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| A Better Renting Future – Consultation Regulatory Impact Statement |
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| **Submission**  **to**  **Department of Housing and Public Works** |

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| 3 January 2019 |

Table of contents

[Introduction 2](#_Toc28960400)

[The role of the Queensland Human Rights Commission 2](#_Toc28960401)

[Discrimination 3](#_Toc28960402)

[Human rights 3](#_Toc28960403)

[Ending tenancies fairly (Part 2) 4](#_Toc28960404)

[Current provisions 5](#_Toc28960405)

[History 6](#_Toc28960406)

[Commission response to 2013 amendments 7](#_Toc28960407)

[Decisions following 2013 amendments 8](#_Toc28960408)

[Involuntary or unintentional behaviours 10](#_Toc28960409)

[Suspected illegal activity 12](#_Toc28960410)

[Recommendations 14](#_Toc28960411)

[That if section 290A is extended to all tenancies sub-section (3) should be removed. 14](#_Toc28960412)

[The inclusion of a list of factors for the QCAT to consider when terminating a tenancy and granting a possession order. 14](#_Toc28960413)

[That the Department consider whether s 297A and s 296A should be repealed or amended on the basis of incompatibility with human rights. 15](#_Toc28960414)

[Rental housing quality and minimum housing standards (Part 3) 15](#_Toc28960415)

[Weatherproofing 17](#_Toc28960416)

[Energy efficiency 17](#_Toc28960417)

[Privacy 18](#_Toc28960418)

[Accessibility 18](#_Toc28960419)

[Domestic and family violence protections (Part 4) 20](#_Toc28960420)

[Minor modifications (Part 5) 20](#_Toc28960421)

[Renting with pets (Part 6) 22](#_Toc28960422)

[Summary of recommendations 23](#_Toc28960423)

# Introduction

1. The Commission welcomes the review of the *Residential Tenancies and Rooming Accommodation Act 2008* (the RTRA Act), which is much needed in light of the changing nature of housing in Queensland, the lack of housing affordability, and an increase in long-term renters. Overall, the recommendations in the Regulatory Impact Statement (the RIS) further the objective of improving protections for tenants while safeguarding the interests of property owners. Given increasing levels of homelessness in Queensland, it is commendable that the Queensland Government is committed to improving stability in the rental market.[[1]](#footnote-1)
2. The RIS sets out options for reform in relation to five priority areas. These submissions will be confined to commenting on specific issues in relation to the following areas:

* ending a tenancy early (Part 2);
* minimum housing standards (Part 3);
* domestic and family violence (Part 4);
* minor modifications (Part 5); and
* renting with pets (Part 6).

1. While supporting the important objectives of the review and many of its recommended options, this submission will highlight specific areas where the Department may wish to further consider the recommendations in light of human rights and discrimination law. These include:

* making amendments to current provisions and proposed reforms regarding ending tenancies on grounds of illegal activity and disrupting the quiet enjoyment of other tenants; and
* proposing further reforms to address accessibility, climate change, and related issues.

1. The recommendations are summarised in full at the end of this submission.

# The role of the Queensland Human Rights Commission

1. The Queensland Human Rights Commission (the Commission) has functions under the *Anti-Discrimination Act 1991* (the AD Act)and the *Human Rights Act 2019* (the HRA) to promote understanding, acceptance, and discussion of human rights in Queensland, and to provide information and educational services about human rights.

## Discrimination

1. A major purpose of the AD Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination, including in the area of accommodation. The Commission receives and conciliates complaints in relation to discrimination alleged by both private and social housing tenants. In the financial year 2017-18, the Commission received 214 complaints about contraventions relating to accommodation. The discrimination complaints were mostly about discrimination based on impairment (including having assistance animals), family responsibilities and race. Further complaints in relation to accommodation were made about sexual harassment, victimisation and being subjected to unlawful requests for information.

## Human rights

1. The HRAconsolidates and establishes statutory protections for certain human rights recognised under international law. Any proposed changes to the RTRA Act will need to be scrutinised for compatibility with the human rights contained in the HRA.[[2]](#footnote-2) While the HRA does not include a specific right to housing, a number of important human rights are engaged in the application of residential tenancy laws, most relevantly, the:

* right to recognition and equality before the law; [[3]](#footnote-3)
* right to privacy and reputation (which includes the right not to have one’s home unlawfully or arbitrarily interfered with);[[4]](#footnote-4)
* right not to be arbitrarily deprived of one’s property;[[5]](#footnote-5)
* right to protection of families and children;[[6]](#footnote-6)
* right to a fair hearing (including in determining housing matters).[[7]](#footnote-7)

1. Under the HRA, a human right may only be limited where the limitation is reasonable and can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[[8]](#footnote-8) In deciding whether limitations on the rights are reasonable and demonstrably justified, a number of factors must be considered and balanced.[[9]](#footnote-9)
2. The United Nations Human Rights Committee has commented that this obligation includes ensuring individuals are protected not only by the State, but against violations of their rights by private persons. This includes taking appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[[10]](#footnote-10)
3. Therefore tenancy laws are necessary to protect both the rights of tenants and lessors. The right to property for lessors is particularly relevant in this context.
4. From 1 January 2020, social housing tenants can make human rights complaints to the Commission about public entities, including the Department, as well as social housing providers contracted to perform work for the Department.

