WEstjustice
Western Community Legal Centre

Residential Tenancies Act Review – *Fairer, Safer Housing*

Submission in response to the 'Alternate Forms of Tenure' Issues Paper

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1. Introduction

1.1 About WEstjustice

WEstjustice 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 or study in the Maribyrnong, Wyndham and Hobsons Bay areas.

WEstjustice has a particular focus on working with newly arrived communities. More than 53% of our clients over the last five years spoke a language other than English as their first language. Approximately one quarter of our clients are newly arrived, having arrived in Australia in the last five years. Furthermore, our refugee service in Footscray alone has seen approximately 700 clients in the past five years.

1.2 About the WEstjustice Tenancy Program

WEstjustice employs two tenancy lawyers who provide specialist advice, casework and representation to vulnerable and underprivileged tenants who live in the west of Melbourne. In the past five years, WEstjustice's tenancy program has assisted over 1,100 clients with almost 1,800 matters. Accordingly, we form part of the Tenancy Advice and Advocacy Program ('TAAP') agency system of independent third-party negotiation and representation outlined at page 16 of the Issues Paper.

Our catchment area includes suburbs in Melbourne's inner-west (including Footscray, Sunshine, and Braybrook), and Melbourne's outer-west (including the fast growing areas of Werribee, Wyndham Vale, Hoppers Crossing and Melton). We also provide a duty lawyer service to assist tenants with on-the-spot advice and representation one day per week at the Victorian Civil and Administrative Tribunal ('VCAT') in Werribee. Whilst we primarily assist tenants in private tenancies, we also advise tenants who live in rooming houses and residential parks.

Our tenancy program has a particular focus on working with clients from refugee and non-English speaking backgrounds. We work closely with local refugee settlement agencies and community development workers, and almost 60% of our tenancy clients in the past two years were born outside of Australia.

2. Executive Summary

WEstjustice believes that the time is right, in light of the Fairer Safer Housing review and the concurrent State Parliament inquiry in to the retirement living sector, for residential parks and villages to be covered by standalone legislation. The owners of removable dwellings, who enter into site agreements to situated those dwellings in a particular part or village, enter into very different contractual arrangements, with attendant risks and liabilities that vary from other parties under the RTA. We believe that legislation similar to that in New South Wales (and to a lesser extent, Queensland) offers the best model to build from.

Beyond the need for standalone legislation, which prescribes certain contractual terms, caps deferred management fees, and prohibits certain conduct from park owners and management, we believe more oversight and enforcement of the sector is vital. With that in mind, a central register of residential parks and villages should be developed, Consumer Affairs Victoria (CAV) should conduct wider inspections of existing agreements in the sector, and a Retirement Housing Ombudsman should seriously be considered for Victoria.

The second part of our submission deals with rooming houses. We believe that, like residential parks, rooming houses are an evolving sector, and CAV and the Victorian Civil and Administrative Tribunal (VCAT) should continue to exchange information on new situations that emerge that the RTA should apply to.

There are a number of problematic provisions in the Residential Tenancies Act 1997 (RTA) that may place rooming houses at greater risk of homelessness, which we recommend should be ameliorated or withdrawn. Chief among these are the current regime of immediate notices to vacate for disruption, which frequently impact residents with mental health or substance abuse issues.

Beyond changes to the rooming house provisions of the RTA, we suggest practical and/or legislative changes that make service of documents to rooming house residents more reliable. Lastly, we cite a potential worrying trend in rooming houses to use interim Personal Safety Intervention Orders (PSIOs) as a *de facto* form of eviction.

3. Summary of Recommendations

Recommendation 1: *Part 4A of the Residential Tenancies Act 1997 be repealed and replaced with standalone legislation governing the rights and responsibilities of moveable-dwelling owners and park operators.*

Recommendation 2: *Residential parks and villages should be required to register with Consumer Affairs Victoria, and this register should be made publically available.*

Recommendation 3: *Undischarged bankrupts and individuals who been convicted for fraud or dishonesty offences in the past five years should be prohibited from managing or promoting residential parks and villages (directly or indirectly).*

Recommendation 4: *Legislation governing residential parks and villages should prescribe certain terms and conditions to be included in all site agreements, set out template disclosure documents, and prescribe a prominently displayed cooling-off period after entering into an agreement of at least 14 days.*

Recommendation 5: *Legislation governing residential parks and the site agreements entered into at such parks should cap deferred management fees at 10% of the sale price of a dwelling, and not allow for automatic or 'fixed' rent or service fee increases under a contract.*

Recommendation 6: *Legislation governing residential parks and villages should provide templates for the presentation and calculation of deferred management fees, and prohibit extra charges on homeowners (e.g., interest on rent, fees for visitors).*

Recommendation 7: *Legislation governing residential parks and villages should provide that homeowners' partners or carers have an automatic right of occupancy during the homeowner's tenancy.*

Recommendation 8: *Legislation governing residential parks should allow homeowners to be absent from the property for a maximum of three years without the risk of their agreements being terminated.*

Recommendation 9: *A homeowner's maximum liability for rent in case of a lease break should be limited to three months where that homeowner must permanently vacate to receive special and personal care.*

Recommendation 10: *Consumer Affairs Victoria (CAV) should complete a targeted review of residential park and village agreements in the retirement housing sector to identify unfair contract terms.*

Recommendation 11: *Further campaigning and advertising should clearly outline the different nature of residential park and retirement village arrangements, and offer guidance on how residents may identify and respond to unfair contract terms, while also improving the understanding and knowledge of operators.*

Recommendation 12: *Where a matter before the Victorian Civil and Administrative Tribunal (VCAT) discloses contractual requirements in a Part 4A/residential park dispute that are in breach of the legislation, VCAT should notify CAV in case the issue is systemic at the park.*

Recommendation 13: *A Retirement Housing Ombudsman should be established in Victoria in line with other industry external dispute resolution models.*

Recommendation 14*: CAV and VCAT should aim to exchange information and knowledge on an annual basis about emerging trends in rooming houses, including models that may current evade easy legal categorisation.*

Recommendation 15: *Local councils should provide accessible and clear information directed at residents on the ways in which councils oversee rooming house accommodation standards.*

Recommendation 16: *Where breaches of RTA rooming house penalty provisions are identified, this should be noted in VCAT orders, and these should then be sent to CAV as a matter of standard practice.*

