

Legislation Review  
Disability Services Division – Department of Human Services  
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22<sup>nd</sup> December 2005

Dear Review Committee,

**RE: RESPONSE TO EXPOSURE DRAFT OF DISABILITY BILL**

The Tenants Union of Victoria welcomes the opportunity to respond to the Exposure Draft of the Disability Bill. We also endorse submissions made to you by the Office of the Public Advocate (OPA) and Action for More Independence and Dignity in Accommodation (AMIDA).

**Who we are**

The Tenants Union of Victoria was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. We represent the interests of tenants in law reform and policy-making, by lobbying governments and business organisations to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of housing and financial assistance provided to low-income and special needs households.

**Residency rights for disabled Victorians**

In Victoria, residency rights for tenants accommodated in the rental sector, in rooming houses and in caravan parks are enshrined in the *Residential Tenancies Act 1997* (RTA). Residency rights revolve around security of tenure (meaning that residents cannot be arbitrarily forced or required to move out of their accommodation); privacy and quiet enjoyment of accommodation; and ancillary rights affecting the condition of property, such as repairs.

Currently, people living in accommodation provided by disability support providers are excluded from the protections applicable to all other residents in the RTA. No rights equivalent to those detailed in the RTA are provided in existing disability legislation.

The Tenants Union is disappointed that the Government has resiled from a firm commitment to extend RTA rights to disabled Victorians living in residential disability services and community residential units (CRUs). In the *Review of Disability Legislation – Report of Recommendations* (October 2004), the Department of Human Services (DHS) concluded that the RTA should be amended so that CRUs would come within the RTA (with variations appropriate for this kind of tenure). This was considered the optimal means of clarifying and protecting the residency rights of people accommodated in CRUs: ensuring that they would enjoy privacy and quiet enjoyment of their accommodation; have maintenance and repairs carried out when necessary; receive formal notice

to vacate if required to move; and have access the Victorian Civil and Administrative Tribunal (VCAT) in case of disputes.

However, it was subsequently decided that it was impracticable to amend the RTA to include this class of residents, and that RTA residency rights could not be reconciled with the duty of care owed to residents by disability service providers. In response, we note that a number of residential service and CRU providers are voluntarily operating in accordance with the RTA with apparent success. We also argue that the residency rights enumerated in the Disability Bill are not sufficient to protect disabled Victorians' security of tenure and the standard and amenity of the accommodation provided.

The Tenants Union believes the paramount consideration should be the protection of disabled residents. This class of people are particularly vulnerable to exploitation and abuse, and consequently should enjoy the highest possible level of legislative protection. We do not see how extending RTA residency rights to this group would compromise the ability of disability service providers to fulfil their legal obligation of care to all residents. Inclusion of the residency rights of those accommodated by disability support providers in the RTA has the distinct advantage of positioning these rights within an established body of case law and jurisprudence, thereby clarifying them and expediting the adjudication of any disputes. The RTA also makes provision for a comprehensive dispute resolution process, granting the VCAT broad powers to hear matters pertaining to residential tenancies and to make enforceable remedial and compensatory orders.

While it would be acceptable for residency rights equivalent to those enshrined in the RTA to be articulated in other legislation (such as the proposed Disability Bill), this is not the preferred option. Merely transporting RTA rights into other legislation may be problematic, as it is likely that issues and mechanisms essential to the successful operation of the tenancy system embedded throughout the RTA will be overlooked. Therefore, we conclude that the most straightforward option is to include the residency rights of disabled Victorians accommodated in residential services in the RTA.

**Recommendation: That the residency rights of disabled Victorians accommodated in residential services be included in the *Residential Tenancies Act 1997*.**

Ultimately, wherever they are articulated, residency rights must be equivalent to those in the RTA. As consumers, disabled Victorians should be entitled to the highest possible standards of service and protection – at least equivalent to that enjoyed by consumers of other types of accommodation services. Extending RTA residency rights to disabled Victorians in residential services would not only reflect the consumer relationship between resident and service provider, it will also contribute to this class of people's enjoyment of the benefits of secure tenure in appropriate accommodation. Housing provides more than mere shelter from the elements – it has a distinct psychological aspect in terms of making people feel protected, and connected to and valued by, their communities. An increasing body of research demonstrates that secure tenure in affordable housing that is appropriate to the needs of tenants translates into tangible health, social and economic benefits for them, and increased levels of social cohesion for the broader community.