# Ending tenancies fairly (Part 2)

1. Part 2 of the RIS aims to create certainty for both tenants and lessors while supporting renting families and older people to build and sustain community and service connections. It also aims to provide owners with income security with the ability to plan ahead for future tenancies, works and repairs.
2. The recommended option in the RIS is Option 5, which would require property owners and managers to only end tenancy agreements for ‘approved reasons’ with the addition of new grounds. In general, the Commission supports this recommended option because of its potential to reduce the incidence of retaliatory evictions. The Commission considers that retaliatory evictions may disproportionately impact on some groups, and in particular people with disabilities as reflected in the *Disrupted* report by the consumer advocacy group, Choice, National Shelter, and the National Association of Tenant Organisations.[[11]](#footnote-11) However, the Commission strongly encourages the Department to reconsider a recommendation to include approved reason *5.5 Serious or significant breach due to actions of a tenant, occupant or guest*, in the form currently suggested.
3. In particular, the Commission is concerned about a number of existing procedures for the eviction of social housing tenants:
   1. ‘Serious breaches’ - Section 290A combined with s 340 provides an abbreviated termination process for ‘serious breaches’ on the low threshold of suspected illegal activity.[[12]](#footnote-12)
   2. Privacy of others - Section 297A and s 296A combined with s 335 provides for termination without any notice where a tenant, occupant or guest has interfered with the privacy of others, with no apparent regard for the circumstances of the tenant.
4. The Commission has serious reservations about the proposal to extend the serious breach ground to all tenancies in Queensland, which will further limit human rights and entrench discrimination in the private housing market. It might also increase housing instability for tenants, which is contrary to the objectives of the review of the legislation.
5. In summary, the Commission recommends that:
   1. If section 290A is extended to all tenancies, sub-section (3) (which provides that a lessor may form a reasonable belief that premises or property has been used for any illegal activity whether or not anyone has been convicted or found guilty of an offence) should be removed.
   2. The Queensland Civil and Administrative Tribunal (QCAT) be obliged to consider a list of factors prior to terminating a tenancy and granting a possession order, including the circumstances of the tenant.
   3. The Department consider whether s297A and s296A should be repealed or amended on the basis of incompatibility with human rights.

## Current provisions

1. A tenant may currently be issued a notice to leave for certain grounds. If a tenant does not leave after the notice period, the lessor may apply to a tribunal for a termination order. In relation to social housing tenants, these grounds include serious breaches under section 290A by the tenant, occupant or guest, which includes either illegal activity, or intentionally or recklessly:
   1. destroying or seriously damaging a part of the premises;
   2. endangering another person in the premises or a person occupying or allowed on, premises nearby; or
   3. interfering significantly with the reasonable peace, comfort or privacy of another tenant or another tenant’s appropriate use of the other tenant’s premises.[[13]](#footnote-13)
2. Under this provision, the lessor may form a reasonable belief that the tenant has engaged in illegal behaviour whether or not anyone has been convicted of an offence in relation to the activity.[[14]](#footnote-14) Social housing tenants need only be given 7 days’ notice to leave following a serious breach.[[15]](#footnote-15) In addition to termination of a tenancy for serious breaches, section 297A allows for a social housing provider to apply to the QCAT for a termination order to remove a tenant for objectionable behaviour by a tenant, occupant or guest in circumstances where the person has caused a serious nuisance, or harassed, intimidated or verbally abused others including lessors, agents and neighbours. Section 296A allows a lessor to apply for a termination order where not only the tenant, but an occupant or guest, has caused serious damage or injury to others.
3. Unlike s 290A, neither of these provisions rely on prior notice being given to the tenant.
4. While s 297A refers to the peace, comfort and privacy of a person occupying nearby premises, s 290A refers only to the peace, comfort and privacy of another tenant. It unclear from the RIS how s 290A would operate in relation to the private tenancy sector, and in particular whether the intention is to only protect the peace, comfort and privacy of other renters, or everyone affected including any owner-occupiers living nearby.

## History

1. The broad powers under section 290A, s 296A and 297A were introduced in 2013 amendments to the RTRA Act. They reflect the legislature’s view at the time that QCAT was not terminating social housing tenancies with sufficient frequency following the implementation of the Department’s Anti-social Behaviour Policy[[16]](#footnote-16) on 1 July that year.[[17]](#footnote-17) The Explanatory Note to the *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (the Explanatory Note) cites the need for social housing providers to have broad powers to respond to illegal activities in order to allow immediate action to terminate tenancies quickly.[[18]](#footnote-18) The Explanatory Note specifically considered the power to evict a tenant for illegal activity without a conviction, and stated that the intention was to “lower the standard of proof” to expedite ending the tenancy.
2. The impact on tenants was considered as follows:

This may be considered to impact on the rights of tenants where eviction action could be taken before any conviction has occurred. However, the section is considered to be justified.[[19]](#footnote-19)

1. One such justification provided was that a criminal charge and conviction can take months to occur, allowing for the criminal activity to continue on the premises.[[20]](#footnote-20)

## Commission response to 2013 amendments

1. The Anti-Discrimination Commissioner raised a number of serious concerns about the amendments in 2013.[[21]](#footnote-21)
2. In relation to termination for objectionable behaviour (section 297A) the Commissioner raised the concern that:

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…. There is no mention 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.[[22]](#footnote-22)

1. In relation to the termination for behaviours of persons other than the tenant (section 290A, s296A and section 297A), the Commissioner stated that:

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.[[23]](#footnote-23)

1. Further, in relation to termination for illegal activity (section 290A) the Commissioner raised the following concerns:

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.[[24]](#footnote-24)

1. The Commissioner recommended that the RTRA Act amendments include provision that all relevant circumstances are considered by the QCAT when determining whether it is reasonable to terminate the tenancy, including the circumstances of the tenant and any other vulnerable members of the household. The Commissioner also recommended that the Department continue to monitor the impact on vulnerable groups such as those who have disabilities, children and young people and Aboriginal or Torres Strait Islander tenants.[[25]](#footnote-25)