Recommendation 17: *Section 131 of the RTA and CAV's practices should be amended to permit a resident to verbally give notice to a rooming house owner of repairs, and to permit a resident to apply to the Director by phone.*

Recommendation 18: *The template CAV inspection report should have the ability to specify requested repairs which are in fact urgent, and identify any potential breaches of the Public Health and Wellbeing Act 2008 in the same report.*

Recommendation 19: *Section 131 of the RTA should clearly indicate that a rooming house resident may request inspection from CAV where a rooming house owner's repairs are considered inadequate.*

Recommendation 20: *Section 112 of the RTA, which places an additional duty provision on rooming house residents to pay rent on time, should be repealed.*

Recommendation 21: *Section 137(e) of the RTA, which allows a rooming house operator to inspect a room once every 4 weeks, should be amended to allow entry for inspection once every 3 months.*

Recommendation 22: *Section 280 of the RTA should be amended so that residents alleged to have caused disruption receive a 14-day Notice to Vacate, instead of being asked to vacate immediately.*

Recommendation 23: *Section 278 of the RTA should be amended to confine immediate Notices to Vacate to instances of malicious damage.*

Recommendation 24: *Section 288 of the RTA, which allows termination of a resident's stay for no reason, should be repealed.*

Recommendation 25: *Section 283 of the RTA, which allows termination of a resident's stay for successive breaches, should be amended to confirm that a Notice shall be of no effect if issued for breaches of house rules that are not made in accordance with the Act, or that are declared invalid by the Tribunal.*

Recommendation 26: *Section 116 of the RTA should be amended to remove the imposition of a specific duty to compensate a rooming house operator, and confirm that residents have a duty to take care to avoid damaging their room and common areas.*

Recommendation 27: *Rooming house operators should be obliged to install individual post boxes for each resident in a rooming house.*

Recommendation 28*: Section 506(1) of the RTA should be amended to confirm that a notice or document to be given under the RTA may not be left with another adult at a rooming house, and should either be delivered personally to the recipient or sent by post to their last known place of residence.*

Recommendation 29: *Magistrates dealing with Personal Safety Intervention Order (PSIO) matters should receive training in order to be able to identify rooming house situations and better balance the interests of both parties.*

4. Part 4 and Part 4A Parks and Sites

4.1 Defining the residential park sector – an odd fit?

When Part 4A of the Residential Tenancies Act 1997 (RTA) was introduced by the Residential Tenancies Amendment Bill 2010, the reasons that legislative reform was needed were well articulated by Johan Scheffer MLC during the Bill's second reading before the Victorian Legislative Council:

"A growing number of residential villages are not made of movable dwellings such as caravans, but are collections of purpose-built homes that are not likely to ever be moved but are compact enough to be technically designated as being non-permanent. The lease arrangements between these owner-renters and the owners of the estates have raised considerable concerns over security of tenure amongst tenants and organisations that represent vulnerable tenants, such as the Housing for the Aged Action Group.

The concern is based on the fact that owner-renters, who may have in some cases invested hundreds of thousands of dollars in a dwelling, do not know where they stand in relation to the legal validity of their tenure and are often not clear on what facilities and amenities they are entitled to or how they may or may not organise themselves on their premises…to a great extent these measures deal with a number of the uncertainties that have grown up as the caravan park arrangements have transformed into permanent or semi-permanent leasing arrangements."[1]

However, the factors Scheffer describes also highlight a number of the ways in which Part 4A site agreements are distinct to the remainder of the RTA:

- The owners of dwellings covered by Part 4A of the RTA ("homeowners") own assets that are purchased for hundreds of thousands of dollars, and though technically transportable, are financially costly and logistically complex to relocate.

- Because of the size of the asset and the cost of vacating or moving, homeowners may either be afraid of having their tenancy rights terminated or find it difficult to leave when they need to. This can be exacerbated due to the fact that, unlike land, the value of the structure will often depreciate over time absent significant maintenance or improvement.

- Though the RTA deals with Part 4A site agreements, it largely does not regulate the sale and purchase of Part 4A dwellings. This means that the RTA covers one part of the transaction between park operator and homeowner but is not of assistance in another.

- The RTA replicates the same mechanisms to increase and challenge rent that exist elsewhere in the legislation for Part 4A sites, and does not regulate the charging of deferred management fees or other fees.

[1] Johan Scheffer, Speech in 2nd reading of Residential Tenancies Amendment Act 2010. Legislative Council, Fifty-Sixth Parliament, First Session, 17 September 2010 (Extract from Book 14), p.5000. Accessed at http://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_Feb-Jun_2010/Council_Daily_Extract_17_September_2010_from_Book_14.pdf on 14 September 2016.

- Part 4A accommodation models marketed to residents over 55 years of age share a number of common themes with retirement villages, but the RTA does not make provision for issues where a resident can no longer care for themselves, or offer appropriate consumer protections by prohibiting certain classes of persons from operating parks (insolvent persons, those with recent fraud or dishonesty convictions).

Beyond these, the reality is that the law on residential parks lacks accessibility. Without seeking advice, park residents may see themselves as homeowners (in lay terms, they are correct) and not immediately identify their matter as a tenancy issue.

Part 4A of the legislation, located entirely under the s206 umbrella, is similarly forbidding. It is not easily broken down with subheadings and can appear more labyrinthine than necessary to the educated but casual reader.

4.2 Developing separate legislation

As the Issues Paper identifies, Victoria now stands apart from New South Wales, Queensland, Western Australia, and South Australia in its lack of separate legislation for the residential park model. We believe that NSW's Residential (Land Lease) Communities Act 2013[2] and Queensland's Manufactured Homes (Residential Parks) Act 2003[3], which apply purely to situations in which the site tenant owns a manufactured home and rents the underlying land, are good models to draw from.

