Proposed Residential Tenancies Regulations 2020

WEstjustice submission

Joseph Nunweek, Senior Lawyer

About WEstjustice

WEstjustice (the Western Community Legal Centre) was formed in July 2015 as a result of a merger between the Footscray Community Legal Centre, Western Suburbs Legal Service and the Wyndham Legal Service. WEstjustice is a community organisation that provides free legal assistance and financial counselling to people who live, work, study or access services in the western suburbs of Melbourne. We have offices in Werribee and Footscray as well as a youth legal branch in Sunshine and outreach across the West. WEstjustice provides a range of legal services including: legal information; outreach and casework; duty lawyer services; community legal education; law reform; advocacy; and community development projects.

We currently provide tenancy advice, assistance and representation to renters who work, live and study in the Wyndham, Maribyrnong, Hobsons Bay, Moonee Valley, and Melbourne LGAs. While we assist all renters who come to us seeking help, we have a particular centre-wide practice priority in regards to:

- Culturally and linguistically diverse (CALD) groups, including refugees and recently-arrived households;
- Women and children facing family violence;
- Youth, particularly international students who require rental accommodation in Central and Greater Melbourne;
- Other economically vulnerable individuals and households.

Our response to the regulations and the Regulatory Impact Statement (RIS) is guided by these practice priorities, as well as the topic-specific guiding questions offered by Consumer Affairs Victoria. It is not intended as an exhaustive response to each change proposed, instead highlighting those our centre has particularly strong views on.

It should not be lost in the process of doing so that the collective reforms and changes will overwhelmingly improve conditions for Victorian renters, representing a huge gain in security, privacy and dignity for a significant portion of the state's households. We commend the changes overall.

Mandatory Pre-Disclosures

WEstjustice is supportive of the proposed list of mandatory pre-disclosures, and acknowledges that some other suggested pre-disclosures may not be straightforward for a rental provider to readily source. However, we wish to make a case for the following pre-disclosures to be mandatory:

Landlord's insurance details

We believe that renters should be able to receive a pre-contractual disclosure as to whether the landlord has insurance, and if so, of the relevant insurer.

In our casework, we have encountered the following kinds of matters in which the landlord's insurance or lack of insurance has a direct bearing on the renter.

- Situations where the landlord is required by the *Residential Tenancies Act* to perform significant repairs that would have been claimable under an insurance policy, had the landlord had it. Instead, the landlord is unable to promptly meet the costs and organise repairs to be carried out, requiring the renter to have to go to VCAT to seek relief or in some cases simply give up and vacate.
- Situations where a landlord is seeking to recover costs from a renter after a tenancy ends that might otherwise be recovered by claiming on insurance. WEstjustice has on occasion encountered situations where a renter pays compensation ordered by VCAT and is subsequently contacted by an insurer holding them liable for a claim for the same loss – that is to say, a matter in which a landlord has 'double dipped' in breach of the conditions of subrogation that apply to virtually all insurance contracts.

In both cases, an awareness of the landlord's insurance status is part of allowing a renter to make an informed choice as a consumer.

Disclosure of mandatory mould and damp repairs

In the RIS, it is noted that mould is included in the proposed minimum standards, the implication being that any disclosure of previous work to treat or remedy mould would be redundant.

We would observe that, unlike other minimum standards of repair and fitting, a property's issue with mould may not always be visible at the commencement of an agreement, particularly where:

- The tenancy commences during hot and dry summer months when a mould issue is not apparent, or;
- Where a provider has previously undertaken works that may disguise but not remove a mould problem.

If there have been previous mould and damp repairs, disclosure of these allows the renter to make an informed choice both for themselves and the members of their household. It is important to remember that while many renters will be satisfied to know that a problem previous arose and was addressed, some renters and households may need to be particularly vigilant about these issues due to certain existing medical conditions, including impaired immune systems, chronic obstructive pulmonary disease, and asthma.

We share the perspective of other submitters that a phased approach could be included if immediate mandatory disclosure of this issue were a challenge.

Prohibited Terms

Prohibition of any contractual requirement that a renter pay the landlord's excess

WEstjustice believes that the list of additional prohibited terms set out in the proposed regulations addresses a number of key issues that will preserve the integrity of the amended RTA.