## Decisions following 2013 amendments

1. The position paper *Objectionable Behaviour in Social Housing* produced for the Caxton Legal Centre in 2018[[26]](#footnote-26) summarised a number of decisions that indicate a troubling trend following the amendments. The paper identified that tenancies are being routinely terminated by QCAT under the 2013 provisions even though in many cases the tenant will become homeless.
2. Some examples of published decisions where terminations of tenancy were approved by the QCAT, include:
   1. where a tenant’s behaviour was involuntary and a manifestation of their disability;[[27]](#footnote-27)
   2. where disturbances of the peace were caused by a violent partner of the tenant who was experiencing domestic violence;[[28]](#footnote-28)
   3. Where drug offences were being committed by adult children of an Aboriginal tenant.[[29]](#footnote-29)
   4. Where a guest to the premises accidentally broke a light fitting, the police were called and there was an altercation between the guest and the police where more damage was caused, despite the tenant herself causing no damage.[[30]](#footnote-30)
   5. Where a tenant had an intellectual disability with several serious health conditions. On the basis of police finding materials believed to be used in the manufacture of drugs his tenancy was terminated despite him not being yet being charged or convicted.[[31]](#footnote-31)
3. The Explanatory Note to the 2013 amendments recognised that while there might be an impact on tenants from the amendments that this would be mitigated by the fact that there is a right not to leave the property and await adjudication by the QCAT, which is bound by the rules of natural justice.
4. It is questionable how many tenants would be aware of their right to remain and contest the notice after being giving notice to vacate. Further, the *Objectionable Behaviour in Social Housing* position paper purports that there is a trend of the QCAT granting these orders in virtually every case, reflecting the low threshold in s340 for termination which is merely that the lessor demonstrates that they held a reasonable belief. As many decisions of the QCAT at first instance are not published, it is difficult to identify how often tenancies were terminated on the grounds of s290A, s296A and s297A in the period since 2013. However, an RTI request by Caxton Legal Centre seeking Department data on the frequency of applications for termination orders for a 1 year and 2 month period indicated that 100% of the applications for termination orders on these grounds were successful.[[32]](#footnote-32)
5. Therefore, it may reasonably be concluded that the 2013 amendments are causing a disproportionate incursion into the rights to privacy (home life) and equality of social housing tenants and creating situations of inequality, particularly:
   1. Where the tenant, occupant or guest has involuntarily or unintentionally engaged in disruptive behaviour; or
   2. Where the tenant or their associates is suspected of illegal activity by the lessor but has not been convicted.

## Involuntary or unintentional behaviours

1. The Court of Appeal in *Simonova v Department of Housing and Public Works* [2019] QCA 10 decisively concluded that considerations of whether disruptive behaviour is a manifestation of a disability of the person alleged to have interfered with the peace, comfort or privacy of others, will not be a factor in deciding such matters. The court confirmed a decision of the QCAT Appeal Tribunal to evict a tenant for ‘nuisance’ behaviour stemming from their mental and physical conditions, confirming that the provisions in the RTRA Act require strict liability whether the behaviour is ‘voluntary’ or not.
2. Although the case considered s 297A and s 345A rather than s 290A, the court considered the meaning of the words interfered with the ‘reasonable peace, comfort or privacy…’ which also appear in section 290A. The Court of Appeal decided that the words are directed to the harm caused, and there is no warrant for ‘importing or inferring elements of intention or voluntariness.’[[33]](#footnote-33) In the Commission’s view the provision when interpreted strictly can lead to unjust outcomes, particularly for those tenants who have profound disabilities.
3. Although the Department terminates tenancies in accordance with clearly articulated policies and procedures and generally only a last resort,[[34]](#footnote-34) private landlords are unlikely to have a code of conduct to set clear expectations for their tenants. While the Department policy is to investigate allegations, issue appropriate warnings and work with tenants to try to preserve the tenancy by providing referrals to services to resolve behavioural issues,[[35]](#footnote-35) private lessors will be unlikely to have a vested interest in helping tenants maintain stable housing.
4. The situation is likely to be exacerbated by the difficulty that tenants may have in challenging an eviction in light of the history of QCAT decisions and the RTI information received by the Caxton Legal Centre.
5. In sanctioning the actions of occupants and guests, sections 290A, 296A and 297A require a tenant to exercise a high degree of control over occupants and guests at the property, placing a significant burden on the tenant, including when they are victims of violent behaviours from others including co-tenants, occupants and family members.
6. For these reasons, the Department is encouraged to seriously consider whether the extension of section 290A to all tenancies could cause unintended negative consequences for the most vulnerable tenants renting in the private housing sector, including people with disabilities, Aboriginal or Torres Strait Islander tenants and people experiencing domestic and family violence. The consequence of extending the powers of private landlords to terminate tenancies in these situations is likely to be an increase in homelessness amongst these groups. It may also force tenants out of private housing and into public housing, which is a finite resource.
7. Further, it is arguable that section 290A is not compatible with human rights and could be challenged on this basis in future. In Victoria and the ACT, since the introduction of human rights legislation,[[36]](#footnote-36) the right not to have one’s home interfered with (as an aspect of the right to privacy) has been considered in several tenancy eviction cases. Serving a notice to evict engages the right to privacy, and then the court must consider whether giving the notice was either unlawful or arbitrary.[[37]](#footnote-37) ‘Arbitrary’ can include situations of unjustness, capriciousness, unpredictability or unreasonableness in the sense of not being proportionate to a legitimate aim sought.[[38]](#footnote-38) A tenancy that is terminated in an unjust or unreasonable way without due consideration for the impact on the tenant of losing their home, might impermissibly breach the right to privacy.
8. The right to equality before the law and non-discrimination is articulated in section 15 of the HR Act. The effect of s 290A, as described above, is that certain groups are disproportionately impacted over others. In particular, tenants who have behavioural issues over which they have limited control can have their tenancy terminated. Women experiencing domestic violence might have their tenancy terminated when a violent partner or family member is causing disturbances as technically they are a “guest” of the tenant. The provision does not promote the right to equal and effective protection against discrimination.[[39]](#footnote-39) The provision is also inconsistent with the AD Act as terminating a tenancy in the above situations may also be challenged on the basis of direct and indirect discrimination.[[40]](#footnote-40)
9. In addition, the provision may be incompatible with the right to protection of families insofar as termination of the tenancy under section 290A does not require consideration of the particular circumstances of the tenants and their dependents. Where a tenant has family and particularly dependent children living on the premises, due consideration must be given to the protection of the family and the best interests of the children.[[41]](#footnote-41)

## Suspected illegal activity

1. In the Commission’s view, section 290A(3) may not be compatible with the HR Act as it unreasonably infringes several rights including privacy, equality, family and the presumption of innocence until proved guilty. When deciding on whether to terminate a tenancy for a serious breach under section 290A, the QCAT may make the order it if it satisfied that the lessor has “established the ground of the application and notice to leave”.[[42]](#footnote-42) In this context, it seems that would only require the lessor to produce evidence satisfying a reasonable belief of any unproven illegal activity, regardless of how minor it may be, and of the impact the eviction may have on the tenant. While the Commission appreciates that the lessor’s right to property must include protection from damage caused by illegal behaviour, we question if the current provisions strike an appropriate balance between the rights of tenants and lessors.
2. 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.

