situation, this clause substitutes subsection 36 (1) (b) so that it now provides that a tenancy is terminated where a party serves a termination notice in accordance with the SRTTs and the tenant vacates the premises in accordance with the notice.

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

Clause 16 Section 36 (1) (n)

This clause is consequential to the new definition of *posting termination clause* in new schedule 2, 2.2 introduced by clause 45. This new definition updates the language by removing the phrase 'fair clause for posted people' from subsection 36 (1) (n) from the RTA and substitutes it for the phrase 'posting termination clause'. This clause provides clearer language for the purpose of the termination provision.

Clause 17 Section 36 (2), definition of *fair clause for posted people*

This is a consequential amendment to the new definition of *posting termination clause* in new schedule 2, 2.2 introduced by clause 45 below. It substitutes the definition of ***fair clause for posted people*** and introduces a new definition for the term ***posting termination clause***.

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

Clause 18 New section 45A

This clause inserts new section 45A. New section 45A provides that on application by the tenant, if ACAT is satisfied that it is appropriate, it is empowered to make a TPO if a lessor has engaged in threatening, harassing, intimidating or abusive behaviour towards a tenant or a related person, or has permitted another person to behave in this way. This includes conduct that the tenant or a related person is *reasonably likely* to find threatening, intimidating, harassing or abusive.

This provision further clarifies that the ACAT may also make any other order it considers appropriate in the circumstances.

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

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

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

However, as a matter of procedural fairness, subsection 45A (3) requires that the tenant provide the lessor with written notice that details the alleged conduct not later than 1 week before applying to ACAT for an order. Under subsection 45A (4), ACAT must not list the matter for hearing until at least 14 days has passed since appropriate notice has been provided to the lessor.

To ensure that this new protection for tenants is appropriately balanced, subsection 45A (6) provides that when deciding whether it is appropriate to make a TPO, the ACAT must consider the nature, frequency and duration of the conduct; the circumstances of the conduct, including any behaviour of the tenant or a related person; whether the conduct is likely to continue; whether the lessor has stopped, or has agreed to stop the conduct (and is reasonably likely to do so); any family violence order or protection order made against the lessor by the Magistrates Court (or any order under a law of a State or a foreign country that has the same effect, or substantially the same effect); the effect of the conduct on the tenant and any related person; whether any other order is reasonably available; and, any other matters ACAT considers relevant.

To assist ACAT in determining whether any other order is reasonably available, this clause provides an example. The example refers the reader to the orders available

under section 83, which relevantly include, an order restraining any action in breach of a residential tenancy agreement or occupancy agreement.

This clause also inserts a note, clarifying that **State**, includes the Northern Territory. The note then refers the reader to the dictionary of the Legislation Act.

Related person and **lessor** are introduced as defined terms for the purposes of new section 45A.

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

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

Clause 19 New section 46AA

This clause inserts new section 46AA.

New section 46AA (1) confers powers on ACAT specific to disputes in relation to minimum housing standards. The provision allows ACAT, upon application by a tenant, to make an order terminating a residential tenancy agreement where a lessor has failed to meet their obligations under the new minimum housing standards provisions established under new section 19B. This provision allows a tenant to take a tenancy dispute to ACAT when the lessor does not comply with any applicable minimum housing standards.

However, subsection 46AA (2) allows ACAT to refuse to terminate the agreement if the tenant has failed to provide the lessor with reasonable access to enable the lessor to undertake work necessary to ensure the premises complies with minimum housing standards. The policy intention of this is to recognise that allowing a tenant to terminate a tenancy where the lessor fails to comply with minimum standards may be unfair on a lessor in circumstances where the tenant has failed to provide reasonable access.

A lessor's expanded right of access to a rental premises is provided under new SRTT, clause 82 (1) (clause 39 below).

Clause 20 Termination of agreement for aged care or social housing needs Section 46A (5), definitions of *registered community housing provider* and *social housing dwelling*

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

Clause 21 Section 47

Current section 47 of the RTA supports lessors by allowing them to apply to ACAT to terminate a tenancy in circumstances where the tenant has not breached the agreement but where the lessor has issued a termination notice in accordance with the SRTTs and the tenant has not vacated the premises in accordance with that notice.

This Bill introduces new termination provisions to ensure that lessors can continue to manage tenancies effectively following the removal of without grounds evictions. With respect to lessors of public housing, community housing, temporary housing assistance and subsidised accommodation properties, new termination provisions have been introduced to recognise and support the legitimate and justifiable grounds on which a tenancy may come to an end, and that enable a lessor to provide targeted accommodation assistance to the most vulnerable members of the community. For example, under the new termination provisions, the Housing Commissioner may terminate a tenancy if the tenant is no longer eligible for housing assistance under the Program. Doing so allows that property to be reallocated to someone who *is* eligible for housing assistance, and is in need of that assistance.

However, tenants reliant on public housing, community housing, temporary housing assistance and subsidised accommodation may experience complex vulnerabilities, particularly in the context of a tenancy agreement that represents an inherent and significant power imbalance. In recognition of this, this Bill introduces several safeguards to ensure that the new termination provisions are construed narrowly and are only used as intended.

ACAT's discretion under section 47 is unconfined (except in so far as there is an implied limitation on the factors ACAT may consider having regard to the language, purpose and scope of the RTA). However, it is acknowledged that by introducing specific termination provisions, which apply in narrowly defined circumstances and explicitly contemplate scenarios in which a public or community housing lessor may legitimately need to terminate a tenancy to support the administrative management of a housing assistance program, there is a risk that ACAT may narrow the prevailing interpretation of its discretion.

To this end, clause 21 substitutes section 47 provides that where an application relates to a public housing, community housing, subsidised housing or temporary housing assistance termination clause, ACAT may only make a TPO if it is satisfied that the termination is reasonable and proportionate in the circumstances of each case.

In assessing whether a termination is reasonable and proportionate, ACAT must consider the following: (i) the history and length of the tenancy; (ii) the functions of the lessor in providing public or subsidised housing; (iii) the conduct of the tenant, lessor or owner in relation to matters that are relevant to the notice for termination

being served on the tenant; (iv) any hardship that the tenant will, or is likely to suffer if the residential tenancy agreement is terminated (including financial hardship, difficulties in finding alternative accommodation, any risk of the tenant experiencing a prolonged period of homelessness and impacts on the tenant's physical or mental health); (v) any other matters the ACAT considers relevant.