However, despite the welcome provisions preventing the curtailing of renter activities, and preventing renters from being asked to indemnify the owner for an injury or damage on the land, we consider a further prescribed prohibited term needs to be put in place – namely, that a landlord cannot stipulate that the renter is to pay their insurance policy's excess in the event of loss or damage.

In seeking this, we note that payment of an excess by a renter has been misinterpreted both by VCAT and debt collection agencies in the past as an acknowledgement of liability for the total loss. This has included situations in which a renter in fact disputed liability, but wanted to "settle" the matter quickly by paying the landlord a small amount relative to the loss.

We also note the insurance industry's position (as set out in a letter from Suncorp Group to this review which WEstjustice has cited) that an excess is an integral pricing mechanism for an insurance policy in the relevant market. It is set to be borne by the policyholder, and not by a third party.

Minimum Standards & Energy Efficiency

Mould & Dampness & Ventilation

WEstjustice welcomes the requirement that each room of a property will be required to be free from mould and damp but notes the logistical gap in the proposed regulations as to how this will be achieved. In some ways, the requirement is analogous to a minimum standard that a rental property be "warm" or "secure" that does not delve into the specifics of providing heating appliances, deadlocks, or window locks.

We note that in New Zealand, the *Residential Tenancies (Healthy Homes) Regulations 2019*[1] make provision for a ventilation standard in rental properties as follows:

- All habitable rooms in a rental property must have at least one door, skylight or window which opens to the outside and can be fixed in the open position;
- Any room with a shower or bath must have an extractor fan vented to the outside;
- Any kitchen must have an extractor fan vented to the outside.

We believe that analogous standards would achieve the outcome that the minimum standard is seeking but remove ambiguity about how this is to be achieved.

We also note that the minimum standards for kitchen facilities have required the provision of a stovetop but not ventilation for that stovetop. Rather than presenting a mould or dampness issue, we would submit that kitchen extractor fans address a smoke inhalation and fire risk that it is in both landlord and renter's interest to avoid. Simultaneously to expanding on the mould and damp requirement to require ventilation measures, we would add the presence of a working kitchen extractor fan to the kitchen requirements.

Energy Efficiency

<u>Insulation</u>

WEstjustice notes that while heating has been made a welcome mandatory requirement of the new minimum standards, the proposed regulations are silent on insulation, with the indication that the

[1] http://www.legislation.govt.nz/regulation/public/2019/0088/latest/LMS147044.html, s.21-24.

Department of Environment, Land, Water and Planning is commencing work for consideration of a minimum standard of insulation for rental properties.

We believe that a minimum standard of insulation would contribute to the improved effectiveness and efficiency of heaters installed in properties and would also moderate a property's temperature in extremely hot weather events. In this sense, and particularly given that a model for a minimum standard of insulation has recently been introduced in New Zealand, it is unfortunate that planning for this standard has not gone hand in hand with other measures for thermal comfort. We believe that work on this additional minimum standard should be undertaken as a matter of priority, particularly in the event that the energy efficiency standards as proposed are the ones in the final regulations.

Energy Efficiency Standards for Heating

WEstjustice notes that the low standard for heating (2-star heating for Class 1 buildings; no minimum for Class 2 buildings) will have potential knock-on effects. In Victoria and other parts of Australia, electricity prices have almost doubled and wholesale gas prices have almost tripled in the last decade. In 2018, over 83 percent of the voting public were concerned or very concerned about their electricity bill.[2] Though energy prices have been driven up by multiple factors, renters are fundamentally dependent on the installed heating systems provided by a rental provider. If that heating system is low-efficiency, renters are forced to choose between incurring higher energy costs and remaining in the situation outlined in the RIS, in which they sacrifice wellbeing, opportunity, and socialisation to save on costs.

Additionally, as a energy-saving measure, a more efficient appliance will in turn reduce CO2 emissions from Victorian rental properties. Given the number of Victorian households that are rentals, this is a significant opportunity to 'futureproof' a significant portion of the Australian housing stock in terms in terms of environmental impact.