1. 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.[[43]](#footnote-43)

1. The presumption of innocence is protected by the HR Act in section 32. The UN Human Rights Committee (UNHRC) has explained that the scope of the right includes a duty for all public authorities to refrain from prejudging the outcome of a trial. The right guarantees that no guilt can be presumed until the charge has been proven and ensures the accused has the benefit of the doubt.[[44]](#footnote-44)
2. Further, the low threshold required and the lack of clear criteria for the tribunal to consider (including factors relevant to the tenant) suggest that the tenant’s right to equality, privacy (home life) and potentially right to family, are significantly limited by the current provisions. Case law from the United Kingdom and the European Court of Human Rights suggests that a social housing provider must demonstrate that any eviction of a social housing tenant is a proportionate limitation on their right to privacy.[[45]](#footnote-45) In *Director of Housing v TK,* the Victorian Tribunal found that a notice to vacate on the basis of illegal activity was justified including because the landlord agreed to delay a decision after seeking submissions from the tenant’s legal advisers. The notice to vacate was issued after the tenant was convicted.[[46]](#footnote-46)
3. Under section 290A(3), a “reasonable belief” on the part of the lessor of illegal activity by any person on the premises can lead to the termination of the tenancy in the absence of a charge or conviction. This may result in patently unfair outcomes where the tenant, occupant or guest did not in fact do anything illegal on the premises. Section 290A(3) also does not qualify the illegal activity by the degree of seriousness, nor require that other steps are taken prior to termination to limit terminations to a ‘last resort’ option. The Commission questions if illegality in this context could be a reasonable belief that a tenant has used the premises as a business without local council approval. Retaining the provision for social housing tenants and extending it to all tenancies may result in unfair tenancy terminations that are unreasonable or disproportionate to the breach.
4. The RIS indicates that owners and managers have raised concerns about the difficulties in terminating tenancies where they suspect that there is illegal activity but it has not been proven in court. It appears that the purpose that is to be achieved is to expedite the process of eviction in cases of suspected illegal activity. Although limiting the risk of landlords may be a legitimate purpose, it does not appear to be a proportionate response to allow the ‘reasonable belief’ of a lessor about illegal activity to trigger an immediate end to the tenancy, without due regard to the history or the severity of the activity, or other circumstances of the tenant and occupants.

## Recommendations

### That if section 290A is extended to all tenancies sub-section (3) should be removed.

1. We recommend that section 290A as it applies to private tenants should not contain sub-section (3) in order to ensure compatibility with human rights.
2. To ensure equality across renting sectors we recommend that sub-section (3) is also removed from section 290A. Social housing tenants already face multiple disadvantages, and should not be subject to a less favourable position under the law compared with tenants in the private sector.

### The inclusion of a list of factors for the QCAT to consider when terminating a tenancy and granting a possession order.

1. Should s290A be retained or extended to all tenancies we strongly recommend that a section is added to the Division 5 procedural requirements[[47]](#footnote-47) that sets out a list of factors for consideration by the QCAT when an application is made to the QCAT for a termination order because of a serious breach. Certainty of law is a component of a human rights proportionality assessment, including providing safeguards to ensure discretionary powers are exercised in the least restrictive way of achieving the purpose. Under the current provisions it is unclear what factors QCAT should consider in terminating a tenancy arising from a s 290A notice. The factors to consider in order to fairly balance the rights of the landlord, tenants and others residing nearby, with the rights of tenants to preserve their tenancy, home and family, could include the following:
   1. The length of the tenancy;
   2. The seriousness of the conduct;
   3. Whether it was recurrent, and if so with what frequency;
   4. The consequence of ending the tenancy on the tenant and/or their dependents;
   5. Any mitigating factors such as physical or mental health of the person said to have engaged in the conduct, or whether the person was experiencing family or domestic violence at the time;
   6. The extent of the impact on the lessor, other tenants or those living in nearby premises; and
   7. Whether any other order or course of action is reasonably available.
2. A potential model to consider is the recent reforms of the Victorian residential tenancies legislation. The Victorian Civil and Administrative Tribunal will be able to refuse to grant a possession order on the basis it would not be *reasonable* and *proportionate* to do so. This allows for consideration of various factors including the frequency of a particular breach, whether it is trivial, whether someone else was involved, whether family violence was a contributing reason, whether the breach has been remedied to the extent possible, the effect of the conduct on other people, the respective parties’ behaviour and any other relevant matter.[[48]](#footnote-48) Importantly, this will allow VCAT to also consider whether any other order or course of action is reasonably available instead of making a possession order.[[49]](#footnote-49) This aligns the Victorian residential tenancies legislation with the *Charter of Rights and Responsibilities Act 2006*, which also requires consideration of less restrictive options when determining compatibility with human rights.

### That the Department consider whether s 297A and s 296A should be repealed or amended on the basis of incompatibility with human rights.

1. While not within the scope of the current RIS and its recommendations, the Commission recommends that the Department repeal or amend 297A and s 296A considering the issues raised above. The safeguarding of the peace, comfort and privacy of other tenants and nearby residents from continuing and unreasonable interference is a legitimate objective. However, the provisions in their current form are arguably incompatible with the HRA when other less restrictive options are available to achieve this purpose.

