

28 February 2022

Queensland Human Rights Commission  
Level 20  
53 Albert Street  
BRISBANE Q 4002

By email:- [adareview@qhrc.qld.gov.au](mailto:adareview@qhrc.qld.gov.au)

Dear Colleagues

### Submission regarding review of *Anti-Discrimination Act 1991 (Qld)*

I write to make a submission on behalf of Suncoast Community Legal Service Inc.

#### *Ten Point Plan*

I have considered the 'Ten-point plan for a fairer Queensland' published on the Community Legal Centres Qld website and wish to endorse the initiatives described under the headings:

1. No more excuses for Discriminating
2. Expand who is protected
3. Make it easier for people to access adjustments and flexibility
4. Remove the requirement to compare how people are treated
5. When unfair treatment happens, make respondents show it wasn't discrimination.
6. Spell out the positive change we want to see in Queensland
7. People, especially children, need more time to complain
8. People who experience the same discrimination should be able to work together
9. An enforcement body to make sure anti-discrimination law is followed
10. Have experts making decisions about discrimination cases

#### *General Observations*

Working in the disability sector at QAI for six years and at a generalist community legal service for fourteen years, I have had more exposure to the *Anti-Discrimination Act* than most. However, I still find it an extremely difficult piece of legislation to explain to clients and to give advice about. This is clearly a problem when you extrapolate out to the disadvantaged Queenslanders attempting to use it. My hope for this review is a significant redraft that reduces the size and complexity of the Act and makes it comprehensible by the people it is intended to assist.

A side-effect of this complexity seems to be at trend towards vigorously defending complaints, paying lip-service to the conciliation process and seeking leave for representation by lawyers in

QCAT. My experience is that Queensland Government Departments and Crown Law are a significant part of this trend. In the words of the 'Ten-point plan' I would prefer to see the Queensland Government 'Spell out the positive change we want to see in Queensland' rather than out-lawyering disadvantaged Queenslanders with clever and complex legal arguments and threats of costs orders.

*Specific Submission – Discrimination excused by legislation*

In relation to the topic the 'Ten-point Plan' describes as 'No more excuses for discriminating' I wish to raise the case of Milka Simonova, which I expect is well-known to the Commission. In my opinion any amended *Anti-Discrimination Act* which still fails to protect people like Ms Simonova from clear discrimination at the hand of a Queensland Government Department will be failure.

Suncoast Community Legal Service attempted to defend eviction proceedings by the Department of Housing in QCAT at Caloundra during 2017. The application sought a termination order on the basis of 'objectionable behaviour' under section 297A *Residential Tenancies and Rooming Accommodation Act 2000 (Qld)* relying on Ms Simonova's 'noisy behaviour'.

Ms Simonova suffered from chronic paranoid schizophrenia and post-traumatic stress disorder. She also suffered from polyps on her vocal chords, causing her voice to have a 'fog-horn like quality'. Medical evidence from her treating psychiatrist was accepted that Ms Simonova was not in voluntary control of the disruptive behaviour subject to the complaints, that she was never without the symptoms such as auditory hallucinations and persecutory delusions which were triggering her vocalisations and that she had no insight and no capacity to make rational decisions about how to express herself. In short, the Department of Housing was terminating her tenancy and making her homeless because of objectionable behaviour which was entirely attributable to her disabilities.

Despite this, the termination order was granted *Department of Housing and Public Works v Simonova[2017] QCAT 328* with the QCAT Member satisfied that the elements of objectionable behaviour were made out and termination was justified. The member found that objectionable behaviour as a manifestation of mental illness was within the scope of the relevant provisions, citing *Lawler v Department of Housing and Public Works, Queensland [2017] QCATA 21* as authority that 'a tenant ... cannot in answer to an application for termination for objectionable behaviour, rely on the mental illness as a defence.' She added that 'the fact that the tenant would thereby likely be rendered homeless has not been a bar to the making of the termination order in such circumstances'.

The decision was affirmed on appeal in the QCAT Appeals division and in the Queensland Court of Appeal.

The QCAT Member had observed in the proceedings that the Residential Tenancies Act termination hearing was the wrong forum for introducing notions of discrimination. However, a corresponding *Anti-Discrimination Act* complaint dragged on for several years and was vigorously defended by the Queensland Government before coming to an unsatisfactory conclusion. When the *Queensland Human Rights Act* finally came into force in January 2020 it did not introduce an Economic, Social and Cultural Right to Housing. It is difficult to see how the present *Queensland Human Rights Act* would make any difference to Ms Simonova's situation either.

While there may be many legislative sections in Queensland legislation, the drafting of Section 297A *Residential Tenancies and Rooming Accommodation Act 2000 (Qld)* is a striking example. Section 297A is clearly discriminatory in two ways.

11. It legitimises overt direct discrimination by government in the form of adverse action against people with the protected attribute of impairment for actions that manifest entirely, or substantially from their disabilities. Once again Ms Simonova had no ability to control the behaviours which were disturbing her neighbours, yet the Department of Housing was able to terminate her tenancy without attempting any modifications to the house or yard or locating any alternative premises where neighbours were more distant. Evidence was given that such alternative premises, where available, could not be approved for a single person under the Department's policies. Her status as a public housing tenant and the likelihood of homelessness resulting from the termination could not be taken into account.
12. By applying a lower threshold for termination to public and community housing tenants than tenants of private landlords. Consider the distinctions between section 297 and 297A.