### **The Disability Bill Exposure Draft**

The intention of the Disability Bill is to provide a coherent legislative framework for people with a range of disabilities, and to facilitate a whole of government and whole of community approach to enabling Victorians with disabilities to participate in community life. The Bill also intends to make a strong foundation for the provision and regulation of high quality disability support services and to articulate and reinforce the rights of people accessing those services.

## *Jurisdiction*

The coverage of the Disability Bill extends to people living in “residential services” – defined as residential accommodation with rostered staff provided by or on behalf of a “disability services provider” for the purpose of providing disability services to residents of community residential units (CRUs) or any other residential service. A “disability service provider” is either the Secretary of the Department of Human Services or a person or body registered as a disability service providers. Many thousands of disabled Victorians accommodated in CRUs and other forms of residential service will be affected by the changes proposed by the Disability Bill.

However, there are a number of provisions in the Exposure Draft of the Bill that would in fact compromise the rights of disabled Victorians if they passed into law:

### **Definition of “disability service provider”:**

As explicated previously, a “disability service provider” is defined as either the Secretary of the Department of Human Services or a person or body listed on the register of disability service providers. Clauses 40 and 41 outline the application and registration process.

The Tenants Union is particularly concerned that disreputable accommodation providers may seek registration as disability service providers to avoid compliance with the terms of the RTA. We note that this has occurred in relation to the provision of Supported Residential Services (SRSs). It is apparently the Department’s intention that only operators in receipt of government funding will be registered as disability service providers for the purposes of the Bill. Currently, this is not clear on the face of the Bill; we urge that these clauses be redrafted to clarify that funding is a condition precedent to registration. This will forestall the potential for inappropriate operators to apply to be registered as disability service providers, be rejected, and then seek judicial review of the Secretary’s decision.

**Recommendation: That the definition of “disability service provider” be amended to include the receipt of government funding as a condition precedent to registration.**

### **Residential statements**

Clause 57, which details the information that must be included in a “residential statement”, is broadly equivalent to RTA Part 2 Div 1, in which the general requirements of a tenancy agreement are enumerated. However, the drafting of Part 2 Div 1 is superior, as it prescribes penalties for non-compliance and provides for review of harsh and unconscionable terms in the agreement by the VCAT.

By penalising non-compliant conduct, the RTA compels landlords to perform their duties. Equivalent protections do not exist in the draft Disability Bill; it lists a number of requirements for service providers, but makes no provision for their enforcement. Furthermore, a residential statement must not include information that is inconsistent with the Disability Act (cl 57(4)), and that inconsistent information cannot be “used or relied upon” (presumably by the provider, though this is drafted ambiguously – cl 57(5)). However, there is no means (such as VCAT review) by which this is to be enforced included in the provisions.

Also, we note that a statement of the resident’s rights and duties must be included as part of the residential statement, but there is no requirement that any statement of the duties of the disability service provider be included. We believe that this is likely an oversight that should be rectified before the Bill is introduced to Parliament.

**Recommendations:**

- **Penalties for not complying with these provisions should be included.**
- **VCAT should be empowered to review residential statements, so that unjust terms can be varied or declared invalid**
- **The duties of the residential services provider should also be included as a mandatory term of the residential statement.**
- **That the definition of “disability service provider” be amended to include the receipt of government funding as a condition precedent to registration.**

**Offences relating to interference with rights**

Clause 62 creates a number of offences:

- forcing or attempting force a resident to vacate their room;
- taking or attempt to take possession of a resident’s room;
- causing a resident to abandon a room by interfering with proper use and enjoyment of the accommodation; or
- taking any other action intended to cause the resident to abandon the room.

The penalty for commission of any of these offences is 20 penalty units or \$2000.