4.2.1 The Residential (Land Lease) Communities Act 2013

The NSW legislation includes the following provisions that vary from Part 4A of the RTA:

- Offers two methods of site fee increase, either in the agreement or by notice. Fixed methods are written into the agreement and cannot be challenged as excessive.[4]
- New park operators are bound by existing site agreements.[5]
- Park rules do not form part of a site agreement, but must still be adhered to by law. Site tenants can take enforcement action against an operator if they are not properly acting on the rules (e.g., treating residents unequally).[6]
- Allows the charge of entry and exit fees, and provides for operators to share in the sale price of a home.[7]
- Homeowners are empowered to vote together to pay for shared improvements or new facilities in the park.[8]
- Spouses, partners and carers are given an automatic right to move in with a homeowner, and an operator cannot unreasonably refuse consent for others to move in.[9]

[2] Act 97 of 2013, accessed at http://www.austlii.edu.au/au/legis/nsw/consol_act/rlca2013320/ on 14 September 2016.
[3] Accessed at http://www.austlii.edu.au/au/legis/qld/consol_act/mhpa2003356/ on 14 September 2016.
[4] Residential (Land Lease) Communities Act, ss.66-67
[5] Ibid, s.31

[6] Ibid, s.94
[7] Ibid, s.110
[8] Ibid, s.50

- A 14-day cooling-off period applies after entering an agreement, rather than a 5-day cooling off period. [10]
- Specific provisions prevent operators from intervening in the home sale process.[11]
- Homeowners can leave the park for a period of 3 years without risking the termination of their agreement (for example, to obtain specialist care)[12]
- Operators must enable easy access by tradespeople and emergency services to residents' homes.[13]
- New provisions and penalties apply to the conduct of residential park operators, including an obligation not to engage in high-pressure sale tactics or harassment.[14]

We note that community legal centres and housing advocacy groups have criticised the NSW legislation for allowing rents to be linked to aged pension increases, and for providing 'voluntary sharing arrangements' that may effectively give homeowners a choice between sharing any capital gains they make on a dwelling with an operator, or accepting rent increases.[15]

4.2.3 The Manufactured Homes (Residential Parks) Act 2003

The Queensland legislation varies from Part 4A of the RTA in the following ways:

- A 28-day cooling off period applies, rather than a 5-day period.[16] Operators must provide a template Home Owners Information Document, which is prescribed by law.[17]
- New park operators obtain the benefits and obligations of the previous owner, and relocation compensation must be paid if the site is to be used for another approved purpose.[18]
- Park operators are unable to interfere with the transfer of a home by a site tenant or unreasonably refuse consent to a transfer.[19]
- A park operator may be appointed to sell or negotiate the sale of a home by its owner with written authority. The fee the operator may recover for doing so is capped by legislation. An operator may not charge a fee for a sale if they did not assist in the sale. [20]
- Homeowners may apply to the Queensland Civil and Administrative Tribunal (QCAT) to have their rent reduced if amenities and services advertised were not provided at the time of sale, or if the quality of shared facilities decreases substantially.[21]

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[9] Ibid, s.44
[10] Ibid, s.23
[11] Ibid, s.107
[12] Ibid, s.128
[13] Ibid, ss.40-41
[14] Ibid, ss.21-25
[15] Amy Bainbridge, "Pensioners on brink of homelessness after developer buys residential park and serves eviction notice", *ABC News Online*, 25 November 2014. Accessed at http://www.abc.net.au/news/2014-11-24/pensioners'-plight-highlights-gap-in-consumer-protections/5913608 on 14 September 2016.
[16] Manufactured Homes (Residential Parks) Act 2003 (QLD), s.33.
[17] Ibid, s.18.
[18] Ibid, s.40
[19] Ibid, s.58.
[20] Ibid, ss. 59-62
[21] Ibid, s. 72.

- Park rules may only be amended through a notice period that allows an operator/homeowner liaison committee to resolve possible objections.[22]
- Park operators are bound to respond to complaints or proposals from residents' committees within 21 days.[23]

We note that the Queensland legislation is presently being reviewed, and that it may include a number of additional protections after amendment.

Absent any national initiative for laws governing residential parks or other accommodation for retirees, WEstjustice's primary recommendation in the residential parks sector is that Part 4A be severed from the remainder of the RTA and that a new Act specifically regulating the rights and obligations of park operators and homeowners be developed.

The time is right to assess the experience of New South Wales and Queensland's recent and current rounds of reform, and incorporate findings of the Victorian Parliament's present Inquiry in the Retirement Living Sector.

Recommendation 1: *Part 4A of the Residential Tenancies Act 1997 be repealed and replaced with standalone legislation governing the rights and responsibilities of moveable-dwelling owners and park operators.*

4.2.3 Registration of Parks and Operators

We note that retirement villages covered by the Retirement Villages Act 1986 are presently required to appear on a public register maintained by Consumer Affairs Victoria.[24] Whether ultimately covered by standalone legislation or not, we believe introducing these requirements is appropriate for enforcement and consumer information purposes.

Recommendation 2: *Residential parks and villages should be required to register with Consumer Affairs Victoria, and this register should be made publically available.*

Section 17 of the Retirement Villages Act 1986 restricts the type of person that may be involved in the management of a retirement village or promote the sale of residence rights. Individuals who are currently insolvent or have been convicted of a fraud or dishonesty offence in the past 5 years may not be involved in these roles, either directly or indirectly.

Given the importance and value of the transactions for both moveable dwellings and their associated site agreements, we believe the legislation governing residential parks should place similar requirements on individuals who would manage or promote such living arrangements.

[22] Ibid, s.78.
[23] Ibid, s.103
[24] Retirement Villages Act 1986 *(Vic)*, Part 6C.

Recommendation 3: *Undischarged bankrupts and individuals who been convicted for fraud or dishonesty offences in the past five years should be prohibited from managing or promoting residential parks and villages (directly or indirectly).*

4.2.4 Prescribed terms of site ageements

The Retirement Villages (Contractual Arrangements) Regulations 2006 prescribes a range of conditions to be included in residence contracts, including how sale of a residence right at a retirement village should be conducted, how the refund of in-going contributions is to be calculated, basic obligations of owners, residents, and village managers, and key information that must be included on the front page of any residence contract. A contract will be void or read down insofar as it does not comply with these obligations.

In contrast, the current RTA regulations only prescribe cooling-off information for a site agreement, but not how and where this information may need to be given in the context of a site agreement. It is conceivable that this notice could be buried in a composite dwelling sale and purchase/site agreement.