**297 Application for termination for tenant's objectionable behaviour**

(1) The lessor may apply to a tribunal for a termination order because the tenant—

(a) has harassed, intimidated or verbally abused—

(i) the lessor or lessor's agent; or

(ii) a person occupying, or allowed on, premises nearby; or

(b) is causing, or has caused, a serious nuisance to persons occupying premises nearby.

(2) An application under this section is called an application made because of objectionable behaviour.

(3) In this section—

lessor does not include—

(a) the chief executive of the department in which the Housing Act 2003 is administered, acting on behalf of the State; or

(b) a community housing provider.

**297A Application for termination for objectionable behaviour in public or community housing**

(1) The lessor may apply to a tribunal for a termination order because the tenant, *an occupant, a guest of the tenant or a person allowed on the premises* by the tenant—

(a) has harassed, intimidated or verbally abused—

(i) the lessor or lessor's agent; or

(ii) a person occupying, or allowed on, premises nearby; or

(b) is causing, or has caused, a serious nuisance to persons occupying premises nearby; or

(c) *has intentionally or recklessly endangered another person at the premises or interfered with the reasonable peace, comfort or privacy of a person occupying premises nearby.*

(2) An application under this section is called an application made because of objectionable behaviour.

(3) In this section— lessor means—

- (a) the chief executive of the department in which the Housing Act 2003 is administered, acting on behalf of the State; or
- (b) a community housing provider.

The corresponding section 345 and 345A continue the differing treatment for public and community housing tenants:

**345 Objectionable behaviour other than in public or community housing**

- (1) If an application is made to a tribunal for a termination order because of objectionable behaviour, the tribunal may make the order if it is satisfied—
  - (a) the applicant has established the ground of the application; and
  - (b) the behaviour justifies terminating the agreement.
- (2) In deciding if the behaviour justifies terminating the agreement, the tribunal may have regard to—
  - (a) whether the behaviour was recurrent and, if it was recurrent, the frequency of the recurrences; and
  - (b) for behaviour in the form of harassment, intimidation or verbal abuse—its seriousness.
- (3) Subsection (2) does not limit the issues to which the tribunal may have regard.
- (4) In this section—
  - applicant does not include—
    - (a) the chief executive of the department in which the Housing Act 2003 is administered, acting on behalf of the State; or
    - (b) a community housing provider.

**345A Objectionable behaviour in public or community housing**

- (1) If an application is made to a tribunal for a termination order because of objectionable behaviour, the tribunal may make the order if it is satisfied—
  - (a) the applicant has established the ground of the application; and
  - (b) the behaviour justifies terminating the agreement.
- (2) In deciding if the behaviour justifies terminating the agreement, the tribunal may have regard to—
  - (a) whether the behaviour was recurrent and, if it was recurrent, the frequency of the recurrences; and
  - (b) for behaviour in the form of harassment, intimidation or verbal abuse—its seriousness; and
  - (c) for behaviour in the form of intentional or reckless endangerment—its seriousness; and
  - (d) *for behaviour in the form of interference with a person's reasonable peace, comfort or privacy—its seriousness.*
- (3) *Also, in deciding if the behaviour justifies terminating the agreement, the tribunal must have regard to—*
  - (a) any serious or adverse effects on neighbouring residents or other persons, including whether neighbouring residents or other persons are likely to be subjected to objectionable behaviour if the agreement is not terminated; and*
  - (b) any evidence regarding the tenancy history of the tenant;**and*
  - (c) if the tenant is a tenant under a State tenancy agreement—*
    - (i) the department's responsibility to other tenants;**and*
    - (ii) the needs of persons awaiting housing assistance from the State.*
- (4) Subsections (2) and (3) do not limit the issues to which the

tribunal may have regard.

(5) In this section—

applicant means—

(a) the chief executive of the department in which the Housing Act 2003 is administered, acting on behalf of

the State; or

(b) a community housing provider.

State tenancy agreement means a residential tenancy agreement under which the lessor is the chief executive of the department in which the Housing Act 2003 is administered, acting on behalf of the State.

The punitive intention of this legislation is reinforced by section 349A:-

**349A How tribunal must deal with public or community housing tenant**

(1) This section applies if an application is made to a tribunal for a termination order by—

(a) the chief executive of the department in which the Housing Act 2003 is administered, acting on behalf of the State; or

(b) a community housing provider.

***(2) The tribunal must not refuse to terminate the tenancy merely because the tenant is a tenant of the chief executive or a community housing provider.***

It is trite to say that discrimination occurs where people or groups of people are treated less favourably on the basis of a personal attribute. The Commission would presumably accept that people who are able to obtain a tenancy from the Department of Housing or a community housing provider are overwhelmingly from situations of disadvantage, generally resulting from one of the already protected attributes. Once again, I endorse the 'Ten-point plan' suggestion that the protected attributes should be expanded to a broader group including 'people with low socio-economic status or who are from a disadvantaged social origin'.

The idea that this group of people can be treated so unfavourably by legislation without falling foul of the *Anti-Discrimination Act* or the *Queensland Human Rights Act* is a significant failure. I call on the Queensland Government once again to 'Spell out the positive change we want to see in Queensland' and 'Stop making excuses for discriminating' within its own legislation and policy.

Yours Faithfully

Julian Porter

Managing Solicitor