# Rental housing quality and minimum housing standards (Part 3)

1. Part 3 examines potential options to ensure Queensland rental accommodation is safe, secure and functional including setting out proposed Minimum Housing Standards. The RIS recommends Option 5 to prescribe minimum housing standards with enhanced repairs and maintenance provisions. This builds on the 2017 RTRA Act amendments that allowed for minimum housing standards to be set for things like sanitation, ventilation, protection from damp, privacy and security and energy efficiency. The data presented in the *Open Doors* report indicates that a high percentage of rental households are affected by serious quality or maintenance issues.[[50]](#footnote-50) With a long waitlist for housing there is significant pressure on social housing services to create new tenancies, which can result in current housing stock not being properly maintained.
2. Prescribing minimum standards for tenanted properties is compatible with the HR Act. Although there is no right to a home of a particular condition, where social housing conditions are extremely poor they may arguably interfere with human rights including the right to privacy,[[51]](#footnote-51) right to life,[[52]](#footnote-52) recognition and equality before the law,[[53]](#footnote-53) and the protection of families and children.[[54]](#footnote-54)
3. The Commission is of the view that setting Minimum Housing Standards may improve the safety, security and functionality of properties in both the private and public housing sectors.
4. Nonetheless, in order to meet their obligations as public entities, climate change may require social housing providers to go beyond these minimum standards. In addition to obligations arising under tenancy law, from 1 January 2020, Queensland public entities must act and make decisions consistently with human rights. In this context, social housing providers will likely have to consider the rights to life and right to privacy of tenants in their decisions and actions, including in relation to the maintenance of housing stock.[[55]](#footnote-55) The UNHRC has noted that the right to life includes addressing adequate conditions for protecting life such as shelter and the facilitation of adequate general conditions such as social housing programmes. The Committee has also observed that ensuring minimum standards that reduce the adverse impacts of climate change is a human rights-compatible approach. The UNHRC has recognised that environmental degradation, climate change and unsustainable development constitute some of the most serious threats to the right to life, and expressed a pressing obligation on state parties to ensure that the right to life informs decisions with regard to the environment.[[56]](#footnote-56)
5. The Special Rapporteur on adequate housing has advocated that ‘grossly inadequate housing’ should be seen and addressed as an unacceptable violation of the right to life (as well as the right to housing).[[57]](#footnote-57) The Australian Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) has previously stated that ensuring homes are resistant to extreme weather conditions is part of the protection afforded by the right to life.[[58]](#footnote-58) In analysing the connection between the special rights of children and climate change, the High Commissioner for Human Rights has observed that the negative impact of climate change threatens the ability for children to enjoy their human rights including in relation to housing.[[59]](#footnote-59)
6. In the Northern Territory, climate change is already requiring local councils to consider if their housing stock is fit-for-purpose and if they have adequate stock (and other resources) to manage the influx of residents forced from other areas by weather change, particularly Aboriginal and Torres Strait Islander peoples. Many of these issues are occurring in the vicinity of the Queensland-Northern Territory border and so are likely to be emerging issues for social housing providers and other public entities in Queensland. [[60]](#footnote-60)
7. The Commission welcomes the specific references to recommended standards in the RIS.

## Weatherproofing

1. The RIS notes that a safe and healthy environment can only be maintained by a fully weatherproof structure. This includes ensuring the property is not impacted by water leaks or dampness. The Commission supports the inclusion of this recommended standard.

## Energy efficiency

1. Tenants and advocacy groups have supported mandatory energy efficiency standards in rental properties during the *Open Doors* consultation.
2. A Minimum Housing Standard could extend the star rating requirements from the Queensland Development Code[[61]](#footnote-61) to existing rental properties. Rather than prescribing energy efficiency features, the star rating can be achieved through a combination of features such as:

* energy efficient room layouts
* ceiling and wall insulation
* ventilation
* light coloured roofs and walls
* energy efficient glazing
* ceiling fans.

1. However, this option was not recommended in the RIS because it may be cost-prohibitive for rental property owners. The Commission recommends the inclusion of a minimum standard for energy efficiency for all properties be further considered.
2. Increased energy efficiency measures are an important way to reduce the greenhouse gas emissions that contribute to climate change. The cost to lessors is mitigated by the fact that there is flexibility in achieving the star rating and that there is a 2 year transitional period for changes to be implemented. There may also be opportunities for negative gearing and to retain tenants on a longer term basis. This measure would have a significant positive impact on the environment with 35% of people in Queensland currently renting.[[62]](#footnote-62)

## Privacy

1. The Commission supports the inclusion of privacy as a minimum standard to be met to “ensure rental properties provide privacy in areas where there would be a reasonable expectation of privacy” such as in bathrooms and toilets.
2. Prescribing minimum requirements for privacy promotes human rights. The right to privacy is an important right protected by the HR Act.[[63]](#footnote-63)

## Accessibility

1. The Commission notes that accessibility has not been included as a recommended minimum standard. Although not cited as a top priority for stakeholders,[[64]](#footnote-64) the vast community benefits should be considered when deciding if accessibility in new social housing stock should be a minimum standard.
2. There are compelling human rights, economic and social arguments for the provision of basic access features in all new housing. The societal costs of inaction to provide basic access in new housing are ultimately shifted to the health, disability and aged care sectors and individuals and their families. The Australian Building Codes Board is currently undertaking a Regulatory Impact Statement (RIS) for potential minimum accessibility standards for housing, to be applied through the National Construction Code (NCC).
3. Liveable housing with minimum accessibility features should be considered as a priority for inclusion as a minimum standard in all new social housing. Accessible housing benefits many groups including:

* families with young children who have prams and strollers and must consider trip hazards for infants;
* people with disabilities;
* ageing people;
* people who sustain a temporary injury;
* people who have visitors regularly to the property from any of the above categories.