We suggest that future legislation prescribe terms for:

- Sale of a dwelling/site agreement either independently or using the park operator as agent;
- How deferred management fees (if any) are calculated;
- Basic obligations of all parties under the site agreement;
- A disclosure document analogous to the Home Owners Information Documented provided under Queensland's legislation;
- A cooling-off period of 14 days, with longer cooling-off periods where required disclosure documents were not provided before a site agreement was signed.

Recommendation 4: *Legislation governing residential parks and villages should prescribe certain terms and conditions to be included in all site agreements, set out template disclosure documents, and prescribe a prominently displayed cooling-off period after entering into an agreement of at least 14 days.*

4.2.5 Fee disclosures and regulation

Individuals who buy into a residential park in Victoria are presently charged some combination of:

- The purchase of their dwelling;
- Ongoing 'rent' or 'service' fees;
- A deferred management fee upon exit, with other associated costs if a dwelling is moved on exit.

We have also encountered instances where site agreements purport to charge interest on late payments of rent or service fees.

Our view is that future residential park legislation should not create an unchallengeable right for fixed rent or service fee increases under site agreements that would be tied to increases in pensions. An operator should be able to make fair increases in a service fee to enable the continued upkeep of common facilities and amenities, but should not be able to automatically increase rent without that maintenance occurring.

In light of the dwelling purchase and deferred management fees, we are wary of rent under site agreements becoming an additional line of profit, rather than a necessary reinvestment into the park akin to maintenance charges under the Retirement Villages Act.

Additionally, we believe that deferred management fees should be:

- Transparent and easy to understand for prospective residents;
- Be inclusive of other reasonable costs that arise when exiting a site agreement/selling a dwelling, and capped at a maximum of 10% commission on the selling price of the dwelling.

Recommendation 5: *Legislation governing residential parks and the site agreements entered into at such parks should cap deferred management fees at 10% of the sale price of a dwelling, and not allow for automatic or 'fixed' rent or service fee increases under a contract.*

Recommendation 6: *Legislation governing residential parks and villages should provide templates for the presentation and calculation of deferred management fees, and prohibit extra charges on homeowners (e.g., interest on rent, fees for visitors).*

4.2.6 Supported living and lease-breaking

Part 4A of the RTA has no provisions on how to deal with a homeowner's need for ongoing assisted living if this becomes an issue during their tenancy. In the void, some individual site agreements have created strict rules on who may live with a park resident, and the basis on which a resident may be forced to leave a park. Some of these provisions are exceptionally concerning, and are outlined below in this submission.

Conversely, section 44 of the NSW residential parks legislation provides an automatic right of occupancy to:

- A homeowner's spouse or de facto partner;
- A homeowner's carer.

Other occupants are only allowed by written consent of the park operator. This must not be withheld unreasonably.

We believe this is a fair and cultural appropriate measure that offers park residents dignity and security. A moveable dwelling purchased for occupancy of a site in a residential park is its owner's property and home, and we sternly oppose any measure that forces a resident's exit at short notice due to infirmity.

Similarly, we support measures similar to section 120 of the NSW legislation, which provide that an agreement may not be terminated for non-use of a dwelling or site unless it has not been used for the past 3 years. This allows for a resident to leave and return with confidence (for example, if they need to spend time with family temporarily).

Part 4A of the RTA's cap of a maximum of 12 months' liability for rent in case of a site agreement lease break may not be appropriate in all cases. We suggest that where a homeowner is moving due to a situation where they will require "special and personal care" as defined by s237(4) of the RTA, and cannot obtain that while living at the park, this liability be limited by law to a maximum of three months.

Recommendation 7: *Legislation governing residential parks and villages should provide that homeowners' partners or carers have an automatic right of occupancy during the homeowner's tenancy.*

Recommendation 8: *Legislation governing residential parks should allow homeowners to be absent from the property for a maximum of three years without the risk of their agreements being terminated.*

Recommendation 9: *A homeowner's maximum liability for rent in case of a lease break should be limited to three months where that homeowner must permanently vacate to receive special and personal care.*

4.3 Non-compliant contracts, and sector oversight

Whether or not residential parks are eventually covered in a new and standalone piece of legislation, we remain concerned that a number of agreements between park operators and park residents/homeowners do not comply with Part 4A of the RTA as it stands, or offer their own provisions where the RTA is currently silent that put park residents at a serious disadvantage.

The examples set out in this section are taken from a standard form Occupancy Agreement that several homeowners in a residential park provided to us last year.

4.3.1 Homeowner's Obligations Not To Cause Damage

The Occupancy Agreement required the homeowner to request permission to bring onto the premises 'any object which by its nature or weight might cause damage to the premises'. It may be argued that a natural consequence of being a homeowner is that there will be objects that may cause some damage to premises. Heavy objects such as pianos, large pot plants or garden furniture might well cause an element of minor damage to premises, and this thus may raise questions as to the appropriateness of a landlord's consent being required in such circumstances when it pertains to a home belonging to the resident.

Even where a resident did not own a property, but instead paid for an indefinite licence to occupy (as in some Retirement Village Act agreements), we argue that this would still be a restrictive clause. Given the duration of their stays and the price they pay to enjoy that tenure, retirement living residents should be entitled to reasonable furnishing and fixture arrangements of their own.

4.3.2 Ending of Occupancy Agreement due to infirmity

The Occupancy Agreement purports to require the homeowner to vacate the premises within fourteen days where the operator is of the 'reasonable opinion' that the homeowner is 'no longer able to live independently and are dependent on Assisted Living'.

Alarmingly, this provision attempts to 'irrevocably authorize the manager to discuss with any Medical Practitioner treating the Resident matters pertaining to the said Resident's physical, emotional and mental health and wellbeing'. It further states that the Resident shall consent, upon request from the Manager, to undertaking an assessment by an independent Medical Practitioner as to their capacity to live independently and to agree 'to be bound by such independent assessment'.

If at the conclusion of this process the homeowner vacates, the operator purports to become the attorney to affect the sale of their right to occupy the home where, 'in the reasonable opinion of the landlord, the resident has not made appropriate arrangements'.

The potential for abuse of this provision, further to the legal and moral appropriateness of such a provision's inclusion in a standard form contract, is extremely concerning.