In practice, this empowers ACAT to refuse to grant a TPO even where the grounds for termination for a community housing, public housing, subsidised accommodation or temporary housing assistance tenancy agreement, have been established, on the basis that termination is not reasonable and proportionate in the circumstances.

This clause also introduces **community housing provider termination clause**, **public housing termination clause**, **subsidised accommodation clauses**, and **temporary housing assistance termination clauses** as defined terms for the purposes of this section. Each of these terms is defined by director the reader to section 8 (4) of the RTA (clause 5).

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

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

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

Clause 22 New section 51A

This clause inserts new section 51A. New section 51A provides that on application by the lessor, if ACAT is satisfied that it is appropriate, it is empowered to make a TPO if a tenant engages in behaviour that is, or is reasonably likely to be experienced as, threatening, harassing, intimidating or abusing behaviour towards a lessor or related person.

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

As a matter of procedural fairness, subsection 51A (4) requires that the lessor provides the tenant with written notice, detailing the alleged conduct, not later than 2 weeks before applying to ACAT for an order. This provision also states that ACAT may not list the matter for hearing until 21 days has passed since appropriate notice has been provided to the tenant.

It is noted that the timeframes for notice to the tenant and the date on which ACAT may hear a matter are longer in this section than in 45A. This is in acknowledgement of the differing outcomes for that parties in the exercise of each section. In section 45A when the tenant relies on the provision, the tenant is choosing to end the tenancy. However, in s 51A a tenant may have their tenancy ended (against their wishes) in a relatively short timeframe. To increase the protections available to tenants in this circumstance, the timeframes are slightly longer.

New section 51A also permits ACAT to suspend the operation of a TPO made under this section for up to three weeks if it is satisfied that: (i) the tenant would otherwise suffer significant hardship; (ii) that hardship would be greater than that suffered by the lessor; and, (iii) it is appropriate to do so.

As with new section 45A (above), to ensure that this new protection for lessors is appropriately balanced, subsection 51A (7) provides that ACAT must consider a range of factors in deciding whether it is appropriate to make a TPO including: the nature, frequency and duration of the conduct; the circumstances of the conduct, including any behaviour of the lessor or related person; whether the conduct is likely to continue; whether the tenant has stopped, or has agreed to stop the conduct (and is likely to do so); any family violence order or protection order made against the tenant or another person living at the premises by the Magistrates Court (or any order under a law of a State or a foreign country that has the same effect, or substantially the same effect); the effect of the conduct on the lessor; whether any other order is reasonably available; and any other matters ACAT considers relevant.

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

This clause also inserts a note, clarifying that **State**, includes the Northern Territory. The note then refers the reader to the dictionary of the Legislation Act.

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

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

While ‘family member’ is not a defined term, the intent of the provision is that a ‘family member’ is a person who plays an active role in managing the tenancy that

may not necessarily be a formal agent or representative of the lessor, and that this be a relevant consideration for ACAT when determining whether to make any order under this provision.

Clause 23 Section 57

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

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

While this substituted clause largely reflects the existing law, notably, new subsection 57 (b) (i) (E) recognises that a tenant publishing information, or disclosing information that was published by someone else, about their lessor, rental premises or residential tenancy agreement may also be subject to retaliatory action from a lessor. For example, a tenant may share information about their experience as a tenant on social media.

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

The term '**information**' is defined so that it includes allegations, complaints and opinions.

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

The intention of this provision is to allow tenants to raise issues of concern about the operation of their tenancy (so long as they are not false or misleading) and to contribute to the public debate around tenancy issues, without having to fear that 'going to the media' about their concerns will lead to their eviction.

Clause 24 Sections 58 to 60

This clause substitutes sections 58 – 60.

Existing sections 58 and 59 provide that a lessor's NTV is defective if it is not in the approved form (under section 133 of the RTA), and served in the manner prescribed by regulation. However, as there are currently no approved forms for NTVs. Therefore, these sections have been updated to reflect when a NTV will be considered to be defective.

It is noted that the amendments in clause 24 are connected to those in clause 47 which amends the Dictionary of the RTA to insert a new definition for **defective termination notice**.

As per clause 47, **defective termination notice** is now defined as a notice that –

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

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

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

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

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

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

Clause 25 New section 64AD

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

This clause, together with the amendments at clauses 23 and 24, is intended to extend and compliment the retaliatory eviction protections at existing section 57 of the RTA.

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

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

For example, if a tenant received a termination notice requiring them to vacate the property in twelve weeks, and the tenant believes that this is a retaliatory termination notice, under new section 64AD, the tenant would be able to apply to ACAT for an order disallowing the NTV at any time prior to the expiration of the notice period, rather than having to wait until the expiration of the notice period and for the lessor to apply for a TPO. This scenario would allow a tenant more time to vacate the property and secure alternative accommodation.

Further to the above, clauses 23 to 25 are intended to support the policy objectives of removing without cause evictions. By requiring a lessor to rely on prescribed, justifiable grounds for terminating a tenancy, a tenant has increased rental security, and in the circumstances envisioned by this provision, is empowered to engage in public debate and discussion about issues relevant to tenants without fear of eviction or conflict.

Example

Frankie is a tenant. Frankie was approached by a journalist from a local news station and was asked to talk about their experience renting in the ACT. The journalist explained that the interview may be used for a segment about the increasing pressures faced by tenants in the ACT. Frankie explained to the journalist that they

had recently received a rent increase notice from their landlord. Frankie talked about how this notice had impacted their family, disclosing their concern about their family's wellbeing and financial security. Frankie told the journalist that they believed the rent increase notice was "totally unreasonable" given the size and condition of the property. The interview was aired during the evening news broadcast.

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

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

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

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

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

Clause 26 Waiver of notice requirements

Section 65 (2)

Existing section 65 (2) refers to a tenant giving their lessor a notice in the approved form under section 133 of the RTA. This section has been updated to reflect that there are currently no approved forms under section 133 of the RTA.

It is noted that this amendment is connected to the amendments in clause 47 which inserts a new definition for **defective termination notice** into the Dictionary of the RTA and to the amendments at clause 24, which substitute the defective termination notice provisions at sections 58-60 of the RTA.

This clause substitutes existing subsection 65 (2) with new subsection 65 (2) and (3), which collectively, empower ACAT to make an order correcting a tenant's defective termination notice if it was prompted by an increase in rent, and the tenant has

vacated in accordance with that notice. Prior to making the order, ACAT must be satisfied that correcting the defective termination notice would not put the lessor in a significantly worse position than they would have been if the tenant had originally issued a compliant termination notice.