WEstjustice's preference is therefore that the regulations follow the "high energy efficiency" option, which would require Class 1 dwellings to meet 3.5 or 4 star ratings, subject to the heater type.

Renter Modifications With and Without Consent

WEstjustice welcomes the list of additional proposed modifications that will not require a landlord's consent.

Like Tenants Victoria, we would propose the addition of a right to secure and modify external gates so that they can be locked, so as to prevent children and pets (particularly dogs) from running out onto the road.

We would further suggest that renters be able to make the following modifications without requiring the landlord's consent.

- The affixing or installation of a doorbell, provided where necessary due to the model that any installation be performed by a licensed electrician;
- Internal 'baby gates' to secure the top of staircases or hazardous spaces for infants and toddlers.

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[2] *Energy Bills & Energy Efficiency, Survey of community views by YouGov Galaxy, April 2018. Accessed at https://www.eec.org.au/uploads/Documents/EEC%20Survey%20online%20(FINAL)%20.pdf on 17 December 2019.*

We note that where consent is required, there is presently no timeline in which for consent to be implied if a landlord or their agent does not respond. This seems to be a confusing state of affairs, particularly when contrasted with the legislation's new provisions on pets. For the avoidance of doubt, WEstjustice recommends that either by regulatory prescription (or if necessary, by amendment) a window of 14 days be established for a landlord to consent to or reasonably refuse modifications of the class that require this.

After the expiry of that time period, there would be deemed consent. We consider the 14-day window is appropriate as these modifications involve health and safety and equal opportunity considerations.

For modifications involving family violence considerations, please read our response in the next section.

Family Violence Protections

WEstjustice applauds the efforts to structure the entirety of the new Act to ensure better protection for the victim-survivors of family violence and their dependents. The Act's regulations, where relevant, should enable the expedient protection of victim-survivors.

For this reason, we believe a 48-hour window for a landlord or their agent to consent (or reasonably refuse) the following modifications is appropriate:

- [those modifications] "necessary to ensure the safety of a party to the existing rental agreement who has been or is being subjected to family violence by another party to that agreement (including a protected person under a family violence safety notice, family violence intervention order or recognised non-local domestic violence order), or is a protected person under a personal safety intervention order made against another party to that agreement…"

At the end of that window, consent would be deemed to have been given.

We also note that, while the amended Act now allows a Tribunal to satisfy itself that a fixed-term tenancy should be terminated, or a party added or removed, on the basis of a wider range of evidence of family or domestic violence. However, there is an inconsistency elsewhere in the Act as to when an individual can access its family violence provisions.

In particular, while the Act standardises a regime of 'open for inspections' where multiple prospective buyers or occupants may attend a property at once to view it, it only allows a 'protected person' to ask that these sales inspections not go ahead, rather than any person who is experiencing or at risk of family violence. This is particularly pertinent in the case of sales inspections, where a victim-survivor's formal 'protection' may have lapsed, and they may now be at an elevated risk of being stalked or surveilled. If this language cannot be modified by way of regulation, we would suggest an amendment to resolve this potentially dangerous ambiguity.

Lastly, we suggest that, to preserve the privacy and dignity of family violence victim-survivors, landlords and agents should be prohibited from including **questions to the effect of the tenant's reasons for existing their last property on a tenancy application form**. In the case of family violence, this may require an individual to disclose that they were indeed in a VCAT proceeding (for example, to reduce a fixed term) contrary to the other prohibited application form questions. It may also pressure victim-survivors into feeling as if they have to lie or omit information when answering this question to ensure sensitive personal information remains private.

We note that victim-survivors are by no means the only individuals who may wish to keep their reasons for moving private due to personal issues or requirements, and suggest that this question should be **prohibited for all renters** in the regulations.

Compensation for Sales Inspections

The RIS proposes that compensation for sales inspections be capped at the equivalent of half a day's rent.

In doing so, it appears to treat previous decisions of VCAT (ie*, Hargans v Ronchetti*[3]) as distinguishable from the ordinary levels of disruption experienced by a renter during a sales inspection.

