

# Fairer, Safer Housing: Residential Tenancies Act Review Security of tenure Issues Paper

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## A Submission from the Community Housing Federation of Victoria

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The Community Housing Federation of Victoria (CHFV) welcomes this opportunity to make a submission in response to the Security of Tenure Issues Paper, released by the Victorian Government as a part of its review of the Residential Tenancies Act 1997 (Vic) (**RTA**).

CHFV is the peak body that represents the not-for-profit community housing sector in Victoria. CHFV's member community housing organisations (CHOs) are committed to providing secure, affordable and decent housing for people on low to middle incomes. Members include the CHOs registered as housing associations or housing providers under the Victorian regulatory framework for non-profit housing providers plus other organisations and individuals interested in housing.

In this response to the Issues Paper on security of tenure, CHFV builds upon its earlier submission to the Consultation Paper published in August 2015.

### Executive Summary

The Review has rightly recognised the importance of security of tenure for residential tenants in Victoria, given that more Victorians are renting and for longer periods. CHFV agrees that security of tenure is important for the community by providing tenants with the ability to meaningfully plan for the future and build support networks in their local community.

A key benefit to housing in CHOs is that they offer a form of tenure security that is above and beyond that mandated by the RTA. This is primarily due to the policies and practices of CHOs to:

- offer an affordable rent (usually linked to household income); and
- make every effort to sustain tenancies and only use eviction as a last resort.

These policies and practices of CHOs are at the heart of what they do and are also reflective of regulatory and funding requirements.

If the private market can offer more security of tenure for Victorians through changes to the RTA, then this should reduce the demand for community housing.

CHFV is broadly supportive of measures to improve security of tenure for all tenants by making appropriate amendments to the RTA. CHFV believes that such measures should however be balanced against the legitimate need for CHOs to be able to take steps to end tenancies in order to safeguard the interests of other tenants and neighbours, to ensure the safety of CHO staff and contractors and to ensure housing assistance is provided to people who are eligible under funding arrangements.

Getting this balance right is a complex task for government. Indeed, the particular issue of the appropriateness of “no specified reason” termination notices is one where the community housing sector does not speak with one voice. CHFV therefore asks that government consider the interests of the over 18,000 community housing tenants and the CHOs that manage them when considering any proposed amendments to the RTA. CHFV looks forward to working with government on this and other proposed amendments to the RTA.

## **Background**

### **Why the RTA matters**

As social housing landlords, CHOs interact with the RTA on a daily basis. The RTA provides the principal formal framework under which CHOs relate to their tenants and residents. CHOs are required by regulation to seek to sustain social housing tenancies wherever possible. The RTA is used as a tool by CHOs to sustain tenancies by:

- providing a frame of reference for the rights and responsibilities of tenants;
- the utilisation of enforcement mechanisms through the Victorian Civil and Administrative Tribunal (VCAT) – not as a method of ending tenancies but principally as a means to ensure tenants comply with their obligations and fully appreciate the consequences of not doing so.

Evictions for non-payment of rent or repeated breaches of duty provisions of the RTA are required by regulation and by CHOs’ policies to be used as a last resort only. This approach, coupled with a rent-setting approach that keeps rent at or below affordability benchmarks and a greater ability to link tenants with support offers tenants a measure of security of tenure not seen in the private rental market.

### **Why security of tenure matters**

A sense that our homes are ours for as long as we need them is taken for granted by many in our community, but for others is a long cherished dream.

Even if landlords do not exercise their rights, many private market tenants suffer just from knowing that the landlord can end the tenancy arbitrarily. This can occur even if the tenant has not done anything wrong, and when the landlord does not need the property back for a valid reason. It is this feeling of insecurity that inhibits tenants from exercising their rights, even when entitled to do so. In a wider sense, a lack of security of tenure in the rental market stands in the way of people seeking work, education and community networks in their local area.

What many tenants of social housing value about their tenancy is not just affordability of rent but also knowing that their tenancy cannot be taken away arbitrarily. The practices and policies of social landlords mean that evictions only occur as a last resort after every effort has been made to sustain

the tenancy and following a fair process which considers the rights and needs of tenants, neighbours and others. This reduces the stress and anxiety of having to find new housing and provides a platform for tenants to build strong connections within their local community.