Clause 27 New section 71AAA

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

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

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

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

This section indicates that a rent reduction order will take effect from the day the premises stopped complying with the minimum housing standard, or any later date stated by the ACAT. This section differs from the rent reduction provisions, as it does not limit any compensation order to 12 months. Rather, a rent reduction order granted under this section will remain in force for the period stated by ACAT.

This section also empowers ACAT to refuse to make an order if the tenant has failed to provide the lessor with reasonable access to enable the lessor to undertake the work necessary to ensure the premises complies with minimum housing standards. The policy intention of this provision is to recognise that allowing a tenant to obtain a rent reduction where the lessor fails to comply with minimum standards may be unfair on a lessor in circumstances where the tenant has failed to provide reasonable access.

This section also allows ACAT to order the lessor to pay the tenant the difference between the rent that the tenant has paid and the rent that would have been payable

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

Clause 28 Orders by ACAT
New section 83 (1) (da)

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

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

Clause 29 Section 83 (1) (f) (ii)

This clause is consequential to the introduction of a new definition of a **defective termination notice** at clause 47. It substitutes subsection 83 (1) (f) (ii), and by doing so, removes references to forms approved by the Minister under section 133 and replaces it with a reference to a defective termination notice.

Clause 30 Section 83 (1) (k)

As above, this clause is a consequential amendment, and substitutes subsection 83 (1) (k) so that it refers to the newly defined term, 'defective termination notice' (clause 47).

Clause 31 Section 83 (2), except notes

This clause is a consequential amendment and substitutes subsection 83 (2) so that it refers to the newly defined term, 'defective termination notice' (clause 47).

To assist ACAT to interpret section 83, for subsection 83 (2) contains 2 notes. These continue to be relevant to the interpretation of section 83, even once subsection 83 (2) is removed. This clause clarifies that these notes will not be omitted under this amendment.

Clause 32 Notice of intention to vacate – award of compensation
Section 84 (1) (b)

This clause is a consequential amendment, and substitutes subsection 84 (1) (b) so that it omits the phrase ‘break lease clause’ and substitutes it with the defined term ‘break lease fee clause’ to align with the new definition of **break lease fee clause** introduced by clause 33.

Clause 33 Section 84 (6), definition of *break lease clause*

This clause substitutes the term ‘break lease clause’ with **break lease fee clause**.

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

Clause 34 Section 85

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

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

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

Clause 35 New tenancy agreement – family violence and protection orders
Section 85A (4), definition of *exclusion condition*

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

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

Clause 36 Regulation-making power
Section 136 (2) (d), except note

This is a consequential amendment to clause 14. As noted above, the minimum standards regulation-making power has been omitted from section 136 (2) (d) and reinserted at section 19A of the Act so that sections relevant to minimum housing standards can be grouped together in new division 2.5 of the RTA.

However, this clause clarifies that the note included in section 136 (2) (d) is not omitted by this amendment as it maintains relevance to the remaining subsections.

Clause 37 Section 136 (3) and (4), and note

As above, this is a consequential amendment to clause 14. The regulation-making power has been omitted from section 136 and reinserted at section 19A of the RTA.

The note that was contained in this section is also omitted by this clause.

Clause 38 Schedule 1, new clause 62A

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

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

This amendment acknowledges that tenants are unlikely to refer to the RTA or the RTR when entering a tenancy agreement and therefore, may not be aware of the lessor's obligation to comply with any minimum housing standards that are in force at the time.

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

Clause 39 Schedule 1, clause 82 (1) and heading

To support the amendments made at clauses 14 and 28, new clause 82 (1) broadens the scope of the lessor's right of access to include access for the purpose of complying with minimum standards. This clause also inserts a new heading which reflects the amended scope of the lessor's right of access.

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

While current clause 82 of the SRTTs allows a lessor to require access to the premises for the purpose of making or inspecting repairs, it is unlikely that ensuring compliance with minimum housing standards would always fall within the scope of a repair to the property (for example, an inspection to assess whether the property meets a newly introduced minimum standard).

Given this, and with the intention of supporting the introduction of new minimum housing standards, new clause 82 (1) seeks to clarify that on giving the tenant 1

week notice (or such other agreed period), a lessor can require access to a tenanted premises at a reasonable time for the purpose of:

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

However, to ensure that broadening a lessor's right of entry does not unreasonably interfere with a tenant's right to peaceful enjoyment of the property, subsection (1A) provides that the lessor must only enter the premises under this section, if, taking into account the nature of the activity, it is reasonable and necessary to do so.

Clause 40 Schedule 1, clause 83

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

Clause 41 Schedule 1, clause 85

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

Clause 42 Schedule 1, new clause 86 (2)

Current clause 86 of the SRTTs provides a pathway for lessors or tenants to terminate a tenancy where the premises is not fit for habitation. New subclause 86 (2) clarifies that this pathway is not available in circumstances where the lessor has only failed to comply with the minimum housing standards that apply to the premises.

This clause also contains a note which directs to section 46AA if a tenant wants to apply to the ACAT to terminate the tenancy if the lessor fails to comply with the minimum housing standards.

The intention of this provision is to prevent lessors from failing to comply with minimum standards and then using that as a reason to terminate the tenancy. Where the tenant wants to terminate a tenancy due to the lessor's failure to comply with the minimum housing standards they are able to do so.

Clause 43 Schedule 1, clauses 94 and 95

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

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

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

Clause 44 Schedule 1, clause 96 and heading

This clause substitutes both the heading and substance of clause 96 of the SRTT. It also creates a new ground for the termination of a periodic residential tenancy agreement.

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

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

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

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

This clause also removes clause 96 (1A) of the SRTTs, which currently requires a lessor to give a tenant a statutory declaration about their intention to reside in the premises, an immediate family member's, or an interested person's, intention to

reside in the premises, if they intend to rely on those grounds to terminate the residential tenancy agreement (as per clause 96 (1) (a) – (c)).

Existing clause 96 (1A) is replaced with new subclause 96 (2) which extends the requirement for the lessor to provide evidence to support their reliance on the nominated tenancy termination ground. This is intended to ensure that these prescribed grounds for termination under the RTA are not misused by requiring the lessor to provide evidence to the tenant that their reliance on the nominated ground is genuine.

An example of what constitutes written evidence has been inserted in this clause which provides that evidence may include a statutory declaration, development application, or quotes from a tradesperson for renovations, notice of decision from the Housing Commissioner.

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

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

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

Clause 45 New schedule 2

This clause inserts new schedule 2.