Hargans proposed to award one day's rent in compensation on the basis that a renter had to clean before the opening of an inspection and move belongings afterward, tasks which appear to be an ordinary (but inconvenient) aspect of having to accommodate a sales inspection. The RIS also fails to consider the cost of foregoing other arrangements (e.g, cultural or religious observance, children's after-school or weekend sport) and disrupting people's use and enjoyment of their home in what in many cases will be their leisure time for the week.

The RIS also notes that in some circumstances, properties may be more difficult to sell quickly (e.g., some rural areas). We note that both the existing and new RTA include provisions which allow either a landlord or renter to apply to VCAT to declare that a particular provision of the legislation should not apply to their agreement. VCAT may grant this exclusion if satisfied that it is necessary to avoid severe hardship to the applicant. In a situation where a very long sales campaign is expected, and the landlord has otherwise mitigated the barriers to a sale (i.e., put the property in good repair), then this may be an appropriate step for a landlord to take.

We therefore propose the compensation for a sales inspection be raised to the equivalent of **one day's rent per inspection**.

Temporary Crisis Accommodation

While recognising there is a need for forms of temporary crisis accommodation ("TCA") which are not subject to the full formalities of the Residential Tenancies Act, WEstjustice opposes a significant change in the definition of TCA which would expand it from a period of less than 14 days to a period of less than six months.

The RIS cites a range of reasons that the period should be extended, including:

- That VCAT struggles to interpret the definition of TCA in its present form;
- That the duration of time people stay in crisis can vary depending on the complexity and duration of client's individual needs.

We note that the recent VCAT decision of *OZW v Salvation Army Project 614*[4] went some way to addressing any perceived ambiguity in the TCA definition and mapped out how the Tribunal might deal with this going forward. It strictly construed the 14-day time limit on accommodation being defined as TCA, and (rightly, in our view) turned its mind to questions of exclusive possession, which are of course foundational to any tenancy right and obligation under the Act.

In the event that VCAT did encounter ambiguity in the present TCA definition, it is difficult to see how merely adjusting the length of time under which accommodation is deemed to be TCA would prevent this in the future. Instead, our view is that this would only to serve to 'kick the can', and require VCAT to still distinguish between forms of non-permanent accommodation that last for six months, and forms that last for six months and one day.

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[3] [2015] VCAT 1779

[4] [2019] VCAT 1030

We appreciate that the length of time in crisis accommodation may vary subject to a client's individual needs, but it is important not to omit the wider structural issue of a stagnating supply of long-term social housing, and a shortage of transitional housing. We note that:

- The total number of applications on the Victorian Housing Register was 50,145 at the end of June 2019, representing over 90,000 people[5].
- There are only 3,700 transitional houses across Victoria, which people would ordinarily stay in while they are seeking a safe, secure long-term housing option[6].
- Victoria had the second highest per capital number of people seeking specialist homelessness service support of any state of territory (113,919, or 175 per 10,000 pop) in 2018-19[7]. The highest rates were in the State's North West and the La Trobe-Gippsland regions, both characterised by a lower level of social and transitional housing supply.
- 40 per cent of all clients seeking homeless services had experienced family violence[8].

We consider that the upshot of this is that, rather than long stays in crisis accommodation being a mere consequence of individual needs, they are a product of a shortage of appropriate medium-term and long-term housing. In that sense, the proposed regulatory change reflects a public policy failure. We believe that in removing a class of persons from the Act's protection, it should have gone through parliament as a legislative amendment rather than modified in this way.

We believe that individuals and families in crisis accommodation are entitled to have urgent repairs and safety issues addressed, are entitled to have quiet enjoyment of the property, and are entitled to have a clear process of checks and balances where a provider proposes to end their stay. We would ask that *if* the time frame for the definition of TCA be extended, it be no longer than **six weeks' maximum, or 42 days**.

Lastly, we note that whatever amendment to the definition of TCA goes ahead, a larger group of Victorians than before will be effectively classified as 'licensees', with little to no rights at common law in terms of being asked to quit a premises, in terms of having their safety or privacy ensured, or even a clear pathway to retrieve goods left behind after a license is revoked. We further note that TCA occupants are not the only kind of residential licensee in Victoria.