There is no basis whatsoever in the RTA for any tenant to be evicted in this fashion. Section 16(5)(b) of the Retirement Villages Act allows an owner to require a resident to leave within 14 days where they need care of a kind not available in a retirement village, but does not empower an owner with:

- The right to demand or access a resident's private medical information;

- The right to require a resident to attend an assessment by an independent medical practitioner of the owner's choosing and have a decision on their capacity to live independently made by that practitioner alone;

- The right to become the resident's attorney for the property's sale where they perceive the resident has not made appropriate arrangements for an attorney of their own (this is expressly forbidden by section 38C and 38D of the Retirement Villages Act).

4.3.3 Deferred Management Fee (or Exit Fee)

The particular fee in this Occupancy Agreement was capped after 5 years at a maximum of 15% of the sale price. As a result on a sale price of $165,000, after occupancy of over 5 years, the deferred management fee would be equal to $24,750.[25] We note that this residential park sold dwellings along with the right to enter into a site agreement, and that a number of homeowners feel they

[25] This accounts for the reality that a relocatable dwelling will often depreciate rapidly, with the sale price falling well below the initial purchase price.

have raised rents during the agreements without concomitant upkeep and maintenance of common areas and facilities.

As recommended above, we believe that this cap should be at an inclusive maximum of 10% of the sale price.

4.3.4 Events of default and landlord's rights

The Occupancy Agreement allowed the to re-enter the premises and end the Occupancy Agreement for a variety of reasons that go beyond those outlined in the RTA. Of particular concern are the reasons pertaining to the homeowner becoming bankrupt, entering into a composition or arrangement with their creditors or, much more broadly, becoming "unable to pay their debts as and when they fall due".

Whilst the *Property Law Act 1958* (Vic) is invoked to give the homeowner fourteen days to remedy a breach capable of remedy, it is unclear how something such as becoming bankrupt may be remedied. The rights of the operator do not necessarily have to be invoked in a particular case, but they may do so 'on any later occasion'.

This standard form term clearly creates a potentially precarious situation for a homeowner, and a large imbalance in parties' rights, despite their ownership of the relocatable dwelling and the possibility that they may be able to find a way to pay their rent regardless of specific circumstances. That the homeowner be unable to even enter into general debt management and repayment agreements (e.g., for credit card debt) without the fear of being ordered to vacate is alarming.

Bankruptcy and formal creditor arrangements are often also considered default events under agreements covered by the Retirement Villages Act, although we believe that "unable to pay their debts as and when they fall due" is a dangerously broad and arbitrary ground for default under any retirement living model.

4.3.5 Interest rate on overdue money

The Occupancy Agreement fixes an interest rate on overdue money at 4% more than the rate fixed from time to time by *the Penalty Interest Rates Act 1983* (Vic).

4.3.6 Dispute Resolution

The Occupancy Agreement required residents with a dispute to undergo compulsory mediation before taking a matter further (e.g., to the Victorian Civil and Administrative Tribunal (VCAT)). It provided that mediation would be approved by a Law Institute of Victoria-approved mediator, and that both parties undertook to pay equal shares of mediation costs.

This requirement cuts against the ordinary mechanisms of the RTA, which allow matters to proceed to VCAT with relative expediency. VCAT may still order mediation where necessary, but it will be significantly cheaper for both parties. Although we have reservations about VCAT's effectiveness in the retirement living context, it is absolutely superior to requiring homeowners to participate in a paid internal dispute resolution (IDR) process.

We believe it is illegal to impose a requirement for compulsory internal dispute resolution in an agreement covered by the RTA. Including this requirement in the agreement is likely to have a chilling effect on the homeowners who read it, who may fear significant mediation costs arising from legitimate concerns raised with park management. We note that the 2005 amendments to the Retirement Villages Act prohibited any mandatory arbitration clauses in agreements and required owner-operators to notify residents of the right to bring disputes to the Director of Consumer Affairs.

4.3.7 Appropriate Courses of Action

Examples like the above lead WEstjustice to suspect that, beyond legislative reform, operators themselves do not understand that they are bound by the RTA 1997, and may be handling the law's ambiguities in ways that are unfair and even unconscionable.

In light of this, we believe that there is an urgent need for a targeted review of residential park agreements in the retirement sector by the appropriate regulatory bodies. This would lead to greater compliance with the legislative framework currently in place.

Educative campaigns and advertising should be reviewed to make sure they are covering both retirement villages and residential parks, that they clearly outline the differences between the two, and that they provide guidance on what kind of terms in a residential agreement may be unfair and how a homeowner may challenge them.[26]

For the purposes of information-sharing, we also suggest that where Part 4A matters disclose contractual requirements that are a breach of the RTA, VCAT notifies CAV so that they may investigate systemic issues that an unlawful occupancy agreement may be causing.

Recommendation 10: *Consumer Affairs Victoria complete a targeted review of residential park and village agreements in the retirement housing sector to identify unfair contract terms.*

Recommendation 11: *Further campaigning and advertising should clearly outline the different nature of residential park and retirement village arrangements, and offer guidance on how residents may identify and respond to unfair contract terms, while also improving the understanding and knowledge of operators.*

Recommendation 12: *Where a matter before VCAT discloses contractual requirements in a Part 4A/residential park dispute that are in breach of the legislation, VCAT should notify Consumer Affairs Victoria in case the issue is systemic at the park.*

[26] In particular, attention should be drawn to those terms and conditions that Reg 8B of the Retirement Villages (Contractual Arrangements) Regulations 2006 state must not be included in a retirement village resident or management contract, including a requirement for a resident to have a will or take out insurance.

In our submission to the Victorian Parliament's inquiry into the retirement living sector, WEstjustice noted that the nature of some agreements we have, as well as the lack of effective external remedies to deal with disputes under any agreement, strengthen the call for the establishment of a Retirement Housing Ombudsman to sit alongside these dispute resolution mechanisms.