Schedule 2 introduces the new additional standard residential tenancy terms for residential tenancy agreements, which will be incorporated into tenancy agreements in the manner set out in amended section 8 (see clause 5 of this Bill).

Section 8 sets out the way in which particular tenancy terms can be included in a residential tenancy agreement. Some tenancy terms may be incorporated automatically, while others will be incorporated by agreement between the tenant and the lessor.

The new terms inserted in schedule 2 are also ‘standard residential tenancy terms’ (referred to throughout this Explanatory Statement as SRTTs) – see the new definition of **standard residential tenancy terms** substituted in the RTA Dictionary by clause 57 of this Bill.

It is noted that, for ease of reference, these new SRTTs are numbered, with then numbers following on from the existing 100 SRTTs contained in Schedule 1.

However, it is acknowledged that where some but not all of these clauses are incorporated in a tenancy agreement this could result in gaps in the numbering of the standard terms. However, so that the clauses can be referred to consistently by ACAT and others numbering has been provided.

Schedule 2, 2.1 Break lease fee clause

101 Termination before end of fixed term – fee for breaking lease

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

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

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

Schedule 2, 2.2 Posting termination clause

102 Termination because of posting

Clause 2.2 reproduces the posting termination clause formerly in section 8, with a slight amendment to the wording to provide greater clarity about the policy intent.

The posting termination clause provides that a tenancy agreement may be terminated if: (a) the lessor is posted to the ACT in the course of their employment; or (b) the tenant is posted away from the ACT in the course of their employment.

If either party wishes to rely on this clause, they must provide either an NTV, or a notice of intention to vacate with a minimum of 8 weeks’ notice. This notice must be supplemented by evidence of their posting (for example, a letter from the employer of the lessor or tenant confirming the details of the posting).

Where a party has relied on this section, the residential tenancy agreement terminates either – (a) 8 weeks after the day the notice is received; or (b) if a later date is stated in the notice – on the stated date.

The relocation of the posting termination clause is not intended to amend its interpretation or operation. Rather, this amendment has been made so that the additional SRTTs are grouped together in a single schedule for readability and clarity.

However, this amendment substitutes ‘Canberra’ for ‘ACT’. The posting termination clause was never intended to apply exclusively to residential tenancy agreements

within Canberra, rather than the greater ACT. This amendment was made to explicitly confirm this intent.

Schedule 2, 2.3 Community housing provider termination clause

103 Termination by community housing provider if premises required by owner

Background

The policy intention of this provision (when it applies to private property owners) is to give property owners, confidence that if they choose to participate in an affordable housing program, they can regain possession of their premises if they need to. The provision is also intended to enable the Housing Commissioner to regain control of the property when a property has been provided to a registered community housing provider (CHP) in accordance with a housing assistance program but the Housing Commissioner has withdrawn assistance from the CHP in accordance with the Housing Assistance program.

Operation of the provision

This amendment introduces clause 103, and by doing so, new grounds on which a community housing provider may terminate a tenancy in circumstances where the owner requires the premises.

The clause provides that an owner requires the premises, if they genuinely:

- intend to sell the premises
- intend to live in the premises
- believe their immediate relative intends to live in the premises
- believe an interested person intends to live in the premises
- intend to reconstruct, renovate or make major repairs to the premises and that work could not reasonably be carried out with the tenant continuing to live in the premises
- intend to stop using the premises for community housing (and are not the Housing Commissioner).

The provision also stipulates the minimum notice period for each of the prescribed grounds. Where an owner intends to sell the premises, live in the premises, or believes their immediate relative or other interested person intends to live in the premises, the tenant must be provided at least 8 weeks notice. Where the owner intends to reconstruct, renovate or make major repairs to the premises, a tenant must be provided with at least 12 weeks notice. These notice periods align with the those provided to other property owners (who are the lessors of the property they own) in clause 96 of the SRTSS. Finally, where an owner who is not the Housing Commissioner intends to stop using the premises for community housing, the tenant must be provided at least 26 weeks notice.

In addition to the above, clause 2.3 also provides that where the Housing Commissioner owns the premises, they may rely on this section if they withdraw the premises in accordance with an approved Housing Assistance Program. This provision will apply regardless of whether the tenancy is fixed or periodic.

If a community housing provider wants to rely on this clause, they must provide written evidence of their grounds for terminating with the NTV. To assist community housing providers to understand their responsibilities under this section, the amendment inserts an example. It provides that written evidence may include a statutory declaration, development application, quotes from a tradesperson for the proposed renovations.

To ensure that a tenant is not unduly restricted in their search for alternative accommodation, and to minimise the time they may need to pay rent on two properties if they have found somewhere to relocate to subclause (3) provides that where a tenant is issued a NTV under this section, they may either: (a) vacate the premises at any time before the expiry of the notice – provided they give at least 2 weeks notice of their intention to vacate; or, (b) at any time during the 2 weeks before the expiry of that notice- provided they give at least 4 days notice of their intention to vacate.

Where a community housing provider has issued a NTV under this clause, the tenancy ends on the day the tenant vacates the premises.

This provision introduces **immediate relative** and **interested person** as defined terms for the purposes of clause 2.3.

Immediate relative of the owner is defined as a son, daughter, son-in-law, daughter-in-law, mother, father, mother-in-law, father-in-law, brother, sister, brother-in-law or sister-in-law.

Interested person for an owner means a person who is not an immediate relative of the owner but who has a close family or personal relationship with the owner and who has a reasonable expectation arising from that relationship that the owner would provide accommodation for the person.

Schedule 2, 2.4 Public housing termination clauses

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

The new termination clauses inserted at new clause 2.4 are:

- 104 - termination if housing assistance is cancelled or withdrawn;
- 105 - termination if tenant refuses transfer to alternate premises; and

- 106 - termination if tenant is party to 2 tenancies.

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

104 Termination if housing assistance cancelled or withdrawn

Background

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

The purpose of this new termination provision is to support the operation of the Program and enable access to housing for the most disadvantaged in the community. The termination provision supports the effective targeting of public housing by ensuring it can be made available to eligible individuals by withdrawing or cancelling assistance from those who are no longer eligible.

Section 25 of the HAA allows the Housing Commissioner to require information from the tenant where the Housing Commissioner reasonably needs the information to review the housing assistance provided to the tenant. It also empowers the Housing Commissioner to cancel or suspend a person's housing assistance if the requested information is not provided within the reasonable timeframe provided by the Housing Commissioner. It is noted a decision to cancel or suspend housing is an appealable decision.

