

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

Residential Tenancies Amendment Bill 2018

In relation to its overall purpose, this Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*. The Bill advances Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR): right to an adequate standard of living, and in particular, the right to live somewhere in security, peace and dignity; and Article 17 of the International Covenant on Civil and Political Rights (ICCPR): right to privacy and reputation.

This compatibility statement provides the rationale for matters in relation to Article 14 of the ICCPR that may be considered to have a bearing on the rights and liberties of individuals.

Overview of the Bill

The primary purpose of the Bill is to provide a framework for the use of residential tenancy databases and set out the parameters for how landlords, landlord agents (real estate agents) and database operators can use, record and access personal information about tenants and potential tenants listed on residential tenancy databases.

Personal information held on residential tenancy databases can have serious consequences in determining whether a person can secure rental accommodation. Increased use of residential tenancy databases and concerns about the effects that inappropriate or inaccurate information listed on these databases had on the prospects of listed persons securing adequate and appropriate housing.

A review of the operation of residential tenancy databases by the former Standing Committee of Attorneys-General (now the Council of Attorneys-General) and the former Ministerial Council on Consumer Affairs (now the Consumer Affairs Forum) lead to the development of national Residential Tenancy Database Model Provisions (the Model Provisions) following national public consultation throughout 2009 and 2010.

The Bill, at clause 8, inserts a new Part 14 into the *Residential Tenancies Act* to establish the Model Provisions as laws of the Territory. The Bill sets out the minimum level of rights, obligations and limitations in relation to residential tenancy databases by providing:

- (a) notification requirements in relation to the use of residential tenancy databases;
- (b) restrictions on information that can be placed on residential tenancy databases;

- (c) obligations to correct information that is inaccurate, incomplete, ambiguous or out-of-date;
- (d) obligations to provide information relating to a person if the person requests it; and
- (e) time limits for keeping personal information on residential tenancy databases.

The secondary purpose of the Bill is procedural in nature, providing jurisdiction to the Northern Territory Civil and Administrative Tribunal (NTCAT) to hear matters relating to leases originating under the former *Tenancy Act*. This amendment addresses a drafting oversight that occurred when jurisdiction of residential tenancy matters was transferred to the NTCAT.

Human rights implications

This Bill engages rights referred to in the ICCPR.

Strict Liability:

All of the offences in the Bill prescribe strict liability for certain physical elements of the offence. Section 43AN of the Criminal Code states that where strict liability is prescribed for an offence or an element of an offence, there are no fault elements for the offence or the physical element. Strict liability offences engage the presumption of innocence because a person can be found guilty of an offence without the need to prove fault or 'a guilty mind' for the offence or for an element of the offence.

Strict liability is used in circumstances where there is public interest in ensuring that regulatory schemes are observed and where it can reasonably be expected that the person was aware of their duties and obligations. Strict liability offences will not necessarily be inconsistent with the Article 14(2) presumption of innocence provided that they pursue a legitimate objective and that removal of the presumption of innocence is reasonable, necessary and proportionate to achieving that objective. Whether a strict liability provision impermissibly limits the right to the presumption of innocence will depend on the circumstances of the case and the particular justification for an offence being a strict liability offence.

Notwithstanding the absence of a need to prove fault, section 43AN of the Criminal Code does not preclude the availability of defences, including: the defence of mistake of fact under section 43AX; the defence of sudden or extraordinary emergency under section 43BC; the defence of lawful authority under section 43BE; and the defence of intervening event under section 43BA.

The objective of the offences in the Bill is to ensure compliance with measures that are intended to balance the competing interests of landlords and tenants in an environment where there is significant potential for power imbalances between people needing housing, and those who are in a position to offer that housing on a temporary basis at a price. Strict liability is used in these circumstances where the subjects covered are procedural in nature, and the circumstances are readily self-evident. Under such situations, it can be reasonably expected that the person was aware of the specifics surrounding the activities that are regulated, negating the general requirement to prove what is otherwise a matter of fact.

For example, in relation to residential tenancy databases, the proposed new section 128 makes it an offence to list a person on a database unless the person is:

- (a) a tenant;
- (b) has breached the tenancy agreement; and
- (c) that breach relates to owing an amount of money that exceeds the security deposit.