1. Inclusion of accessibility as a minimum standard in new social housing would complement the proposed changes to minor modifications as described further below (see Part 5 – Minor Modifications). The sorts of design elements that provide basic access features include:
   1. a safe continuous and step free path of travel from the street entrance and/or parking area to a dwelling entrance that is level;
   2. internal doors and corridors that facilitate comfortable and unimpeded movement between spaces;
   3. a toilet on the ground (or entry) level that provides easy access;
   4. a bathroom that contains a hobless (step-free) shower recess;
   5. reinforced walls around the toilet, shower and bath to support the safe installation of grab rails at a later date;
   6. a continuous handrail on one side of any stairway where there is a rise of more than one metre;
   7. stairways are designed to reduce the likelihood of injury and also enable future adaptation;
   8. at least one, level (step-free) entrance into the dwelling. [[65]](#footnote-65)
2. The inclusion of a requirement to cite the accessibility features of the property on advertisement of all property for rent is also recommended.

# Domestic and family violence protections (Part 4)

1. Part 4 of the RIS recognises the importance of safe and secure housing and makes recommendations in light of the *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* report.[[66]](#footnote-66) Housing is a critical issue for people experiencing domestic and family violence (DFV). DFV is a major contributor to homelessness[[67]](#footnote-67) which places strain on the already stretched social housing system. While there are some existing protections, the Commission strongly recommends that reforms are made to greater protect the safety of tenants and to promote the continuity of tenancies of people experiencing DFV.
2. The Commission recommends Option 3 as promoting and protecting the human rights of tenants experiencing DFV. The approach is consistent with the HR Act which protects relevant human rights of the right to liberty and security of the person[[68]](#footnote-68) and the right to life.[[69]](#footnote-69) The Commission considers it presents a balanced and proportionate response, considering the seriousness of the issue and fundamental importance of preserving the lives of tenants and their children.

# Minor modifications (Part 5)

1. Part 5 of the RIS identifies that liveability is an important aspect of renting. The RTRA Act currently restricts the ability of tenants to make minor modifications without seeking consent of the lessor. While these changes may limit a lessor’s right to property, the Commission supports the proposed amendments suggested in Option 3.
2. The RIS recognises that some tenants have compelling circumstances that require changes to the property, and asking for permission to make changes may not be practical or appropriate. Importantly, the RIS notes that there are significant numbers of people with disability and older Queenslanders living in rental properties, and an aging population will also mean increases in these numbers.[[70]](#footnote-70) A further group that require modifications are parents and carers of young children. The consequence of failing to secure furniture can be serious injury or death of infants and children.
3. The AD Act already ensures a degree of protection for renters with a disability, who cannot be refused the right to make alterations to meet their particular needs.[[71]](#footnote-71) The AD Act also protects people in the area of accommodation on the basis of their impairment,[[72]](#footnote-72) age[[73]](#footnote-73) and family responsibilities.[[74]](#footnote-74) In the Commission’s view it is essential to ensure that amendments are consistent with and/or improve on these existing protections from unlawful discrimination.
4. Option 3 establishes mechanisms to manage minor modifications with appropriate safeguards and appears to be consistent with the AD Act while further its goals of equality and inclusion. This option creates new categories of minor modifications that are essential to 1) meet health, safety, accessibility or security needs or 2) to allow tenants to improve the amenity and personalise their rental accommodation.
5. Under Option 3, the minor modifications for health, safety, accessibility and security modifications include those that are deemed to be “necessary by a registered practitioner or allied health professional” or include reasonable alterations under the AD Act, for example grab rails, shower seats. Appropriately, these kind of modifications for people with disabilities or older people do not require consent of the owner, but the owner must be informed. Owners can only apply for a refusal order if they have a genuine reason.
6. Further, if a person with a disability or a person experiencing DFV requires changes that are not minor, existing processes for fixtures and structural changes will apply, but QCAT would be required to consider various factors when deciding on whether an owner’s refusal is reasonable. These factors appear to be fulsome and well-considered.
7. Option 3 also allows for modifications for security of a tenant experiencing DFV where a tenant is at risk of or escaping DFV, so that they may install dead locks, security doors, camera or alarms. As mentioned above, this is an important step towards protecting the human rights of a person experiencing DFV as these changes may be required in an emergency where waiting for the approval of a lessor is impracticable.
8. While currently only noted for further consideration, the Commission is concerned about a potential option of restoration bonds that may be payable by tenants as an additional sum when proposing minor modifications. This may amount to indirect discrimination against some groups as it will disproportionately be applied to people with disabilities and older tenants who may be already be financially disadvantaged.

# Renting with pets (Part 6)

1. Part 6 of the RIS examines options to make rental properties more pet friendly. Research shows that pets contribute to wellbeing and can provide physical and mental health benefits.[[75]](#footnote-75) The Commission supports Option 4 which would require lessors to provide reasonable grounds to refuse a request to keep a pet.
2. The RIS acknowledges that the *Guide, Hearing and Assistance Dogs Act* *2009* (Qld), the AD Act and the *Disability Discrimination Act 1992* (Cth) provide statutory protections to ensure that property owners do not refuse tenants on the basis of having an assistance animal. Despite this, the Commission receives a number of complaints every year about people being refused rental properties because of their animal, or being asked to remove an assistance animal from the property. In many cases the difference between a pet and an assistance animal does not seem to have been clear for the lessors or property managers who have refused the animal on the premises.
3. In our experience, it is often the case that property managers will routinely refuse animals that are not generally perceived as assistance animals, such as cats. Also, disputes tend to arise when a person applies to have an animal remain on the property but for whatever reason the person cannot obtain the certification necessary to have it registered as a guide, hearing, or assistance dog. This may happen, for example, where the animal has already been with the owner for a long time, and is too old to be formally trained, but nonetheless performs the same role that a trained and registered animal does.
4. The Commission supports options that make renting with pets easier as this may have the knock-on effect of decreasing the discrimination that people with disabilities experience when seeking accommodation. If animals are generally more accepted as a normal part of renting in Queensland, the instance of discrimination against people on the basis of having assistance animals might decrease.
5. However, the Commission is concerned about recommended Option 6 that allows for a pet bond to provide property owners confidence that damage or pest infestation could be remedied at the end of the tenancy. Our concern is that such bonds could start to be applied routinely to tenancies of anyone with animals, whether they be pets or assistance animals. This could entrench discriminatory practices towards people with disabilities who are renting with assistance animals, and may also be financially disadvantaged. We recommend that if this option is included in amended legislation that it includes a clarification that tenants with assistance animals are not required to pay a special bond.