CHFV appreciates that the review is considering ways in which the RTA can improve security of tenure for all tenants. Many of the issues raised in the Issues Paper do not have a great bearing on management of community housing, but insecurity in the private rental sector means even greater demand is being placed on the inadequate resources of the community housing sector. Strengthening of security of tenure in the private rental market is therefore an important goal.

## **CHFV's response to the Issues Paper**

In the following sections, CHFV will set out its response to the issues raised in following aspects of the RTA raised in the Issues Paper:

- lease terms
- terminations of tenancies
- rent increases, and
- repairs, maintenance and modifications.

### **Lease terms**

Tenure in community housing is generally periodic tenancies, which remain on foot unless the tenant elects to leave or if the tenancy becomes unsustainable owing to the tenant's own conduct. Accordingly, CHFV's members do not generally have a practice of offering fixed term tenancies. If the RTA was amended to allow for fixed term tenancies of greater than five years, or to otherwise encourage landlords and tenants to agree longer-term leases of 2-5 years duration, it is unlikely that this would have much application to community housing. CHOs are generally not looking for tenants to make a commitment to stay in housing for a particular period, taking the view that the housing should be there for the tenant as long as the tenant needs it.

Looking at the private market it is interesting that provision for 5-year terms has been present for many years but this is rarely used. This would seem to be a cultural issue in the real estate industry. Longer lease terms would have advantages for tenants as well as landlords. Perhaps solutions could be found in reducing financial incentives for agents to write shorter leases, or providing tax incentives for owners to write longer leases as suggested in the issues paper. These are both outside the scope of the RTA but the Review could make recommendations to government.

### **Termination**

#### **Understanding the competing requirements**

The Issues paper identifies the tension in this area as between allowing too much flexibility for landlords (and consequently creating unreasonable tenure insecurity) and not allowing enough flexibility for landlords (and consequently incentives to offer property in the rental market could be affected).

In community housing the tension is somewhat different. CHO landlords are not seeking flexibility – rather they are seeking that the RTA contains the necessary tools to sustain tenancies by having tenants comply with their tenancy obligations, with the ability to regain possession as a last resort where a tenancy cannot be sustained despite these efforts.

CHOs are also mindful not just of their obligations to individual tenants but also to:

- other people whom they house and their neighbours to ensure a peaceful and safe living environment;
- CHO staff and contractors to ensure a safe working environment in carrying out their duties, which include meeting with tenants, inspecting homes and ensuring the landlord undertakes necessary maintenance; and
- Government and the wider community in ensuring that the CHO offers housing assistance consistent with its obligations as a government-funded body.

CHO tenants on the other hand are seeking the ability to understand what it is they need to do to sustain their tenancy and to be offered all reasonable opportunities to address issues to prevent their ongoing tenancy from being put at risk.

Managing this tension is complex, and much of the relevant policy sits outside the scope of the RTA, being dealt with by the policies and procedures of CHOs. These are reflective of both funding agreements (which determine matters such as rent-setting and eligibility) and regulation of registered housing agencies by the Housing Registrar (which determines such matters as fair and transparent processes and tenancy sustainment). In recent years we have also seen efforts by advocates to argue that the Charter of Right and Responsibilities also applies to decisions of registered agencies that impact on a tenant's tenure. The development and clarification of this body of law is the subject of much debate and discussion, and the recent review of the Charter has made a number of recommendations for reform which may clarify its application to CHOs.

At the same time, CHFV believes that in respect of security of tenure the RTA should generally apply the same set of rules to all tenancies – public, community and private. In this sense the RTA acts as a baseline – establishing the minimum entitlement of all tenants to security of tenure, a right which is enforceable by VCAT.

Getting the balance right in the RTA involves ensuring that all dimensions are given appropriate consideration. In this submission CHFV will explain what security of tenure means in this regard specifically with regard to termination provisions.

### **“No specified reason” termination notices**

As noted in the Issues Paper, the most contentious provisions for termination are the 60/90/120 day “no specified reason” termination provisions (in sections 261 and 263/288 of the RTA respectively).

There are divergent views amongst CHOs about the appropriateness of the use of these termination provisions by both private and social housing landlords.

- Some of CHFV's members believe that there remain circumstances where these termination provisions can and should be used as a part of sound tenancy management of complex social housing tenancies.

- Other CHOs believe that these provisions do not need to be used in any circumstances, but are supportive of amendments to the RTA to expand and clarify other termination provisions where the landlord is required to specify a reason.

