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Minister for the Arts, Creative Industries and Cultural Events
Minister for Building Quality Improvement
Minister for Business and Regulatory Services
Minister for Seniors and Veterans

Member for Ginninderra

Ms Giulia Jones MLA

Chair

Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

ACT Legislative Assembly

GPO BOX 1020

CANBERRA ACT 2601

Dear Ms Jones,

Thank you for the Committee's comments in relation to the Residential Tenancies Amendment Bill 2020.

Rights promotion

Before responding to the concerns raised by the Committee, I would like to note that, considered as a whole, this Bill is rights promoting. The provisions of the Bill, whether taken together or in isolation, engage and promote the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily. This Bill promotes the right to privacy by:

- making the occupancy principles mandatory and strengthening their enforceability;
- introducing a new dispute resolution process through the ACT Human Rights Commission, aiding in the enforcement of rights;
- strengthening an occupant's rights in relation to access to their occupancy premises;
- further limiting the circumstances in which a grantor may access occupancy premises;
- requiring that an occupancy may only be terminated with reasonable notice and on pre-determined grounds, as well as requiring that where an occupant is evicted for breaching their agreement, that the breach justifies termination.

Where residents of a residential premises comprise a family, the proposed amendments also promote protections afforded to families in the ACT under section 11(1) of the *Human Rights Act 2004* (HRA) by strengthening the protections around the home in which that family live.

Please find a response to Committee's specific comments and requests below which I trust will be useful to the Committee's consideration of the Bill.

Response to committee's queries

Human rights compatibility and university occupancy agreements

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The Committee notes the Bill continues to draw a distinction between occupancy agreements and residential tenancy agreements and provides for different forms of protections and obligations depending on the type of agreement in place and that, in doing so, the Bill potentially limits the right to recognition and equality before the law protected by section 8 of the HRA. The Committee also notes the policy intent is that people should be residential tenants unless there are strong policy reasons to not recognise a tenancy.

While acknowledging the basis for such distinctions generally, the Committee has indicated a concern about the distinction drawn in the Bill for occupancy agreements relating to education providers. The Scrutiny Committee has relatedly requested a justification for the potential impact on human rights of the provisions in the Bill relating to education facilities. Noting the concerns raised by the Committee, further information about these issues will be set out in Explanatory Statement for the Bill so that the community more generally can benefit from this explanation.

Equality and non-discrimination

The right to equality and non-discrimination is protected by sections 8 (2)-(3) of the HRA. The HRA provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that everyone is equal before the law and entitled to the equal protection of the law without discrimination. 'Discrimination' under the HRA encompasses a distinction based on particular grounds (for example, race, colour or sex), which has either the purpose ('direct' discrimination), or the effect ('indirect' discrimination), of adversely affecting human rights.¹ That is, not every differential treatment will amount to discrimination as it must be linked to a prohibited ground of discrimination.²

As noted by the Committee, the Bill continues to draw a distinction between occupancy agreements and residential tenancy agreements and provides for different forms of protections and obligations depending on the type of agreement in place. As is the case under the current *Residential Tenancies Act 1997* (the Act), university accommodation will continue to be defined as an occupancy agreement rather than a residential tenancy agreement. The Bill also includes a number of provisions that apply specifically to occupancy agreements provided by education providers. Further education provider specific provisions will also be included in the Bill through Government amendments. I have written to the Committee separately about these Government amendments.

The education provider specific provisions contained in the Bill and Government amendments include:

- an exemption from the requirement to lodge any security deposit taken in respect of occupancy premises with the Territory;
- clarifying that the currently existing university disciplinary requirements and medical leave rules established under statute will not be displaced by the occupancy principles in the event of any inconsistency between the disciplinary requirements or medical rules and the occupancy principles;

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

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

- requiring parties in defined university occupancy agreements who have a dispute to which to which a university dispute resolution procedure applies to exhaust internal dispute resolution procedures (within a reasonable time) prior to making an application to the ACT Civil and Administrative Tribunal (ACAT);
- a clarification that defined university occupancy agreements can be terminated under university disciplinary requirements and medical leave rules and that agreements terminated in these circumstances are not subject to the requirement that the termination is reasonable having regard to the nature of the occupancy agreement; and
- delayed commencement and transitional provisions that apply to education provider occupancy agreements.