The Tenants Union supports penalising this type of behaviour; such conduct is offensive and completely unacceptable given the particular vulnerability of people residing in disability service accommodation. However, given the disruption to a resident’s life and wellbeing such conduct would cause; the potential difficulties disabled Victorians face securing appropriate alternative accommodation; and the particular position of trust and care that the service provider (and their employees and agents) exists in relation to disabled residents, we believe that \$2000 is an insufficiently severe penalty. Proscribing conduct should serve the purposes adequately punishing an offender and deterring both that offender and others from engaging in such conduct in the future. To this end, we believe that a more substantial penalty for commission of these offences should be imposed.

Furthermore, no provision is made for the compensation of victims of these offences. Residents will likely suffer both financial and personal damage from the conduct, and it is unjust that they should be out of pocket or suffer any privation because of the unlawful acts of their accommodation providers. Therefore, we urge that provisions permitting victims of these offences to apply to VCAT for orders for compensation for expenses incurred, and for any pain and suffering experienced, be included in the Bill.

**Recommendations:**

- **A more substantial penalty should be imposed for commission pf any of the cl. 62 offences**
- **Provisions permitting victims of these offences to seek orders for compensation for expenses incurred, and for any pain and suffering experienced, be included in the Bill**

## Repairs

The Disability Bill makes no express provision for the repair of residents' accommodation, urgent or otherwise. Providers are required to maintain premises, fixtures and furniture in good repair (cl. 58(1)(b)); and residents have a duty to maintain their rooms so as not to create fire, health or safety hazards (cl. 59(1)(c)).

The RTA contains extensive provisions in regard to effecting both urgent and general repairs for tenants accommodated in the private rental market, in rooming houses and in caravan parks. Equivalent provisions have not been included in the draft Disability Bill. There is no obvious or just reason why disabled Victorians in residential services and CRUs should not be able to preserve the safety and amenity of their accommodation. The failure to include provision for effecting urgent and general repairs is an oversight that should be rectified before this Bill is introduced into Parliament.

**Recommendation: Express provision for effecting both urgent and general repairs to accommodation should be included in the Disability Bill.**

## House Rules

The RTA permits both caravan park and rooming house operators to establish and enforce 'house rules' relating to the use and enjoyment of facilities, common areas and rooms/vans. The Act requires that house rules made be reasonable and interpreted fairly and consistently, and grants VCAT the power to review rules and declare unreasonable rules invalid. Despite the similarity between rooming houses and some forms of disability accommodation, no equivalent provisions have been included in the draft Disability Bill. This is another omission in the Bill that will need to be addressed before it is introduced in to Parliament.

**Recommendation: Express provision for the making of reasonable house rules, and the granting of a supervisory power over house rules to VCAT, should be included in the Bill.**

## Community Residential Units – Division 2

Clauses 63-88 apply specifically to community residential units (CRUs).

### *Method of payment*

Clause 68 states that a resident may pay the residential charge in the form agreed with the disability service provider, which may include cash, cheque, electronic payment or direct debit.

Because cheques and electronic payments involve additional bank charges that are payable by the resident, the Tenants Union believes it is inappropriate to allow or encourage payment of charges by these methods (particularly for those residents reliant on government financial support for income).

**Recommendation: Payment methods that impose additional costs on the resident should be proscribed.**

### *Temporary relocation of residents*

A notice of temporary relocation may be issued in defined circumstances. According to cl. 74(3), such a notice means that a resident is excluded from their room or from the CRU (depending on the terms of the notice), and the resident “is to be relocated by the disability service provider in alternative accommodation.”

The Tenants Union believes that this section is inappropriately drafted, and that it should state clearly and unambiguously that a resident served a temporary relocation notice must be provided with alternative accommodation of a standard equivalent to their current accommodation. It would be inappropriate for residents to suffer any hardship or decline in quality and availability of services because of relocation, regardless of the reason for the notice. Relocation should not function as a form of punishment.

Furthermore, it is not clear in the legislation whether the resident has the capacity to challenge the issue of a notice of temporary relocation, or in what forum any challenge would be made. Notices to vacate (cl. 76) are challenged in VCAT, but the application of that clause is clearly restricted to that type of notice.

The exclusion of the capacity to challenge a notice of temporary relocation, and the forum in which the challenge is adjudicated, is a clear oversight in the drafting of the Bill that must be resolved before the Bill is introduced into Parliament. We recommend that a clause be included that explicitly empowers residents to challenge notices of relocation. The appropriate body to conduct the review is VCAT, given that VCAT can enforce compliance with its decisions.

