25 September 2013

Ms Kate McGuckin

Research Director

Transport Housing and Local Government Committee

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Dear Ms McGuckin

# Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013

Thank you for providing the Anti- Discrimination Commission (Commission) with the opportunity to comment on the *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* currently before the Parliament.

The Commission has the function of promoting the understanding and acceptance and public discussion of human rights in Queensland.

# Housing and Human Rights

The right to an adequate standard of living, including housing is a right of everyone recognised by the *International Covenant on Economic, Social and Cultural Rights.[[1]](#footnote-1)*

Article 11 of the Covenant states-

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

This right is affirmed in the *Convention on the Rights of Persons with Disabilities.[[2]](#footnote-2)*  Article 28 of the Convention which deals with the right to an adequate standard of living and social protection states:

States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

In relation to children, Article 27 of the *Convention on the Rights of the Child[[3]](#footnote-3)* states, inter alia:

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

….

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

# Right to Presumption of Innocence

A fundamental human right is the presumption of innocence until proved guilty.

The *Universal Declaration of Human Rights* states:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. [[4]](#footnote-4)

Confirming this human right the *International Covenant on Civil and Political Rights* states:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.[[5]](#footnote-5)

**Amendment of the *Residential Tenancies and Rooming Accommodation Act* 2008.**

The Commission has considered the amendments proposed in the Bill. The Commission agrees with Minister Mander that serious and persistent anti-social behaviours by tenants in public or community housing must be dealt with when it occurs. The Commission notes that the Department of Housing and Public Works has introduced an anti-social behaviour management policy, which includes a ‘three-strikes’ process to reduce and better respond to incidents of disruptive behaviour by public housing tenants. The factsheet detailing the policy explains that sometimes some public housing tenants are not evicted for their antisocial behaviour. The factsheet states as follows:

All reported incidents are investigated; however the department can only take action where incidents of anti-social behaviour have been substantiated and where the behaviour is a breach of their State Tenancy Agreement. In some cases, the department is not able to substantiate a Complaint .The department must also take into account other issues such as mental health concerns for the tenant. In these cases, the department may take a range of other actions to assist the tenant to change their behaviour and maintain their tenancy including referral to a support worker or agency, closely monitoring the tenancy or listing the household for a transfer to an alternative, more suitable public housing property.[[6]](#footnote-6)

The Commission agrees with this particular approach outlined in the factsheet, but has concerns that the new legislative provisions that deal with antisocial behaviour do not fully reflect this approach. The current provisions as drafted may in some instances have an adverse and unfair impact on persons who reside in public or community housing who:

* have mental health or intellectual disabilities;
* are Aboriginal and Torres Strait Islander persons, or other person who comes from a culture where residing within extended families is the norm; or
* are children, youth or other vulnerable residents of community housing;

and who may become homeless if they are evicted from their home as a consequence of the new provisions.

The Commission’s concerns are set out in detail below.

## Termination for objectionable behaviour

The proposed new section 297A allows an application for termination of a tenancy because the tenant:

* has harassed, intimidated or verbally abused the lessor or their agent or person occupying premises nearby;
* caused a serious nuisance to persons occupying premises nearby; or
* has interfered with the reasonable peace, comfort or privacy of a person occupying premises nearby.

The new section 345A gives power to the tribunal to make a termination order if it is satisfied the behaviour justifies a termination, and the section set out things the tribunal may consider in determining if the behaviour justifies termination, such as the frequency and seriousness of the behaviour.

Unfortunately, on some occasions persons who have mental health or intellectual disabilities may manifest behaviours that can or may be perceived to be harassing, intimidating or a cause of nuisance. As outlined in the Department’s factsheet above, the best practice approach is for the Department to take a range of actions to assist the tenant to change their behaviour and maintain their tenancy, including referral to a support worker or agency. Termination of a tenancy ought to be the very last resort in circumstances involving highly vulnerable tenants such as those with mental health or intellectual disabilities.

While section 345A (4) states that subsections (2) and (3) do not limit the issues to which the tribunal may have regard, there is no mention at all in the section or elsewhere in the Act requiring the tribunal to also consider the circumstances of the tenant to determine whether the tenancy agreement should be terminated. Nor is there any requirement for the tribunal to look at the impact of the termination of the tenancy on other vulnerable members of the tenant’s household.