We expand on this further in the next section.

However as a general principle, CHFV acknowledges that these “no specified reason” termination provisions have a significant impact on all tenants – both private market and social - by creating tenure insecurity.

### What are the reasons why CHOs use the ‘no specified reason’ notice to vacate?

CHFV believes that some CHOs use the “no reason” provisions in the following circumstances:

Issue	Explanation
A tenant’s or resident’s actions are a threat to the safety of others who are themselves vulnerable and unwilling to give evidence at a VCAT hearing.	A violent tenant or resident may have intimidated other tenants, residents or neighbours such that the victims are unwilling to be a witness at VCAT or be mentioned in a Notice to Vacate. In these circumstances it may be problematic to start a normal Termination process for a breach of the tenant’s duties under the RTA. CHOs could issue Summonses to Appear, but they must consider whether this puts the witnesses in danger or the possibility that they may become hostile witnesses.
Protection of CHOs’ staff and contractors	The RTA does not provide a remedy where a tenant threatens the safety of workers or contractors. This is becoming a serious occupational health and safety issue for CHOs who are under a legal duty to provide a safe working environment.
Where tenants are sub-letting without the CHO’s permission.	In our members’ experience this is difficult to prove at VCAT. Firstly the CHO has to prove that the illegal sub-tenant is living there, which is difficult given 24 hours’ notice of inspection is required under the RTA. The CHO is also required to prove that the illegal sub-tenant is paying rent to the tenant, which is similarly difficult to prove. The result can be that a person who is ineligible for community housing (for example, because they are not an Australian permanent resident or because their household income is too high) is staying in subsidised social housing cheaply or rent-free. This is commonly also associated with serious neighbourhood disturbance caused by the unauthorised sub-tenant
Difficulties in establishing that a tenant's act or omission endangers the safety of occupiers of neighbouring premises (sections 244 and 279)	VCAT and the Supreme Court (Director of Housing v Pavletic) have interpreted the word “endangers” as meaning that there is an ongoing danger to others from the person receiving the notice. Some VCAT members have required a string of dangerous incidents to have occurred in order to prove that the danger is ongoing. This makes it very difficult for a CHO to protect other tenants and neighbours.

Tenants in transitional housing who refuse alternative offers of accommodation	Sections 262A and 287A were inserted in the RTA in 2002 to provide for 30 days' notice to vacate in these cases. These provisions required the Director of Housing to publish requirements for tenants of transitional housing to seek alternative accommodation. More than 13 years after these sections were included the requirements have still not been published despite CHFV's requests for this matter to be addressed.
Tenants who: <ul style="list-style-type: none"> <li>• provide misleading information about eligibility;</li> <li>• no longer comply with eligibility criteria for a particular housing program.</li> </ul>	These provisions currently only apply to public housing. As a general principle CHFV believes that public and community housing should be treated consistently in the RTA. CHOs may (although need not) enact policies and procedures to ensure that their housing assistance is delivered to people the CHO was funded to assist. This may be where a program was designed to assist particular cohorts or people who engage with a particular support program.

Many CHOs consider that the “no reason” termination provisions of the RTA are a vital tool of last resort for these reasons. Often these provisions are used to give protection to vulnerable tenants living alongside people who may have threaten and intimidate their neighbours or CHO staff. CHOs should only use such provisions in accordance with policies and procedures and in a transparent way, so that tenants impacted understand why the notice is being used and what the tenant needs to do to prevent the CHO from seeking possession at a later date.

Other CHOs are of the view that it is possible to manage complex tenancies within the current provisions of the RTA without use of “no specified reason” termination notices.

**Rather than relying on a notice to vacate for ‘no specified reason’, how could the Act cater for landlords with legitimate grounds for terminating a tenancy for reasons that are not otherwise prescribed?**

The RTA could be amended to address many of these concerns. These changes were canvassed in our initial submission to the Consultation paper in August 2015. This includes:

Issue	Suggested changes to the RTA
Protection of CHOs' staff and contractors	Provisions which allow a landlord to serve a notice to vacate if the tenant or the tenant's visitor has seriously or persistently threatened or abused the landlord, the landlord's agent, or any employee or contractor of the landlord.
Difficulties in establishing that a tenant's act or omission endangers the safety of occupiers of neighbouring premises (sections 244 and 279)	This issue could be remedied by changing the word “endangers” to “has endangered” in these sections.
Tenants in transitional housing who refuse alternative offers of accommodation	The Director of Housing publishing its requirements for transitional housing or by amending the RTA to remove this requirement