WEstjustice thus supports the Consumer Action Law Centre's ('CALC') recommendation in CALC's submission to the Victorian Department of Justice and Regulation's *Access to Justice Review*.[27]

While we note that amendments to both the RTA, RVA and VCAT's procedures could enhance its effectiveness, WEstjustice further agrees with the view that (at present) VCAT 'is largely an ineffective forum for resolving retirement housing disputes'.[28]

In particular, it is noted that the overly legalistic nature of VCAT reinforces the power imbalances between the parties to a dispute.[29] Further, VCAT's arduous procedural requirements, including service of documents upon the respondents, fee waiver requirements and the increases to its application fees have made the VCAT a difficult and costly dispute resolution body to navigate.[30]

As CALC highlighted, residents are often self-represented against a well-resourced opponent with legal representation, and VCAT does not tend to take this power imbalance into account.[31] Also, VCAT's decisions are unenforceable at the level of VCAT itself. Both Residential Tenancies List and Civil List monetary orders are often escalated to registration with the Magistrates' Court in order to commence enforcement proceedings. This makes it difficult and expensive to enforce a decision, even if a favourable outcome is obtained.

The establishment of a Retirement Housing Ombudsman would enable an effective and simple mechanism for dealing specifically with disputes between parties. Properly-resourced and free EDR would empower retirees to bring disputes without facing unaffordable fees or potential cost risks.[32]

CALC recommended that, at a minimum, the Retail Ombudsman would be expected to consider retirement housing consumer disputes that relate to the Australian Consumer law, *Retirement Villages Act 1986*, *Residential Tenancies Act 1997*, *Owners Corporation Act 2006*, and associated regulations.[33] WEstjustice supports this recommendation.

Recommendation 13: *A Retirement Housing Ombudsman should be established in Victoria in line with other industry external dispute resolution models*.

[27] CALC, Submission No 53 to the Department of Justice and Regulation, Parliament of Victoria *Access to Justice Review*, Submission, 29 February 2016, 2,21,22 ('*CALC Access to Justice submission*').
[28] Ibid, p.22
[29] See generally WEstjustice, Submission No 12 to the Department of Justice and Regulation, Parliament of Victoria *Access to Justice Review*, Submission, February 2016, p.36.
[30] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report (2014) 357; *CALC Access to justice submission*, p.22
[31] *CALC Access to Justice submission*, p.23.
[32] Ibid, p.22.
[33] Ibid, p.23.

5. Rooming Houses

5.1 Defining the sector

Historically, the role of rooming houses in Victoria involved the provision of accommodation to single or travelling tradesmen and/or other visitors to a town or city. They were a reasonably common dwelling choice that provided shelter for between 5 and 10 percent of Melbourne's population.[34] The level of comfort and extra service varied. In addition to an appropriate standard of rooming and basic furnishing, they would also sometimes offer regular meals, laundry, and housekeeping services.[35]

Over the past 40 years, the makeup of boarding house residents has changed. They have become home to a large high-needs contingent, who may experience psychiatric illness or substance abuse, and in some instances have been characterised as the "interface between homelessness and low cost housing".[36] Large proportions may receive government pensions, or work in low-income and/or casualised employment.

Although there may be based in different locations and have little overlap with the residents of suburban rooming houses, international students that live in central and inner-suburbs may be similarly precarious. The amounts they pay to stay in rooming house accommodation may be significant in the real terms of their country of origin, and they may face the compounding vulnerabilities of limited access to social and health services; exploitation by employers; and even serious fraud and misconduct by private education providers.

We submit that this leads to two major policy considerations:

1.What can be done to avoid a higher risk of homelessness for these individuals in both legislative and procedural terms?

2. As rooming houses have a catchment of disadvantaged and vulnerable people, is enough being done to enforce appropriate standards and protections in the sector?

An additional challenge in enforcement and procedure is the 'new model' or 'mini' quasi-rooming house arrangements that may fall through the cracks of the current legislation.

[34] Australian Housing and Urban Research Institute, "AHURI Final Report No. 54: Boarding houses and Government supply side intervention", Queensland Research Centre, March 2004, p.7.
[35] Ibid, p.8
[36] Ibid, p.11

Case Study: Wei

Wei was a young international student who was looking for accommodation to start his first year of university in the city. He responded to an online advertisement for a room in an apartment in the central city, shared with two other young men.

The man who showed him the room did not live at the property and did not identify his connection to it. Wei agreed to pay a $400.00 "holding deposit" through his mother while he considered whether or not he took the room. When his mother viewed the room herself, she decided it would be inappropriate as the room was too small to even study in. The man the holding deposit had been transferred to said the deposit was non-refundable (a position at odds with the Residential Tenancies Act 1997's stance on such deposits).

We advised Wei that the room, which was unlocked, may potentially be considered a licensee arrangement and thus prevent him from enjoying the RTA's protections. By doing extensive Google searches we were able to verify the man who had showed Wei the room's full name, number, and online handle, and established that he had multiple listings around Melbourne for individual rooms in apartments and houses. This research allowed us to establish an alternative consumer-trader basis on which we could argue the return of the money at VCAT. We were successful in ordering a refund for Wei and his mother at the Tribunal, but we are not confident that the result would repeat itself in the absence of supporting circumstantial evidence.

Examples like the above will remain very difficult to identify, let alone create a mandatory register for. We recommend that Consumer Affairs Victoria and VCAT engage in regular 'information-sharing' about emerging forms of rooming house model so that each is better placed to identify situations that warrant RTA protection or other forms of enforcement.

Recommendation 14*: CAV and VCAT should aim to exchange information and knowledge on an annual basis about emerging trends in rooming houses, including models that may current evade easy legal categorisation.*

5.2 Enforcement and regulation in the sector

Because of their more precarious status, rooming house residents are less likely to assert their consumer rights to enforcement agencies, either by acting on the civil provisions of the RTA or reporting possible criminal breaches. Although resourcing will always be a factor in how systemic rooming house issues are dealt with, channels for residents to raise issues should be as accessible as possible.

We note that different councils have varying website functionalities for rooming house residents to read about the health and wellbeing requirements for accommodation, and raise an issue if need be. For example, Hobson Bay City takes users who search for 'rooming houses' to a specific page about

requirements for providers[37], while Melbourne City Council's website search function for the same term links to a series of homelessness initiatives but lists little practical information on how rooming house residents may raise issues with local government.[38] Conversely, Brimbank City Council's page is designed to help would-be accommodation providers yet provides little direction to those who want to report a rooming house operating outside of the law.[39]

Consumer Affairs Victoria produces excellent general guidance for residents on rooming house rights. However, information relevant to council-by-council enforcement should be reproduced in their own materials. Such consistency within the communication of information would allow rooming house residents to access information seamlessly and better understand their rights.