The Commission notes that the amendments proposed include a new section 349A(2) which states the tribunal must not refuse to terminate the tenancy merely because the tenant is a public or community housing tenant. In relation to this provision the explanatory notes states:

The State has experienced difficulty in obtaining orders from the tribunal to terminate public housing tenancies. The purpose of this amendment is to make it clear that the tribunal must not in any application refuse to terminate the tenancy merely because the tenant is a tenant of the chief executive or a community housing provider.

The Commission considers the circumstances of the tenant and any vulnerable members of the household are relevant matters for the tribunal to take into account when considering the termination of public or community housing tenancies. The Commission is concerned those relevant circumstances may not be taken into consideration by the tribunal unless explicitly required.

The Commission suggests the Act should explicitly state that the tribunal ought to be able to look at **all relevant circumstances** to determine whether it is reasonable to make a termination order, including the circumstances of the tenant and any vulnerable members of the tenant’s household, and that the proposed new section 349A be amended accordingly.

## Termination for behaviours of persons other than the tenant.

The Bill provides for an expansion of the list of people whose serious breach (section 290A), damage to premises or injury to certain persons (section 296A) or objectionable behaviour (section 297A) can lead to the ending of a tenancy to include not only the behaviour of the tenant, but also ‘an occupant, a guest of the tenant or a person allowed on the premises by the tenant’.

Some tenants with certain mental health or intellectual disabilities are at higher risk of and more vulnerable to being manipulated or used by unscrupulous individuals who may be involved in illegal activity or engage in other objectionable behaviour. In addition, Aboriginal and Torres Strait Islander persons, and persons who come from cultures where residing within extended families is the norm, may also be unfairly adversely affected by the provisions where the anti-social behaviour or other problems are the behaviours of members of the tenant’s extended family. While objectionable repeated and sustained behaviour is not acceptable, persons who have social responsibilities to members of their extended families may have greater difficulty in controlling the behaviour of every person that is invited or allowed onto the premises.

The best practice approach in these circumstances is for the Department to take a range of actions to assist the tenant to manage the behaviour of persons coming into their residence and to maintain their tenancy, including referral to a support worker or agency. Other options to resolve these issues at an early stage include developing and maintaining referral pathways to health, employment, education, financial counselling and tenancy sustainment services.

The Bill contains new provisions (sections 527D and 527E) allowing a lessor to require a tenant to give a written behaviour undertaking not to engage in anti-social behaviour which extends to the behaviour of an occupant , guest of the tenant or person allowed on the premises by the tenant, which may assist in this regard. Termination of a tenancy ought to be the very last resort, and again the legislation should explicitly state that the tribunal ought to be able to look at all the relevant circumstances, including the circumstances of the tenant and vulnerable members of the tenant’s household to determine whether it is reasonable to make a termination order.

## Termination for illegal activity

The provision of the Bill dealing with notice for a tenant to leave because of a serious breach (section 290A) allows a lessor to give to the tenant notice to leave the premises if the lessor reasonably believes the tenant, occupant or guest has used the premises for an illegal activity. A lessor may form a reasonable belief that premises or property has been used for an illegal activity whether or not the tenant has been convicted or found guilty of an offence in relation to the activity.

The Commission recognises the Government’s concerns when public housing is being utilised for serious illegal activity such as the operation of drug laboratories. The Commission also understands the frustration of the police and other authorities in waiting for a criminal charge and conviction that can take many months to occur. However, as outlined above, a fundamental human right is that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. This basic human right ought not be overridden by this legislation, and a conviction for serious illegal behaviour being carried on within the premises ought be the requirement before a notice to leave is issued.

**Amendment of the *Guide, Hearing and Assistance Dogs Act 2009***

The amendment makes it an offence to refuse accommodation to a person with disability because the person relies on a certified guide, hearing or assistance dog.

Although the Explanatory Note states that an objective of the amendment is to provide a right of access to places of accommodation for people with disability who rely on guide, hearing and assistance dogs, this right currently exists under the *Anti-Discrimination Act 1991* (AD Act). Under the AD Act it is unlawful to discriminate on the basis of impairment in the areas of pre-accommodation and accommodation. Specifically, it is unlawful to:

1. refuse to rent accommodation to another person because the other person has an impairment and relies on a guide, hearing or assistance dog;
2. required the person to keep the dog elsewhere; or
3. request or require the person to pay an extra charge because the dog lives at the accommodation.