It is noted that the effect of the above outlined provisions is that students living in university accommodation will be subject to different arrangements under the Bill. However, as noted above, differential treatment will only amount to discrimination under the HRA if linked either, directly or indirectly, to a prohibited ground of discrimination. University students living in university student accommodation is not expressly a prohibited ground or protected attribute for the purposes of the HRA. While discrimination may occur on the grounds of ‘other status,’ students in student accommodation are also unlikely to be considered as an ‘other status’ ground of discrimination. Under international human rights law ‘other status’ has been held to include age, nationality, marital status, disability, place of residence within a country and sexual orientation. Although this is a non-exhaustive list, international jurisprudence indicates that ‘other status’ often relates more to an inherent personal attribute rather than one that is purely circumstantial – it should generally relate more to who the person is not what they do³ or, in this case, type of accommodation in which they choose to live. There are exceptions to this approach taking into account the entire circumstances. However, based on this analysis, differential treatment for students living in student accommodation does not engage the right to equality and non-discrimination for the purposes of the HRA. The Committee’s report also does not expressly outline a prohibited ground of discrimination that gives rise to its queries. Even, if it is assumed that the right is engaged in relation to a particular group, directly or indirectly, resulting in a potential limitation on the right to equality and non-discrimination, it is considered that any limits are demonstrably justified as outlined below.

Grounds and purpose for drawing a distinction between occupancies and tenancies - university student accommodation

The standard residential tenancy terms, which apply to all tenancies, are designed to grant a tenant exclusive possession of the premises by limiting the degree of access and control a landlord has over the property and the actions of the tenant. In contrast, the occupancy principles are designed to create greater flexibility, including greater access and control on the part of the grantor to reflect the particular circumstances in which they are being used or to achieve a particular purpose in the provision of accommodation.

In the case of university student accommodation, there are strong policy reasons for the provision of occupancy agreements rather than tenancy agreements. University student accommodation exists for the purposes of accommodating students while they are studying and, in this context, student accommodation occupancy agreements are inherently connected to the student’s enrolment in the university.

³ See, for example, *Swift v Secretary of State for Justice* [2012] EWHC 2000 (QB) [45]-[46] per Eady J. ‘Other status’ has in some cases been found to be broader than innate, inherent, personal characteristics or identity taking all of the circumstances into account: see *Clift v United Kingdom* [2010] ECHR 1106 (13 July 2010) where the European Court of Human Rights considered the situation of different categories of prisoners.

University student accommodation is also generally characterised by large multi-user premises that provide a room for the individual resident as well as access to common shared facilities. In addition to providing accommodation facilities, university residences often offer support services such as pastoral care provided by live-in senior residents, social and sporting activities and, in some cases, they also offer academic tutoring. These support services, aid in achieving the overarching goal of university accommodation, which is to support a student in their educational and personal development. As such, university accommodation is unlike a residential tenancy in that it is not characterised by exclusive possession and control of the premises and that it also entails the provision of on-site services offered by the grantor and requiring access by the grantor to deliver.

In providing accommodation which includes many people living in close proximity who utilise common shared facilities, universities (or their contracted providers) also need to be able to have a higher degree of control of the actions of occupants (unlike in a tenancy) in order to manage situations where one student's behaviour impacts on others.

Due to the provision of on-site services, the need to regulate the use of common spaces as well as the need for a higher degree of control in relation to how individuals within the accommodation interact with each other, university student accommodation is not well suited to a residential tenancy agreement. It is in acknowledgement of all the above factors that this unique form of accommodation offering has been included in the definition of occupancy agreements, rather than requiring that this accommodation be offered under residential tenancy agreements. In other words, for the reasons outlined above, the distinction pursues the legitimate purpose of allowing for suitable accommodation options and associated services which are tailored to the specific environment. The distinction is based on reasonable and objective criteria.

Education Provider Specific Provisions

The above listed education provider specific provisions also serve to ensure that occupancy agreements can operate effectively and meet the purpose for which they are used. Occupancy agreements in other contexts can also be drafted to include provisions that reflect the purpose for which they are being used.

The Bill also introduces an additional dispute resolution option for all occupants, including students, in the form of the ability to make an occupancy dispute complaint to the ACT Human Rights Commission (HRC). Students will be able to make an occupancy dispute complaint to the HRC without having first exhausted internal dispute resolution options under university dispute resolution procedures. This provides an additional rights enforcement pathway for occupants.

Right to privacy, family and home – university rule breach consequence and termination provisions

The right to privacy and home is engaged and may be limited by:

- providing that where a penalty or consequence for breach of an occupancy agreement is imposed under a university discipline or medical leave requirement universities that penalty or consequence can be imposed without being subject to the requirement that it be reasonable and proportionate to the nature of the breach or that it not impose unreasonable hardship on the occupant; and
- providing that university agreements may be terminated under a university disciplinary requirement or medical leave rule (to which the requirement that the termination be reasonable having regard to the nature of the occupancy agreement does not apply).