The proposed new section 128 further restricts the listing to information that relates solely to the breach, requires the information to be accurate, and provides examples of what constitutes acceptable information.

The offence under the proposed new section 128 seeks to balance the commercial desire for a landlord to be informed about a potential tenant's history, against a person's right to be represented fairly and impartially. The offence is one of strict liability on the basis that the action of listing a person on a database is procedural in nature, and that the landlord is in possession of, or ought reasonably to know that, all the salient information that the landlord is listing is pertinent and correct.

The strict liability provisions are not punishable by imprisonment. Rather, offences are punishable by a fine of up to 20 penalty units (presently \$3 080).

The strict liability offences in the Bill are regulatory in nature and act as a deterrent to behaviour that would compromise what should be a harmonious relationship between landlords and tenants. They are compatible with Article 14(2) of the ICCPR, as they pursue the legitimate objective of acting as a deterrent to activities that may otherwise represent a risk to a person's right to an adequate standard of living, and in particular, the right to live somewhere in security, peace and dignity, as set out in Article 11 of the ICESCR.

Self-incrimination:

Article 14(3) of the ICCPR provides minimum guarantees in relation to the determination of criminal charges brought against a person. Article 14(3)(g) provides a right against self-incrimination in respect of not being compelled to testify against oneself.

The proposed new section 134 seeks to provide the NTCAT with the power to make civil orders to resolve disputes relating to residential tenancy database listings or proposed listings. The intent is to provide a quick and inexpensive dispute resolution mechanism, notwithstanding that the circumstances behind a number of such disputes may also give rise to criminal offences.

While this may give a level of expedient justice to an aggrieved tenant, such as the quick correction or removal of inaccurate information listed about the tenant, it nevertheless creates a tension between civil and criminal proceedings over the same subject. This is of particular relevance in respect of the potential for a landlord to provide evidence in an NTCAT proceeding that may prove to be self-incriminating in any subsequent criminal proceeding relating to infringements against database provisions.

The proposed new section 135 balances the tension between civil and criminal proceedings over the same subject matter in a fair, reasonable and objective manner.

While the new section 135 removes the ability for a person to refuse to provide evidence on the grounds that it may incriminate them, it deliberately retains the protection sought under Article 14(3)(g) through prohibiting the use of evidence obtained during the NTCAT proceeding against the person in subsequent criminal proceedings. Additionally, section 135 is limited only to proceedings under new Part 14 relating to database matters.

This Bill also engages rights referred to in the ICESCR.

The right to adequate housing:

Article 11 of the ICESCR provides that everyone has the right to an adequate standard of living including adequate food, water and housing and to the continuous improvement of living conditions.

In relation to housing, the United Nations Committee on Economic, Social and Cultural Rights (the Committee) has stated that housing must provide adequate shelter, which encompasses adequate privacy, space, security, lighting and ventilation, basic infrastructure and location with regard to work and basic facilities, all at a reasonable cost. The Committee has also stated all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.

The Committee's view is that the right to housing is not narrow or restricted in the sense that adequate housing is satisfied merely through having access to shelter or a roof over one's head. Rather, the Committee considers that the right to adequate housing is integrally linked to the inherent dignity of the human person, upon which the principles set out in the ICESCR are premised.

The regulation of residential tenancy databases balances the commercial desire for a landlord to be informed about a potential tenant's history, against a person's right to secure adequate housing in a fair and impartial setting by regulating the nature and use of information on a tenant's history.

The right to privacy and attacks on reputation:

Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks. The Bill engages the right to privacy and the prohibition on attacks to reputation in a positive way.

The Bill promotes the right to protection of the law against interference with the right to privacy and attacks on reputation by regulating the collection, storage, security, use, disclosure or publication of personal information in the residential tenancy setting. The offences proposed in the Bill protect people from having incorrect, out dated or irrelevant information recorded about them in residential tenancy databases, which would be an interference with privacy and may constitute an attack on reputation.

Conclusion

Overall this Bill is compatible with human rights. Any potential incompatibility with human rights is outweighed by the positive promotion of human rights.