The specific prohibitions apply to all guide, hearing or assistance dogs, regardless of whether they are or are not certified under the *Guide, Hearing and Assistance Dogs Act 2009*.

Before the *Guide, Hearing and Assistance Dogs Act 2009*, it was an offence under the AD Act to separate a person with a visual, hearing or mobility impairment from the person’s guide dog. Section 225 of the AD Act provided:

1. A person must not impose a term that would result in another person with a visual, hearing or mobility impairment being separated from the other person’s guide dog.
2. In this section –

***term*** includes condition, requirement or prac tice, whether or not written.

Maximum penalty –

* 1. in the case of an individual – 35 penalty units;
	2. in the case of a corporation – 170 penalty units

This offence provision was replaced with the offence provision in section 13 of the *Guide, Hearing and Assistance Dogs Act 2009.* The repealed AD Act offence provision was much broader that the current offence provision, which is limited to public places and passenger vehicles.

In the Commission’s experience, contraventions of the AD Act by accommodation providers mostly occur due to a lack of awareness of the law and/or an understanding of the issues faced by people with impairment who rely on a guide, hearing or assistance dog. Creating a specific offence in relation to accommodation is likely to result in greater awareness of accommodation providers and to improve protections for people who rely on guide, hearing or assistance dogs.

There is a note at the end of the proposed new section 12A and the current section 13, which refers to the right of action under the *Disability Discrimination Act 1992* (Cwlth). A person with disability may also have a right of action under the Queensland *Anti-Discrimination Act 1991.*

Under the Queensland legislation the complaint process is essentially cost free. The Commission’s function is to endeavour to resolve complaints through conciliation. Where a complaint is not resolved, it can be referred to the Queensland Civil and Administrative Tribunal (QCAT). The general rule in QCAT is that parties must represent themselves and bear their own costs.

Under the *Disability Discrimination Act 1992* (Cwlth) complaints are made to the Australian Human Rights Commission in Sydney, and where a complaint is not resolved, the aggrieved person can make an application to the Federal Circuit Court of the Federal Court. Being a costs jurisdiction, the court process can be a deterrent for a person considering civil action.

By referring only to the Commonwealth Act the notes to the offence provisions may give the impression that this is the only alternate right of action. The Commission recommends that both notes should also refer to the right of action under the *Anti-Discrimination Act 1991* (Qld).

**Recommendations**

1. The Bill be amended in relation to the *Residential Tenancies and Rooming Accommodation Act* 2008 to explicitly permit the tribunal when considering a termination application in relation to public or community housing to look at all the relevant circumstances to determine whether it is reasonable to make a termination order, including the circumstances of the tenant and any vulnerable members of the tenant’s household. It is suggested the proposed new section 349A be amended accordingly.
2. The Bill be amended in relation to the *Residential Tenancies and Rooming Accommodation Act* 2008 to require a conviction for serious illegal behaviour being carried on within the premise before a notice to leave is issued under section 290A of the Act.
3. That the Department of Housing and Public works monitors the impact of the amendments to the *Residential Tenancies and Rooming Accommodation Act* 2008 for possible unintended consequences for vulnerable people including those who:
* have mental health or intellectual disabilities,
* are Aboriginal and Torres Strait Islander persons, or other person who comes from a culture where residing within extended families is the norm, or
* who are children, youth or other vulnerable residents of community housing,

and who may become homeless if they are evicted from their home as a consequence of the new provisions.

1. The Bill be amended in relation to the *Guide, Hearing and Assistance Dogs Act 2009* so that thenote at the end of the proposed new section 12A and the current section 13 refer to the right of action under the *Anti-Discrimination Act 1991* (Qld).

****Yours sincerely

**KEVIN COCKS AM**

**Anti-Discrimination Commission**

1. Entry into force in Australia on 10 March 1976 [↑](#footnote-ref-1)
2. Entry into force in Australia on 16 August 2008 [↑](#footnote-ref-2)
3. Entry into force in Australia on 16 January 1991 [↑](#footnote-ref-3)
4. Article 11, Adopted by the General Assembly of United Nations on 10 December 1948 [↑](#footnote-ref-4)
5. Article 14, Entry into Force in Australia on13 November 1980 [↑](#footnote-ref-5)
6. Queensland Department of Housing and Public Works, *Anti-social behaviour management policy* [2013] <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/AntisocialBehaviour.pdf>> [↑](#footnote-ref-6)