We would therefore urge the Department of Justice and Regulation to evaluate the introduction of future legislation that would codify minimum rights for licensees in these areas, including an appropriate small claims pathway for this to be resolved.

Transitional Provisions for existing Agreements

The RIS confirms that the existing arrangements under the original RTA will not apply to fixed-term tenancy agreements and periodic tenancy agreements entered before 1 July 2020. It is also noted

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[5] Victorian Public Tenants Association, 2020-21 Victorian State Budget Submission, October 2019. Accessed at https://vpta.org.au/wp-content/uploads/2019/10/VPTA-Budget-Submission-2020-21-compressed.pdf on 17 December 2019.

[6] Council of Homeless Persons, "Housing Services". Accessed at https://chp.org.au/homelessness/about-victorias-homelessness-system/housing-services/ on 17 December 2019.

[7] Australian Institute of Health and Welfare (AIHW), Specialist Homelessness Services annual report 2018-19, "Policy framework for reducing homelessness and service response". Accessed at https://www.aihw.gov.au/reports/homelessness-services/shs-annual-report-18-19/contents/policy-framework-for-reducing-homelessness-and-service-response on 18 December 2019.

[8] AIHW, Specialist Homelessness Services annual report 2018-19, "Clients who have experienced family and domestic violence". Accessed at https://www.aihw.gov.au/reports/homelessness-services/shs-annual-report-18-19/contents/policy-framework-for-reducing-homelessness-and-service-response on 18 December 2019.

that of the reforms being implemented are applicable only to the initial process of applying for a rental property, entering into an agreement for that property, and taking possession.

The transitional provisions as they stand have not incorporated a final end-date after which *all* residential tenancies must be compliant with the new Act and its regulations. This presents an issue most obviously for public housing tenancies, which are always periodic in nature, but may also lead to supply-side attempts to evade the effect of new laws, where private landlords keep renters on periodic agreements beyond 30 June 2020.

This would create significant delays in implementing the minimum rental standards and mandatory safety activities required under the new Act and regulations, in many cases for some of the most vulnerable renters. WEstjustice recommends that there be a **final date by which all rental properties must comply with the new Act or regulations of 1 July 2023***,* irrespective of whether renters have been on the same periodic agreement since prior to 1 July 2020.

This may mean in some cases that certain conditions and terms are implied into landlords and renters' existing agreements from that point forward. We note that, despite Consumer Affairs Victoria's best endeavours, this is likely to be the case moving forward from 1 July 2020 anyway for *new* fixed-term and periodic tenancy agreements, many of which will be drafted by private landlords or their agents and fail to appreciate requirements of the new legislation.

Accordingly, we believe the impact of a final phase-in for all remaining rented premises three years after the new laws come into effect will involve minimal compliance issues relative to the rest of the sector.

Notices to Vacate & Notices to Leave – New Formats

WEstjustice have been privy and involved in the feedback process for suggested amendments to the proposed prescribed forms for both the Notice to Vacate and Notice to Leave under the new Act which have been drawn up by Victoria Legal Aid and Justice Connect and will be supplied to Consumer Affairs Victoria as part of their own responses.

The key defect cured by these proposed amendments is that both prescribed Notices would clearly stipulate to a renter that they are *not* eviction notices and that the agreement will not terminate on the Notice's termination date. They also clearly state that a renter may not be required to leave unless a possession order is granted at VCAT.

WEstjustice believes this is crucial due what it has observed as a poor lay understanding of the residential tenancy eviction process in Victoria, aggravated where people have language and other access barriers. It has been common in our casework to come across households who voluntarily left at the end of a Notice to Vacate, in some cases into states of transient accommodation or homelessness, because they believed they and their belongings would be removed by force otherwise. We also note that we have on a number of occasions received reports of both landlords and agents verbally telling renters they can be removed by police if they don't comply with a Notice to Vacate. Clear information at the top of the form would avoid this kind of misinformation.

We also commend Victoria Legal Aid and Justice Connect for the provision of contact details for emergency housing providers. Where it is likely in all the circumstances that a tenancy will come to an end, this will be a prompt opportunity to triage the individual or household and avert homelessness.