However, cancellation of housing assistance (where the assistance is in the form of rental accommodation) may be meaningless if the Housing Commissioner cannot also terminate the tenancy connected to that housing assistance. As such, this provision allows the Housing Commissioner to issue a 26 notice to vacate if the Housing Commissioner has cancelled a tenant's housing assistance in accordance with section 25 of the HAA. However, the Housing commissioner issue the NTV until the tenant is no longer able to seek review of the decision to cancel their housing

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

Currently the Housing Commissioner uses the 'without cause' termination provision to terminate at tenancy in this circumstance. This new termination clause is intended to provide the Housing Commissioner with the continued ability to terminate a tenancy in circumstances where a review of the tenant's entitlement to housing assistance has led to a decision to withdraw housing assistance from them. It is noted that the termination provision is drafted to refer to approved housing assistance programs generally, rather than the existing Program. This is to capture any future versions of the Program should the Housing Commissioner decide to amend the Program. This does mean that it would be open to the Housing Commissioner to decide to amend the existing Program to expand the circumstances in which the Housing Commissioner can review a tenant's eligibility for ongoing housing assistance. To ensure there are appropriate safeguards and oversight to any amendments that may lead to the termination of tenancies, this Bill incorporates amendments to the HAA that increase the level of scrutiny. This Bill requires the creation of legislative instruments related to decisions of the Housing Commissioner that could lead to tenancy termination (see the HAA amendments at Schedule 1 of this Bill for further detail).

Operation of the tenancy termination provision

This provision allows the Housing Commissioner to terminate a tenancy by giving the tenant 26 weeks' NTV the premises on the ground the Housing Commissioner has decided the tenant is no longer eligible to receive housing assistance under a housing assistance program.

This provision also allows the Housing Commissioner to issue a NTV where the tenant has failed to comply with a request for information made in accordance with subsections 25 (2) (a) and 25 (3) the HAA (Housing assistance recipients – requirement for information). These subsections allow the Housing Commissioner to request information that they reasonably need to review the tenant's housing assistance.

Where the Housing Commissioner has issued an NTV under this section on the basis that a tenant has failed to comply with a request for information, that NTV is taken to be withdrawn if the tenant subsequently provides the requested information before the expiry of the NTV.

In circumstances where the Housing Commissioner's decision is a reviewable decision under the housing assistance program, the Housing Commissioner must wait until the tenant is **no longer able to ask for a review** of the decision before issuing an NTV under this section.

For the purposes of this clause, a tenant is **no longer able to ask for a review** of the Housing Commissioner's decision if – (a) the period in which the tenant may make an application for review of the decision has ended, and the tenant has not

made an application; or (b) if the tenant applies for review of the decision – the Housing Commissioner’s decision is confirmed.

As noted above, in circumstances where a tenant was issued with a NTV on the basis of a cancellation of housing assistance (due to a failure to provide information) but subsequently provides the information the original NTV on the grounds of cancellation of assistance is automatically withdrawn. However, in circumstances where the tenant is then assessed as ineligible, the Housing Commissioner can issue a new NTV on the grounds the tenant’s housing assistance is being withdrawn. To avoid a situation where the tenant can deliberately delay providing information in order to stay in the property for a longer period of time, the provision allows the Commissioner to provide a new NTV for less than 26 weeks where the tenant has already been provided with a NTV on the grounds of cancellation. In that circumstance the NTV can provide a vacate date which is the *later* of: the vacate date in the original NTV (issued on the grounds of cancellation) OR 12 week after the new NTV is issued. However, here again, the Housing Commissioner will not be able to issue the NTV on the grounds housing assistance has been withdrawn until after the tenant is no longer able to seek review of the decision.

The policy intent of this section is to balance the competing priorities of providing a reasonable time frame (of at least 12 weeks) for the tenant to vacate the property, whilst not allowing an ineligible tenant to remain in the premises for an extended period of time when they were delayed in responding to the Housing Commissioner’s request for information.

An example has been included to support understanding of this provision.

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

Where a tenant is issued a NTV under this section, they may either: (a) vacate the premises at any time before the expiry of the notice – provided they give at least 2 weeks notice of their intention to vacate; or, (b) at any time during the 2 weeks before the expiry of that notice- provided they give at least 4 days notice of their intention to vacate.

The tenancy terminates on the day the tenant vacates the premises.

If the tenant does not move out in accordance with the NTV, then the Housing Commissioner would need to follow the existing tenancy termination pathway at section 47 of the RTA and apply to ACAT for a TPO on the basis the tenant has not vacated the premises in accordance with a termination notice issued under the Act. As noted above at clause 21 section 47 now also requires ACAT to consider if the TPO being sought is reasonable and proportionate in the circumstances.

This Bill also amends existing section 47 of the RTA to clarify that when hearing a TPO application on this ground, ACAT may not undertake merits review of the administrative law decision by the Housing Commissioner to withdraw housing assistance from the tenant upon finding the tenant is no longer eligible for assistance. See clause 21, above, for more detail on this amendment. ACAT will still be able to exercise its general discretion to consider the circumstances of the case when deciding whether to grant a TPO.

105 Termination if tenant refuses transfer to alternate premises

Background

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

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

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

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

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

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

It is also noted that where the Commissioner wants to end a tenancy on the basis that the Commissioner genuinely intends to sell or renovate the property the Commissioner may still rely on the existing termination grounds at clause 96 of the SRTTs. The insertion of this provision is not intended to prevent the Commissioner from utilising other termination grounds available to all lessors.

Operation of the provision

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

It is noted that currently under the Program a decision to transfer in the interests of community harmony is an appealable decision but the other circumstances in which the Housing Commissioner may require a transfer are not.

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

The provision allows a tenant to end the tenancy provided the tenant gives the Housing Commissioner at least 2 weeks notice of their intention to vacate, or if the tenant wishes to end the tenancy during the 2 weeks before the date stated in the notice, provided they give the Housing Commissioner 4 days' notice of their intention to vacate. This provision further clarifies that the tenancy terminates on the day the tenant vacates the premises.

If the tenant does not move out in accordance with the NTV then the Housing Commissioner would need to follow the existing tenancy termination pathway at

section 47 of the RTA and apply to ACAT for a TPO on the basis the tenant has not vacated the premises in accordance with a termination notice issued under the Act.