# Summary of recommendations

1. The Commission recommends the following in relation to the various proposals made in the RIS:

**Ending a tenancy early (Part 2)**

*Recommend Option 5* with the following reservations:

* that if section 290A is extended to all tenancies, sub-section (3) should be removed;
* the inclusion of a list of factors for QCAT to consider when terminating a tenancy and granting a possession order;
* that the Department consider whether s 297A and s 296A should be repealed or amended on the basis of incompatibility with human rights.

**Minimum housing standards (Part 3)**

*Recommend Option 5*, and in particular:

* include weatherproofing;
* add energy efficiency requirements;
* include privacy as a minimum standard;
* add accessibility considerations;
* consideration of how new obligations on social housing providers to act and make decisions consistently with human rights impacts upon not only decisions to start or end tenancies, but on the adequacy of housing stock.

**Domestic and family violence (Part 4)**

*Recommend Option 3*.

**Minor modifications (Part 5)**

*Recommend Option 3*, with the following reservation:

* restoration bonds not applied routinely to people with disabilities.

**Renting with pets (Part 6)**

*Recommend Option 4*, with the following reservation:

* pet bonds not routinely applied to people with disabilities.

1. Department of Housing and Public Works, *A better renting future – Safety, security and certainty, Consultation Regulatory Impact Statement, Review of the Residential Tenancies and Rooming Accommodation Act 2008* (Stage 1 Reforms, November 2019), 6. [↑](#footnote-ref-1)
2. *Human Rights Act 2019*, Part 3, Division 1. [↑](#footnote-ref-2)
3. HRA s 15. [↑](#footnote-ref-3)
4. HRA s 25. [↑](#footnote-ref-4)
5. HRA s 24. [↑](#footnote-ref-5)
6. HRAs 26. [↑](#footnote-ref-6)
7. HRAs 31*.* [↑](#footnote-ref-7)
8. HRA s 13(1) [↑](#footnote-ref-8)
9. HRA s 13(2) [↑](#footnote-ref-9)
10. United Nations Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add. 13, 26 May 2004 (29 March 2004). [↑](#footnote-ref-10)
11. Choice, National Shelter, and the National Association of Tenant Associations, *Disrupted: The consumer experience of renting in Australia*, (2018), 19. [↑](#footnote-ref-11)
12. In contrast, for breaches that are not considered ’serious’ breaches, QCAT must decide whether termination is ’justified’ based on factors including seriousness, frequency, and detriment — section 337 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld). [↑](#footnote-ref-12)
13. *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 290A. [↑](#footnote-ref-13)
14. RTRA Act s 290A(3). [↑](#footnote-ref-14)
15. RTRA Act s 329(2)(ia). [↑](#footnote-ref-15)
16. This policy has since been replaced by the *Fair Expectations of Behavior Policy* on 1 February 2016 and which appears to remain in effect. [↑](#footnote-ref-16)
17. Explanatory Note (Introduction), *Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013* (Qld). [↑](#footnote-ref-17)
18. Explanatory Note (Introduction), RTRAOLA Bill 2013,13. [↑](#footnote-ref-18)
19. Explanatory Note (Introduction), RTRAOLA Bill 2013, 8. [↑](#footnote-ref-19)
20. Ibid. [↑](#footnote-ref-20)
21. Anti-Discrimination Commission Queensland, *Submission to the Residential Tenancies and Rooming Accommodation and Other Legislation Amendment Bill 2013*, 25 September 2013. [↑](#footnote-ref-21)
22. Ibid 3. [↑](#footnote-ref-22)
23. Ibid 4. [↑](#footnote-ref-23)
24. Ibid 5. [↑](#footnote-ref-24)
25. Ibid 7. [↑](#footnote-ref-25)
26. Ellie Conroy, Sarah Gilmour, and Ayan Mohamud, *Objectionable behaviour evictions in social housing* (Position Paper, May 2018) <https://law.uq.edu.au/files/40147/Objectional\_Behaviour\_evections\_in\_social\_housing\_05082018.pdf> [↑](#footnote-ref-26)
27. *Simonova v Department of Housing and Public Works* [2018] QCATA 33 – tenant had paranoid schizophrenia and PTSD that would cause her to call out in the night, and polyps on vocal chords caused her voice to have a “fog-horn quality”. See also *Lawler v Department of Housing and Public Works* [2017] QCATA 21, where mental illness was a significant contributor to his behaviour. [↑](#footnote-ref-27)
28. *State of Queensland through the Department of Housing and Public Works v Gray* [2017] QCAT 475. Complaints were made about fighting, yelling, obscene language, and police attendances. The tenant made frequent calls to police because her former partner had been released from prison and she was concerned for her safety. [↑](#footnote-ref-28)
29. *State of Queensland through the Department of Housing and Public Works v Boyd* [2016] QCAT 79. [↑](#footnote-ref-29)
30. *Webb v State of Queensland* [2014] QCATA 292. [↑](#footnote-ref-30)
31. *Turnbull v State of Queensland* [2014] QCA 240. [↑](#footnote-ref-31)
32. Ellie Conroy, Sarah Gilmour, and Ayan Mohamud, *Objectionable behaviour evictions in social housing* (Position Paper, May 2018) 9. [↑](#footnote-ref-32)
33. *Simonova v Department of Housing and Public Works* [2019] QCA 10. [↑](#footnote-ref-33)
34. Department of Housing and Public Works, *Fair expectations of behavior for social housing tenants.* [↑](#footnote-ref-34)
35. Department of Housing and Public Works ‘Tenant Behaviour’, *Public and community housing* (Web page) 7 March 2016 <<https://www.qld.gov.au/housing/public-community-housing/public-housing-tenants/during-your-tenancy/tenant-behaviour>> [↑](#footnote-ref-35)