Under the HRA, the right to privacy may be subject to permissible limitations provided that the criteria in section 28 of the HRA are met.

Legitimate purpose (section 28(2)(b))

The university disciplinary rules and medical leave rules are important to the overall functioning and academic and reputational integrity of the universities. They apply to the university's entire student body, not just to students in student accommodation.

The purpose of allowing for the imposition of penalties or consequences under an occupancy agreement or for termination of that agreement where that penalty, consequence or termination arises under a university disciplinary requirement or medical leave rule (regardless of reasonableness or hardship) is to allow for the continued and effective operation of the universities' rules and to avoid inconsistency between statutory provisions. This is more than a measure designed to achieve administrative convenience, it is a measure to support the overall effective functioning of universities.

Rational connection - relationship between the limitation and its purpose (section 28(2)(d))

As noted above, the university disciplinary and medical leave rules apply to the entire student body within the university. The exemption from the occupancy principle requirements with respect to termination has been created to ensure the continuing effective operation of the university as well as to ensure that the rules may be applied across the entire student body equally and without interference from occupancy laws. By providing greater clarity about the scope and limits of occupancy law, the measure is rationally connected to (this is, effective to achieve) the legitimate purpose of supporting the overall effective functioning of universities.

Proportionality (sections 28(2)(c) and 28(2)-(e))

The exemption from the requirement that the termination of an occupancy agreement be reasonable having regard to the nature of the occupancy agreement for universities, is not a general exemption for universities and is limited only to circumstances in which termination of the occupancy agreement is required under the university disciplinary or medical leave rules.

This Bill introduces significant protections for university students beyond those that currently exist. These protections apply to students in student accommodation, except where they are inconsistent with university disciplinary or medical leave requirements. It is noted that students in university student accommodation are already subject to university disciplinary requirements and medical leave rules and this Bill does not displace that. Rather the Bill clarifies the interaction with the existing framework operating for universities.

It is also noted that the above exemption in relation to university disciplinary requirements and medical leave rules is limited to the Australian National University and the University of Canberra who house 6000 and 2500 students in their accommodation facilities respectively. While there are some other education providers in the ACT and in respect of which the carve out does not currently apply, these education providers have comparatively small accommodation facilities or do not offer accommodation at all. In this way, the exemptions have been circumscribed to apply as necessary. Other operators would still be able to use their applicable rules to impose penalties or consequences

so long as they were reasonable and proportionate and do not impose undue hardship on the student.

The exemption is also the least rights restrictive means of ensuring the continued effective operation of the university disciplinary and medical leave rules. This is because there are significant safeguards embedded in the rules themselves. These safeguards ensure that any interference with the right to privacy (including termination of an occupancy agreement) based on those rules and procedures constitute a proportionate limitation. It follows that the measure itself is also compatible with the right to privacy and home.

The safeguards embedded in these rules, include, for example, clear criteria around the type of conduct that could constitute academic misconduct or non-academic misconduct, the convening of panels of inquiry to assess allegations made against students, the ability of a student to appear before a panel of inquiry and to provide submissions to the inquiry and be accompanied by a support person, the provision of notice in writing of the outcome of decisions as well as reasons for decisions, and appeal rights with respect to decisions.⁴ These safeguards ensure that decisions made under student discipline requirements are not arbitrary, as well as providing a level of protection with respect to decision making that is significantly beyond what would exist in the context of other occupancy agreements. It is also noted that these disciplinary requirements take the form of delegated legislation and, as such, are open to scrutiny.

Displacement of section 47(6) of the Legislation Act

The Committee has requested confirmation of the continued need to displace the notification requirements relating to Australian Standard AS 3786 (Smoke alarms using scattered light, transmitted light or ionization). As smoke detectors are an important health and safety device, it was considered necessary to ensure that installed smoke detectors comply with an industry standard. For this reason, AS 3786 was nominated.

I can confirm that this standard is the subject of copyright and therefore unable to be published by way of notifiable instrument. However, the requirement in existing section 1C of the Residential Tenancies Regulation 1998 that the Director-general to make a copy of AS 3786 available for inspection by members of the public during ordinary business hours at a place decided by the Director-General ensures that this standard is still available for any person affected by or interested in the law to review free of charge. This explanation has been incorporated into a Revised Explanatory Statement for the Bill.

I hope this further information is of assistance.

Yours sincerely

Gordon Ramsay MLA
Attorney-General

⁴ See: University of Canberra (Student Conduct Rules) 2018 made under the *University of Canberra Act 1989*, s 40 (statutes) and *University of Canberra (Student Conduct) 2015*; and The Australian National University Discipline Rule 2018 made under the *Vice Chancellorship Statute 2013* section 9.5.