The Bill also amends existing section 47 of the RTA to require that ACAT consider whether a TPO sought on this ground is reasonable and proportionate in the circumstances. Amended section 47 also clarifies that when hearing a TPO application on this ground, ACAT may not undertake merits review of the administrative law decision by the Housing Commissioner to withdraw housing assistance from the tenant upon finding the tenant is no longer eligible for assistance. See clause 21, above, for more detail on this amendment. ACAT will still be able to exercise its general discretion to consider the circumstances of the case when deciding whether to grant a TPO.

106 Termination if tenant is party to 2 tenancies

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

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

Schedule 2, 2.5 Temporary housing assistance termination clause

107 Termination if housing commissioner decides tenant not eligible for ongoing housing assistance

Background

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

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

where they leave due to a relationship breakdown). Instead of requiring any remaining residents to immediately vacate the premises following the death or departure of the tenant, the Program supports the Housing Commissioner to act with compassion by allowing remaining residents to stay in the premises for a bit longer, thereby giving them a period to adjust to their changed circumstances.

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

It is noted that this Bill introduces a new definition for temporary housing assistance which will sit within the HAA and be cross referenced in the RTA (see clause 58 which inserts the new definition in the Dictionary of the RTA and Schedule 1 clause 1.5 which inserts the new definition in the Dictionary of the HAA).

As with the above termination provisions that apply to the Housing Commissioner, this termination provision is drafted to refer to approved housing assistance programs generally rather than the existing Program. This is to capture any future versions of the Program should the Housing Commissioner decide to amend it. An amendment to the current Program may be required to introduce the concept of temporary housing assistance following a tenancy termination breakdown. To ensure there are appropriate safeguards connected to changes to tenancy termination circumstances made through amendments to a housing assistance program, this Bill incorporates amendments to the HAA to increase the level of scrutiny on the creation of legislative instruments that are related to decisions of the Housing Commissioner that could lead to tenancy termination (see the HAA amendments at Schedule 1 of this Bill for further detail).

Operation of the provision

For this provision to be utilised, the ability to terminate the tenancy is connected to the term of the temporary assistance provided by the Housing Commissioner. It is noted that this tenancy provision will not be incorporated in all public housing tenancies with the Housing Commissioner – only those where it is explicitly stated that the tenant is receiving a temporary period of housing assistance (see clause 5, amended section 8 which indicates the provision is only taken to be contained in a tenancy agreement when the tenant is receiving a temporary period of housing assistance). This narrows the operation of the provision and ensures it can only be utilised in limited circumstances.

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

If the Housing Commissioner decides that the tenant is not eligible for ongoing housing assistance before the tenant's temporary housing assistance ends, the Housing Commissioner must provide at least 26 weeks notice to vacate the premises. If the Housing Commissioner makes that decision after the tenant's temporary housing assistance ends, they must provide at least 1 week notice to vacate the premises.

If a tenant is issued a NTV under this section, they may either: (a) vacate the premises at any time before the expiry of the notice – provided they give at least 2 weeks notice of their intention to vacate; or, (b) at any time during the 2 weeks before the expiry of that notice- provided they give at least 4 days notice of their intention to vacate.

The tenancy will end on the day the tenant vacates the premises.

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

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

2.6 Subsidised accommodation clauses

New Sch 2, 2.6 inserts new tenancy terms that apply to tenants in subsidised accommodation.

These new tenancy terms are:

- 108 What are subsidised accommodation eligibility requirements?
- 109 Lessor's obligations in relation to eligibility requirements
- 110 Tenant must provide information relating to eligibility requirements
- 111 Termination if tenant fails to provide information relating to eligibility requirements
- 112 Termination if tenant no longer eligible to live in premises

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

108 What are subsidised accommodation eligibility requirements?

New clause 108 introduces **subsidised accommodation eligibility requirements** as a defined term.

In relation to a premises under a residential tenancy agreement, **subsidised accommodation eligibility requirements** means any rule or requirement relating to government funding or assistance for residential housing against which – (a) the tenant’s eligibility to live in the premises will be assessable during the tenancy; or (b) the lessor’s or owner’s eligibility to receive the government funding or assistance in relation to the premises will be assessable during the tenancy.

109 Lessor’s obligations in relation to eligibility requirements

This clause makes introduces a standard term for subsidised housing agreements that requires a lessor to provide a tenant with information about any change made to the eligibility criteria for their subsidised accommodation, within two weeks of that change being made.

The policy intention of this provision is to ensure that a tenant is aware of the eligibility criteria against which they may be assessed during their tenancy, and any changes made to that criteria during the course of their tenancy. This allows a tenant to remain informed about eligibility criteria that may lead to the termination of their tenancy. This means that if the tenant disagrees with the lessor’s assessment that they are ineligible for ongoing assistance, or the lessor issues a NTV under new clause 112 below, the tenant could bring a tenancy dispute to ACAT.

110 Tenant must provide information relating to eligibility requirements

Background

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

The Housing Commissioner has a legislated ability to require a tenant to provide them with the information reasonably necessary to review that person’s ability for ongoing housing assistance (see section 25 of the HAA). However, subsidised accommodation providers may not always have a legislated ability to require the

tenant to provide them with information. Despite this, the conditions of Government funding for the subsidised accommodation provider may require them to demonstrate that their tenant meets the eligibility criteria for the program. As such a contractual obligation to provide information has been included.

Operation of the provision

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

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

However, this provision clarifies that a tenant's failure to provide such information is not taken to be a breach of the tenancy agreement.

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

111 Termination if tenant fails to provide information relating to eligibility requirements

The purpose of this termination provision is to allow subsidised accommodation providers to end a tenancy for a tenant who is unable to establish their ongoing eligibility for subsidised accommodation. The provision allows the lessor to give the tenant a 26 week notice to vacate where the tenant does not give the information required to establish their ongoing eligibility to their lessor after the lessor has requested the information.

As part of this new provision, for the NTV to be valid it must include a statement that the tenant did not give the lessor the information requested by the lessor the name and contact details of a legal or advocacy service that may be able to provide the tenant with advice about the tenant's legal rights with respect to their tenancy and a statement that the notice will be withdrawn if the tenant give the lessor the requested information before the end of the period stated in the notice.

If the tenant gives the requested information before the end of the NTV period the notice is taken to be withdrawn. This is so as to avoid a situation where a tenant may face tenancy termination on the basis of a failure to provide information when the tenant has, in fact supplied the required information.

However, if the tenant is then found ineligible for ongoing assistance, the lessor may then issue a new NTV on the grounds the tenant is ineligible. To avoid a situation where the tenant can deliberately delay providing information in order to stay in the property for a longer period of time, the provision allows the lessor to provide a new NTV for less than 26 weeks where the tenant has already been provided with a NTV on the grounds of a failure to provide information. In that circumstance the NTV can provide a vacate date which is the *later* of: the vacate date in the original NTV (issued on the grounds of cancellation) OR 12 week after the new NTV is issued.