Recommendation 15: *Local councils should provide accessible and clear information directed at residents on the ways in which councils oversee rooming house accommodation standards.*

Pursuant to our previous issues paper on Disputes Resolution, we recommend that where VCAT identify breaches of RTA rooming house provisions that carry a penalty, VCAT should note that these breaches have occurred in an order and send it to CAV for possible investigation.

Recommendation 16: *Where breaches of RTA rooming house penalty provisions are identified, this should be noted in VCAT orders, and these should then be sent to CAV as a matter of standard practice.*

We also repeat our Recommendations 2-4 of our Disputes Resolution paper insofar as they pertain to rooming house residents – namely, that residents should not have to make written requests to rooming house owners or the Director about non-urgent repairs, that CAV inspection reports highlight the presence of urgent reports if these are identified, and that tenants may seek a CAV inspection where repairs have been performed but are unsatisfactory.

The ability for residents to verbally communicate repair issues is particularly key in this area, given the literacy (and computer literacy) barriers that residents will often face.

Recommendation 17: *Section 131 of the RTA and CAV's practices should be amended to permit a resident to verbally give notice to a rooming house owner of repairs, and to permit a resident to apply to the Director by phone.*

[37] Hobsons Bay City Council, "Accommodation & rooming house registration". Accessed at http://www.hobsonsbay.vic.gov.au/Business/Doing-Business/Accommodation-rooming-house-registration on 13 September 2016.
[38] Search results for "rooming house" on Melbourne City Council website. Accessed at http://www.melbourne.vic.gov.au/pages/search-results.aspx?k=%22rooming%20house%22 on 13 September 2016.
[39] Brimbank City Council, "Accommodation Premises". Accessed at https://www.brimbank.vic.gov.au/business/types-businesses/accommodation-premises on 13 September 2016.

Recommendation 18: *The template CAV inspection report should have the ability to specify requested repairs which are in fact urgent, and identify any potential breaches of the Public Health and Wellbeing Act 2008 in the same report.*

Recommendation 19: *Section 131 of the RTA should also clearly indicate that a rooming house resident may request inspection from CAV where a rooming house owner's repairs are considered inadequate.*

5.3 Tenancy rights vs residency rights

The creation of a tenancy right in a rooming house setting is a complex matter, primarily because a set of Part 2 rights exist alongside the structure of rooming house regulations and the enduring requirements and obligations when using a rooming house's common area, as opposed to a tenant/resident's room. The elevated risk of "lease break" in a rooming house tenancy should also be noted – beyond the "chaotic conditions" cited in Tenants Union of Victoria's 'Laying The Groundwork' paper[40], we note that a number of rooming house residents are still itinerant workers, and may need to follow job opportunities.

We consider it worth interrogating *why* a tenancy right is superior to a residency right under the current RTA, and whether this should continue to be the case. Rooming house residents are at a greater risk of homelessness than many private tenants, and yet they have additional duties to pay rent, and less protection in terms of rights of entry. They also face a nebulous additional ground to vacate immediately for "disruption" in addition to "danger".

We believe that the duty on residents to pay rent on time under s112 of the RTA is an additional hardship that puts residents at risk of homelessness, even if they have never been more than 7 days in arrears. Rooming house operators are entitled to issue Notices of Vacate and seek applications for possession in the conventional means, and should not have a system at their disposal that is open to abuse or unequal application.

Recommendation 20: *Section 112 of the RTA, which places an additional duty provision on rooming house residents to pay rent on time, should be repealed.*

We echo TUV's recommendation in *Laying The Groundwork* that three months is an appropriate midpoint for general inspections in rooming houses[41], and concur that an operator's right to access a room every four weeks fails to respect a resident's privacy or dignity.

[40] Tenants Union of Victoria, "Laying The Groundwork – Residential Tenancies Act Review Discussion Paper", August 2015, p.48. Accessed at https://www.tuv.org.au/articles/files/submissions/150916-TUV-RTA-Review_Laying%20the%20Groundwork.pdf on 12 September 2016.
[41] Ibid, pp. 69-70.

Recommendation 21: *Section 137(e) of the RTA, which allows a rooming house operator to inspect a room once every 4 weeks, should be amended to allow entry for inspection once every 3 months.*

We believe that s280 of the RTA, which currently permits an operator to issue a Notice to Vacate immediately for disruption, be amended so that an operator is required to give 14 days notice to vacate instead.

We appreciate the need for measures to ensure the quiet enjoyment of a rooming house's occupants, especially at ongoing close quarters. However, we also note that residents may be disruptive for reasons of behavioural or learning disorders that are difficult to control and contribute to their difficulty in finding accommodation without notice. Immediate notices to vacate are a powerful tool which should be only be used for matters involving serious safety concerns or criminal behaviour. In our experience, residents who receive immediate notices to vacate tend to comply at once with them, before receiving legal advice that their residency rights can only be extinguished through VCAT's possession order process.

Case Study: Shane

Shane was a rooming house resident who experienced obsessive-compulsive disorder (OCD). When he was stressed or agitated by matters at his work, he would become very demanding to both other residents and the rooming house operator about cleanliness and maintenance in the property. His behaviour could be characterised as annoying or unwelcome by those on the receiving end, but not threatening – additionally, he had raised issues that were indeed breaches of the operator's duty.

Shane came to us after receiving a Notice to Vacate for disruption on a Saturday. He was told he had to leave immediately by the operator, and complied as he was anxious that police would become involved. We were able to advise Shane that a rooming house operator may only obtain possession through VCAT. However, it was too late, as he had voluntarily ended his rooming house residency and was now temporarily homeless.

We consider Shane's situation to be a textbook example of why the immediate Notice to Vacate for disruption is not appropriate. This process put a person with a disability at greater risk, and he forfeited a chance to mount a challenge to the Notice at VCAT that we anticipated may have been successful.

Recommendation 22: *Section 280 of the RTA should be amended so that residents alleged to have caused disruption receive a 14-day Notice to Vacate, instead of being asked to vacate immediately.*

Similarly, we believe that section 278 of the RTA ("Danger") should be amended to provide that only malicious or wilful, not reckless, damage, be grounds for an immediate Notice to Vacate. It is unclear

why section 278 presents a lower threshold for eviction than its counterpart in Part 2 of the RTA, which only refers to malicious damage.