36. Charter of Human Rights and Responsibilities Act 2006 (Vic) and Human Rights Act 2004 (ACT) [↑](#footnote-ref-36)
37. See for example ACT case of Miller v Commissioner for Social Housing [2017] ACAT 10 [98] citing Director of Housing v Sudi [2010] VCAT 328, [34] [↑](#footnote-ref-37)
38. *PJB v Melbourne Health& Anor (Patrick’s case)* [2011] VSC 327, [85] [↑](#footnote-ref-38)
39. HRA s15(4)*.* [↑](#footnote-ref-39)
40. *Anti-Discrimination Act 1991* sections 10–11. [↑](#footnote-ref-40)
41. HRA s 26. [↑](#footnote-ref-41)
42. RTRA Act s 340(2). [↑](#footnote-ref-42)
43. Article 14, entered into force in Australia on13 November 1980. [↑](#footnote-ref-43)
44. UN Human Rights Committee, *General comment No 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007), 9. [↑](#footnote-ref-44)
45. See for example *Manchester City Council v Pinnock* [2011] 2 AC 104. [↑](#footnote-ref-45)
46. [2010] VCAT 1839. [↑](#footnote-ref-46)
47. *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) Div 5. [↑](#footnote-ref-47)
48. Department of Justice and Community Safety (Vic), *Fairer Safer Housing* (Web page) reform 78, available at <<https://engage.vic.gov.au/fairersaferhousing>>. [↑](#footnote-ref-48)
49. *Residential Tenancies Amendment Act 2018* (Vic), section 330A(h). [↑](#footnote-ref-49)
50. Department of Housing and Public Works, *Open Doors to Renting Reform Consultation* (Final Report 2018). [↑](#footnote-ref-50)
51. *Human Rights Act 2019 (Qld),* section 25. [↑](#footnote-ref-51)
52. HRA s 16. [↑](#footnote-ref-52)
53. HRA s 15. [↑](#footnote-ref-53)
54. HRA s 26. [↑](#footnote-ref-54)
55. The Explanatory Note to the *Human Rights Act* notes that the right to life ‘reflects the positive obligations on states…to take positive steps to protect the lives of individuals’. [↑](#footnote-ref-55)
56. UN Human Rights Committee, *General Comment No. 36*, UN Doc CCPR/C/GC/36 (3 September 2019), 13. [↑](#footnote-ref-56)
57. Leilani Farha,, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, UN Doc A/71/310 (8 August 2016), 2 [↑](#footnote-ref-57)
58. Human Rights and Equality Opportunity Commission, *Human rights and climate change: background paper,* (2008) available at <https://www.humanrights.gov.au/our-work/commission-general/publications/human-rights-climate-change-2008> [↑](#footnote-ref-58)
59. United Nations High Commissioner for Human Rights, *Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child,* UN Doc A/HRC/35/13 (4 May 2017), 14. Children are given special protection under s 26(2) of the HRA. [↑](#footnote-ref-59)
60. Lorena Allam and Nick Evershed, ‘Too hot for humans? First nations people fear becoming Australia’s first climate refugees’ *The Guardian* (online, 18 December 2019) <<https://www.theguardian.com/australia-news/2019/dec/18/too-hot-for-humans-first-nations-people-fear-becoming-australias-first-climate-refugees>> [↑](#footnote-ref-60)
61. Queensland Government, *Queensland Development Code*, Part 4.1 Sustainable Buildings, 15 January 2013. [↑](#footnote-ref-61)
62. Australian Bureau of Statistics, *2016 Census Community Profiles – Queensland, Table G33 Tenure and Landlord Type by Dwelling Structure*, < https://quickstats.censusdata.abs.gov.au/census\_services/getproduct/census/2016/communityprofile/3?opendocument>, 2019. [↑](#footnote-ref-62)
63. *Human Rights Act 2019*  s 25. [↑](#footnote-ref-63)
64. Around 44% of stakeholders overall considered this an important standard to include and around 55% of tenants. [↑](#footnote-ref-64)
65. For background to the silver level of livable housing design see Livable Housing Australia, *Livable Housing Design Guidelines,* (2017) <<http://livablehousingaustralia.org.au/library/SLLHA_GuidelinesJuly2017FINAL4.pdf>> [↑](#footnote-ref-65)
66. Available at: https://www.csyw.qld.gov.au/campaign/end-domestic-family-violence/about/not-now-not-ever-report, 2015. [↑](#footnote-ref-66)
67. As noted in the RIS, in 2017-18 121,000 people nationally sought assistance from homelessness services after experiencing DFV. Source: Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019,* available at https://www.aihw.gov.au/getmedia/b0037b2d-a651-4abf-9f7b-00a85e3de528/aihw-fdv3-FDSV-in-Australia-2019.pdf.aspx?inline=true [↑](#footnote-ref-67)
68. *Human Rights Act 2019* s 29. [↑](#footnote-ref-68)
69. HRA s 16. [↑](#footnote-ref-69)
70. As described in the RIS, 72,000 Queenslanders with a disability live in rental properties, and in 2011 there were around 201,000 people over 55 living in rental properties. Source: Australian Bureau of Statistics, *2016 Census of Population and Housing,* from table builder, available at <https://auth.censusdata.abs.gov.au/webapi/jsf/dataCatalogueExplorer.xhtml>

    and Australian Bureau of Statistics, *2016 Census of Population and Housing,* from table builder, available at <https://auth.censusdata.abs.gov.au/webapi/jsf/dataCatalogueExplorer.xhtml> [↑](#footnote-ref-70)
71. *Anti-Discrimination Act 1991* s 84. [↑](#footnote-ref-71)
72. AD Act s 7(h). [↑](#footnote-ref-72)
73. AD Act s 7(f). [↑](#footnote-ref-73)
74. AD Act s 7(o). [↑](#footnote-ref-74)
75. F. Walsh, ‘Health and Mental Health Benefits of Companion Animals’, *Human Animal Bonds I: The Relational Significance of Companion Animals,* available at https://www.kenrodogtraining.com/upload/human2.pdf, Vol. 48, No. 4, Family Process, 2009, 466. [↑](#footnote-ref-75)