Furthermore, this new provision should not be drafted in the same terms as the current cl. 82 (application to VCAT for review of a notice to vacate), because that provision is currently ambiguous and we recommend that it be redrafted (see below).

#### **Recommendations:**

- **The temporary relocation provisions should be redrafted to clarify that alternative accommodation be of the equivalent standard to current accommodation**
- **Residents be should provided with the capacity to challenge notices of temporary relocation**
- **Clarify that VCAT is the forum in which challenges to notices of temporary relocation will be adjudicated**

### *Notice to vacate by a disability service provider*

Clause 76 provides a number of grounds by which a disability service provider may issue a notice to vacate to a resident. Of particular concern is cl. 76(1)(m), which permits a notice to be given without any reason. Not less than 120 days’ notice must be given to a resident if this ground is relied upon (cl. 76(4)).

The Tenants Union is concerned that this provision may be misused by disability service providers to evict residents arbitrarily. Evidence from the residential tenancies jurisdiction indicates equivalent notices to vacate are sometimes issued in response to tenants exercising their rights under the RTA - for example, by requiring the landlord to make repairs to the property. The absence of a reason for the notice unfairly delimits the capacity for the resident to challenge the notice in VCAT, denying them natural justice and procedural fairness. Despite the inclusion of cl. 78, which provides that a notice to vacate has no effect if it is issued in response to a resident exercising a right under the Bill, we urge that this provision be removed, so that disability service providers wishing to terminate a person's residency rely on another of the 12 grounds contained in the Bill.

**Recommendation: The provision for 'no reason' notices to vacate be removed.**

#### *Application to VCAT for review of a notice to vacate*

According to cl. 82, VCAT may only determine whether the notice is valid. However, it is unclear as to whether VCAT should consider the grounds set out in cl 76 that justify the giving of the notice, or whether validity is merely a question of the notice being in the correct form.

Given the significance of a notice to vacate to a resident, this clause should be redrafted to ensure that VCAT is empowered to investigate the grounds on which the notice is founded (and associated relevant circumstances), to clarify that VCAT review is not restricted to a mere procedural investigation of the terms of the form of the notice itself.

**Recommendation: Clarify that VCAT is empowered to investigate the grounds on which a notice to vacate is founded.**

#### **Complaints to the Disability Services Commissioner**

Residents may lodge complaints about their accommodation and their accommodation provider with the Disability Services Commissioner (DSC) (cl 104(1)(a)). The DSC is empowered to investigate and conciliate complaints, and make notices of decision including remedial action that the DSC thinks ought to be taken (cl. 109, 111, 113, 114). However, the DSC has no powers to order compliance, and its notices of decisions are not enforceable.

We are uncertain as to why the DSC has no power to enforce its findings. Without enforceability, there seems to be little purpose in the complaints mechanism, the making of notices of decision, and the office of the DSC itself. There is a notable lack of enforcement and penalty provisions in the Bill pertaining to accommodation (particularly in comparison to the protections afforded tenants under the RTA); a DSC empowered to enforce its decisions could potentially perform useful supervisory and remedial functions. This would afford additional protections to a particularly vulnerable class of people, who may face significant difficulties asserting their personal rights. Furthermore, enforceable DSC decisions would contribute the development and application of service standards and best practice within the sector.

**Recommendation: That the Disability Services Commissioner be empowered to enforce its decisions.**

The Tenants Union thanks the Department of Human Services for the opportunity to comment on the Exposure Draft of the proposed Disability Bill. We have noted a number of ambiguities and omissions in the current iteration of the Bill that we trust will be addressed before it is introduced into Parliament. The particular vulnerability and reliance of disabled Victorians on others for fulfilment of their needs and potential means that any law or policy professing to reinforce their rights should function in an easily comprehensible manner consistent with respect for individual autonomy.

Please do not hesitate to contact the Tenants Union of Victoria on (03) 9411-1410 if you wish to discuss the issues raised in this submission further.

Yours Sincerely,

**Rebecca Harrison**  
Research & Policy Worker  
Tenants Union of Victoria