<p>Tenants who:</p> <ul style="list-style-type: none"> <li>• provide misleading information about eligibility;</li> <li>• no longer comply with eligibility criteria for a particular housing program.</li> </ul>	<p>Amendments to sections 252 and 262 of the RTA to extend their application to include community housing as well as public housing. For example, we understand that Aboriginal Housing Victoria would prefer to use these provisions when it is established that a tenant does not meet its particular eligibility criteria.</p> <p>CHFV expects that not all CHOs would necessarily use these provisions or would apply them to all of their housing programs.</p>
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As a general principle, CHOs would prefer to rely on specific provisions of the RTA which gives tenants a reason and allows tenants to understand their obligations. Indeed, the amendment concerning eligibility would simply be the extension of provisions in the RTA that already apply to public housing.

The other situations rely on proving substantive matters at VCAT, which, for reasons described above, are challenging for CHOs no matter how new provisions in the RTA were worded.

### What would be the impact of removing the notice to vacate for ‘no specified reason’ from the Act?

Possible impacts could be:

- More social housing projects could become dangerous and intimidating places that low-income people would be reluctant to live in. Targeting of allocations to people with priority housing needs has resulted in social housing complexes becoming increasingly concentrated with people with multiple and complex needs. CHFV believes that some homeless people are choosing to “sleep rough” rather than move into a rooming house where they would not feel safe.
- Some therapeutic or specialist services may choose to operate as “health or residential services” and so be exempted from the provisions of the RTA. The residents would then lose the tenancy rights that they currently enjoy.

Our members’ concern is that there are competing rights of individual tenants to have security of tenure and the rights of other tenants, residents and neighbours to feel safe and have peaceful enjoyment of their homes. Indeed their own security of tenure can be threatened in these instances. CHOs only use the “no specified reason” notices as a last resort when other solutions are not viable.

Getting the balance right is a complex task for government. This is reflected in the divergent views of the sector on this point. CHFV asks that in considering any desired changes to the termination provisions of the RTA, government give due regard to the rights of all tenants and the legitimate interests of CHOs in reaching that balance. CHFV is eager to work with government and stakeholders so ensure that this process reaches a well-informed and appropriate conclusion.

## Rent Increases

The current notice period and frequency of rent increases in the RTA is satisfactory for community housing. Compliance with these should not impact on security of tenure as funding and regulatory requirements community housing rents generally requires rents to be no more than a proportion of household income and/or 75% of market rent.

In CHFV's previous submission to the Consultation Paper, we noted that any changes to the rent increase provisions needed to carefully consider the impact of those changes on CHOs and the rebated rent model under which most CHOs operate:

*Most CHOs calculate rents based on either a percentage of gross household income or a proportion of the market rent of the property, or a combination of both. Where rent is based on household income, this can be a complex process which requires a tenant to provide reasonable details of household income. Household income can change dramatically, either through changes in household composition or changes to a tenant's employment status. The regime in the RTA, which requires 60 day notice of rent increases and for rent increases no more than every 6 months, is inflexible and not well-adapted to this process. For example, a CHO may be prevented from increasing a tenant's rent even when a tenant has informed the CHO that they are earning additional income, if a rent review has already been undertaken recently.*

*Some CHOs respond to this complexity by separating out notices under the RTA (used to set a market or maximum rent) with a separate process which calculates the tenant's entitlement to a rental subsidy. These processes are complex and difficult for tenants to understand.*

*CHFV acknowledges that this is a difficult issue. The needs of CHOs to maintain their financial viability through appropriate rent-setting must be balanced against the rights of tenants to a clear and transparent process, proper notice of rent increase and to appeal rental assessments if unsatisfied with the outcome. What the review should consider is whether any amendments could be made to the RTA to better reflect the realities of the rent-setting process to provide more certainty to both CHOs and tenants.*

## Repairs, maintenance and modifications

We believe tenants could be given more flexibility with regard to minor modifications to rental housing, such as being able to attach picture hooks and picture rails, or to improve gardens without having to restore the premises to its previous condition. There should also be provision for tenants to make modifications needed to deal with disabilities.