The policy intent of this section is to balance the competing priorities of providing a reasonable time frame (of at least 12 weeks) for the tenant to vacate the property, whilst not allowing an ineligible tenant to remain in the premises for an extended period of time when they were delayed in responding to the lessor's request for information.

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

Where a tenant is issued a NTV under this section, they may either: (a) vacate the premises at any time before the expiry of the notice – provided they give at least 2 weeks notice of their intention to vacate; or, (b) at any time during the 2 weeks before the expiry of that notice- provided they give at least 4 days notice of their intention to vacate.

This provision further clarifies that the tenancy ends on the day the tenant vacates the property.

112 Termination if tenant no longer eligible to live in premises

The purpose of this termination provision is to allow subsidised accommodation providers to end a tenancy where the tenant is no longer eligible to live in the premises or will stop being eligible to live in the premises. The provision will apply where:

- the tenant stops, or will stop, being eligible to live in the premises; or
- the lessor or owner stops, or will stop, being eligible to receive government funding or assistance to provide the premises to the tenant.

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

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

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

For the NTV issued under this clause to be valid, it must include particulars of why the notice to vacate has been issued. Such particulars include the reason the tenant has or will become ineligible or the reason the lessor has or will become ineligible for funding or assistance for the premises. This means that if the tenant disagrees with the grounds for the tenancy termination (such as the reasons they have been assessed as ineligible), the tenant could bring a tenancy dispute to ACAT on the basis of the particulars contained in the NTV.

The NTV is also required to contain the name and contact details of a legal or advocacy service that may be able to provide the tenant with advice about the tenant's legal rights with respect to their tenancy. Tenancy law issues are likely to be both complex to understand and emotionally distressing for tenants. This requirement was included to recognise that tenants may not be aware of the services and resources available to assist them navigate a dispute.

Where a tenant is issued a NTV under this section, they may either: (a) vacate the premises at any time before the expiry of the notice – provided they give at least 2 weeks notice of their intention to vacate; or, (b) at any time during the 2 weeks before the expiry of that notice- provided they give at least 4 days notice of their intention to vacate.

This provision further clarifies that the tenancy ends on the day the tenant vacates the property.

Clause 46 Dictionary, notes 1 and 2

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

This clause inserts a note into the RTA Dictionary, which advises the reader that the Legislation Act contains definitions that are relevant to the interpretation of the RTA. The note lists the following terms as being defined in the Legislation Act: *ACAT; administrative unit, adult, Australian Consumer Law (ACT); building code; calendar month; child; commissioner for fair trading; corporation; Criminal Code; director-general, disallowable instrument, document, domestic partner, entity; Executive; expire; fail; health practitioner, housing commissioner, human rights commission; individual; in relation to; instrument, may, Minister, month; must, notifiable instrument; penalty unit, police officer, prescribed; public holiday; sign; statutory instrument; territory law; under, and, working day.*

Clause 47 Dictionary, new definitions of **defective termination notice** and **family violence order**

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

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

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

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

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

Clause 48 Definition of **FV Act**

This clause is consequential to clause 34 which replaces the definitions for division 6.5A of the RTA. The new definitions remove the term FV Act and instead refer to the *Family Violence Act 2016*.

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

Clause 49 Dictionary, new definition of *housing assistance*

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

The new definition of *housing assistance*, in relation to a tenant, refers the reader to section 7 of the HAA.

Clause 50 Dictionary, new definition of *minimum housing standards*

This clause is consequential to the changes at clause 14 which inserts new Division 2.5 in relation to minimum housing standards. Clause 14 also inserts new section 19A which relocates the regulation making power previously at section 136 (2) (d) and amends the wording of the provision slight to make *minimum housing standards* a defined term.

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

The new definition of *minimum housing standards* inserted in the Dictionary refers the reader to new section 19A (1) of the RTA, which provides the new definition: a *minimum housing standard* is a minimum standard prescribed by regulation for premises made available for occupation under a residential tenancy agreement, including in relation to the following matters: physical accessibility, energy efficiency, safety and security, sanitation and amenity.

Clause 51 Dictionary, new definition of *personal protection order*

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

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

Clause 52 Dictionary, definition of *protected person*

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

Clause 53 Dictionary, definition of *protection order*

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

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

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

Clause 54 Dictionary definition of *publish*

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

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

Clause 55 Dictionary, definition of *PV Act*

This clause is a consequential amendment to clause 34 which replaces the definitions for division 6.5A of the Act. The new definitions remove the term *PV Act* and instead refer to the *Personal Violence Act 2016*.

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

Clause 56 Dictionary, definition of *respondent*

This clause is a consequential amendment to clause 34 which replaces the definitions for division 6.5A of the Act. This amendment omits a reference to section 85 (1) within the definition of *respondent* and substitutes it with a reference to section 85.

Clause 57 Dictionary, definition of *standard residential tenancy terms*

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

This is a consequential amendment to clause 5 above which amends section 8 of the RTA to clarify when particular tenancy terms will be incorporated into a tenancy agreement.

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

Clause 58 Dictionary, definition of *temporary housing assistance*

This clause also introduces *temporary housing assistance* as a defined term. The definition of *temporary housing assistance* refers the reader to the dictionary of the HAA.

Clause 59 Dictionary, definition of *Termination notice*

This clause substitutes the definition of *termination notice*

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

Part 3 *Residential Tenancies Regulations 1998*

Clause 60 *New section 5B*

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

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

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

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

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

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

Further, the effect of paragraphs (c) is that a tenant may not make any other minor modification in a units plan unless the owners’ corporation rules allow for such a

modification, and where required, the appropriate permission has been obtained from the owners corporation.

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

- **class A unit** refers the reader to the *Unit Titles Act 2001*, section 10.
- **class B unit** refers the reader to the *Unit Titles Act 2001*, section 11.
- **common property** refers the reader to the *Unit Titles Act 2001*, section 13.
- **owners corporation** refers the reader to the *Unit Titles (Management) Act 2011*, dictionary.
- **rule**, in the context of an owners' corporation, refers the reader to the *Unit Titles (Management) Act 2011*, dictionary.

Schedule 1 Housing Assistance Act – Other amendments

[1.1] Sections 20 and 21

This clause substitutes sections 20 and 21 of the HAA. The amendments to sections 20 and 21 are consequential amendments as a result of new termination provisions for public housing and temporary housing assistance being inserted into the RTA (see clause 5 of the amendment bill and schedule 2, section 2.4 and 2.5).

The amendments to sections 20 and 21 provide that any determinations or operational guidelines made under the HAA that deal with a **relevant matter** must be disallowable instruments rather than notifiable instruments.

Relevant matter includes: the review of a person's entitlement to housing assistance, requiring a person receiving housing assistance to move to an alternate premises, or a person's eligibility for temporary housing assistance.

The purpose of this amendment is to provide an appropriate level of scrutiny to legislative instruments which provide guidance on circumstances that may lead to a tenancy termination. Disallowable instruments, unlike notifiable instruments, must be tabled in the Legislative Assembly. They also require an explanatory statement (which includes a human rights compatibility statement) when they are made. This provides policy transparency and ensures human rights are explicitly considered and any impacts explained when the instrument is made.

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

[1.2] Approved housing assistance programs – market rents New section 22 (2A) and (2B)

This subclause inserts new section 22 (2A) and (2B) into the HAA.

Currently, section 22 of the HAA provides that housing being rented under a housing assistance program must be charged at market rent. The HAA then defines **market rent** for the purposes of this section as: the rent that would be charged by the lessor

for the housing, if the housing were rented by a willing lessor to a willing tenant – (a) dealing with each other at arm’s length; and, (b) each of whom had acted knowledgably, sensibly and without compulsion.

Section 23 of the HAA places an additional obligation on the housing commissioner to review the rent charged for housing rented under an approved housing assistance program at least once each year. This means that, each year, the housing commissioner must review rents charged and, if they are below the market rent, the housing commissioner must increase the rent charged to the newly assessed market rate.

In relation to the discussion on rent increases, it is noted that section 22 also allows an approved housing assistance program may provide for a rent rebate in accordance with the program. In practice, this means that the housing commissioner, when establishing a new tenancy, sets the rent charged for the property at the assessed market rate for the property. Where the tenant is eligible, the housing commissioner will then provide the tenant with a rent rebate for the property which is determined with reference to the tenant’s household income. The rent rebate will then be the amount payable by the tenant. It is noted that the discussion in relation to rent increases which follows in this section relates to the *rent charged under the tenancy agreement* and does not relate to any rent rebate provided to the tenant under a housing assistance program.

Section 64B of the RTA places limitations on all lessors, including the Housing Commissioner, from increasing a rental rate under a tenancy agreement by an amount that is more than the amount prescribed by regulation, unless the tenant provides written consent to such an increase, or the lessor obtains ACAT’s prior approval. The prescribed amount for rent increases is set out in section 5A of the *Residential Tenancies Regulation 1998*.

The combination of the obligation on the housing commissioner under the HAA to always charge market rent and the obligation under the RTA to not increase the rent by more than the prescribed amount (without the consent of the tenant or approval from ACAT) provides some administrative and practical challenges for the housing commissioner in circumstances where achieving the market rent for the property would require increasing the rent above the prescribed amount. This is because, for each individual tenancy where this is the case, the housing commissioner would need to write to the tenant to seek their agreement to the increase and if that was not provided, the housing commissioner would need to apply to ACAT for approval to increase the rent to the assessed market rate. Because of the size of the housing commissioner’s portfolio, this could represent a significant administrative burden.

The policy intent of new subsections 22 (2A) and (2B) are to overcome this incongruence in the housing commissioner’s legislative obligations by giving the housing commissioner the discretion to increase the rent by less than the market rent (up to the prescribed amount).

Subsection 22 (2A) provides that subsection (2B) will apply if: an entity is currently being charged less than the market rent for housing (disregarding any rebate), and if the housing commissioner were to increase the rent to market rent, that increase would be more than the amount prescribed by regulation under the RTA.

Subsection 22 (2B) then empowers the housing commissioner to choose to increase the rent payable by that entity by up to the prescribed amount, rather than to adjust it to market rent.

This amendment gives the housing commissioner the discretion in relation to existing tenancies to only increase the rent by an amount up to the prescribed amount if the market rate for the property is assessed as being above the prescribed amount.

For clarity, this provision still gives the housing commissioner the discretion to seek increase the rent by more than the prescribed amount should the housing commissioner decide to do so. However, if the housing commissioner wishes to increase the rent charged above the prescribed amount, the housing commissioner would still be required to comply with the obligation under the RTA to seek agreement from the tenant to the increase or the apply to ACAT for approval for the increase.

[1.3] New part 11

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

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

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

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

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

New section 112 *Housing assistance program determinations*

This clause provides that the [Housing Assistance Public Rental Housing Assistance Program \(Review of Entitlement to Housing Assistance\) Determination 2020 \(No 1\) \(NI2020-658\)](#), as in force immediately before the commencement day, is taken to be a disallowable instrument made under section 20. This ensures that this existing

determination can continue in force without needing to be re-made as a disallowable instrument for the purpose of amended section 20 (see clause 1.1 above).

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

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

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

New section 113 Operational Guidelines

Subclause (1) repeals the [Housing Assistance Public Rental Housing Assistance Program \(Review of Entitlement to Housing Assistance\) Operation Guideline 2013 \(No 1\) \(NI2013-534\)](#). This is because this operational guideline makes reference to the Housing Commissioner utilising the without cause termination provision to terminate a tenancy in circumstances where the Housing Commissioner takes action to withdraw housing assistance from a tenant upon finding they are no longer eligible for assistance after a review of entitlement. As this Bill repeals the without cause termination provision, this instrument will need to be remade. As this instrument deals with a relevant matter for the purposes of amended section 21 (see Clause 1.1 above) an amended version of this guideline will need to be remade as a disallowable instrument for when this Bill commences.

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

New section 114 Expiry- pt 11

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

The clause also contains a note which advises the reader that a transitional provision is repealed on its expiry but continues to have effect after its repeal. The note refers the reader to section 88 of the *Legislation Act 2001 (ACT)* for further information.

[1.4] Dictionary, notes 1 and 2

This clause inserts a note into the HAA Dictionary, which advises the reader that the *Legislation Act 2001 (ACT)* contains definitions that are relevant to the interpretation of the HAA. The note lists the following terms as being defined in the *Legislation Act 2001 (ACT)*: *ACAT, director-general, entity, Executive, exercise, function, may, Minister, must, planning and land authority, reviewable decision notice, territory land and year.*

[1.5] Dictionary, new definition of *temporary housing assistance*

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

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