Recommendation 23: *Section 278 of the RTA should be amended to confine immediate Notices to Vacate to instances of malicious damage.*

Lastly, as we have previously recommended for Part 2 of the RTA, we believe that s288 of the RTA, which allows a rooming house operator to vacate for no specified reason, should be repealed. We remain strongly of the view that termination of a tenancy should be 'for cause', especially where an individual's means for shelter are otherwise very limited.

Recommendation 24: *Section 288 of the RTA, which allows termination of a resident's stay for no reason, should be repealed.*

5.4 Rooming house rights and responsibilities

The RTA currently contains means by which a resident can seek a declaration that a rule they consider to be unreasonable is invalid. We agree that as a matter of fairness, a resident should not be compelled to comply, compensate or vacate as a result of not observing house rules they should not have been expected to obey in the first place.

S119 already limits a resident's duty to comply with house rules "made in accordance with this Act". To avoid doubt, we recommend amending s283, which permits a rooming house operator to issue a Notice to Vacate for successive breaches by a resident, to state that a Notice will not be valid if it relates to breaches of house rules not made in accordance with the RTA, or that have been declared invalid or unreasonable by the Tribunal.

Recommendation 25: *Section 283 of the RTA, which allows termination of a resident's stay for successive breaches, should be amended to confirm that a Notice shall be of no effect if issued for breaches of house rules that are not made in accordance with the Act, or that are declared invalid by the Tribunal.*

It is unclear to us why s116 of the RTA imposes an additional burden to compensate for damage, while s62 of the RTA only imposes the obligation to give notice of damage (along with a duty to ensure that care is taken to avoid damage to rented premises or common areas at s61). We note that Part 3 of the RTA lacks a general duty on residents to take care to avoid causing damage to their room or common areas.

We suggest that s116 of the RTA be amended to remove the imposition of a duty to compensate the rooming house operator. This would not extinguish an operator's right to seek compensation under sections 208-210 of the RTA. Section 116 should also be modified to confirm that residents and their visitors have a duty to take care to avoid damage to their room or common areas.

Recommendation 26: *Section 116 of the RTA should be amended to remove the imposition of a specific duty to compensate a rooming house operator, and confirm that residents have a duty to take care to avoid damaging their room and common areas.*

The TUV's recommendation that a rooming house owner be required to provide a separate mailbox for each room of the rooming house is a reasonable one[42]. Rooming house residents, by the nature of the accommodation, must endure a lower level of privacy and security than private tenants. Separate mailboxes would be one of the key ways that they can enjoy added stability, by making sure they reliably receive important personal, government and legal correspondence they may need to attend to.

A related issue arises with the RTA's service requirements. S506(1)(b) of the RTA allows service to be affected by leaving a notice or document at the person's usual or last known place of residence or business with a person apparently over the age of 16 years and apparently residing or employed that that place. This may be an appropriate form of service in a private tenancy situation, but presents a material risk in a rooming house, in that important mail (such as a Notice to Vacate) is never received by its recipient.

Even where registered post addressed to a resident is used, it is unclear whether this is proving to be effective for the purposes of service. Other residents may sign on the recipient's behalf and not deliver them the letter. If a card is left for a would-be recipient to collect their mail, this may be lost in the shuffle of a communal mailbox.

The case study below highlights the inconsistency of service by mail in the rooming house environment, and its serious consequences.

Case Study: Malcolm

Malcolm lived in a rooming house in Melbourne's West and had experienced a number of disputes with the rooming house operator. He happened to be home on the day that a Notice to Vacate for disruption was served by registered post. He knew from previous legal advice that this did not force him to leave the property and that he should await an application for possession from the operator.

Malcolm shared his rooming house with a number of residents with drug, alcohol or psychological issues. He could not always rely on these residents to pass on mail they collected from the property's sole mailbox or received at the door.

[42] Ibid, p.70.

Though they may have been posted, this meant Malcolm never received a VCAT application for possession from the operator, or a Notice of Hearing from VCAT. He became aware of the order granting the operator a warrant of possession the evening before it was executed the next morning, and he was evicted. We believe that Malcolm had an arguable case for both reopening the matter and challenging the Notice. As the residency had terminated it was now impossible for him to do either.

Recommendation 27: *Rooming house operators should be obliged to install individual post boxes for each resident in a rooming house.*

Recommendation 28*: Section 506(1) of the RTA should be amended to confirm that a notice or document to be given under the RTA may not be left with another adult at a rooming house, and should either be delivered personally to the recipient or sent by post to their last known place of residence.*

5.5 Quiet enjoyment and the granting of Personal Safety Intervention Orders (PSIO)

From our discussions with other community legal centres, we have been made aware of a number of instances in which the Personal Safety Intervention Orders Act 2010 is used as a *de facto* form of eviction. Some of these may involve the issuing of interim personal safety intervention orders (PSIOs) for good cause, while others lack merit. Either way, their application can result in immediate homelessness on the basis of an interim order.

The example below outlines a serious instance of where we believe the process has been misused in a number of ways.

Case Study: Ray

Ray had an ongoing interpersonal dispute with his rooming house's operator about a failure to affect repairs. A new resident, Davis, moved in for a week's short stay and explained to the occupants to the house that he was an acquaintance of the operator. Ray and Davis had a verbal disagreement about the rooming house operator, which Ray left before it became too heated.

A few days after Davis had left, police attended the rooming house and arrested Ray. Ray was told that the operator had informed them he was staying there in breach of an interim PSIO. The police provided Ray with a copy of the PSIO. It contained:

- *Allegations that Ray had lunged at Davis with a knife;*
- *A requirement that Ray stay 400 metres away from the rooming house at all times, which he was presently violating.*

The application had been made by Davis himself, and not on the initiative of the police. The police accepted that Ray had no knowledge of the PSIO until he was arrested and did not charge him for a breach. Ray was homeless for three days until he could get the interim PSIO varied to require that he not come within 5 metres of Davis (even though Davis was no longer at the property).

Ray was able to return to the rooming house. Subsequently, the PSIO was dismissed for want of evidence of Davis's allegations.

Though elaborate, Ray's case shows how the PSIO process may be abused by a rooming house operator to deal with "problem" residents.

We do not believe that the RTA or the PSIO Act 2010 should be amended on this matter. As eventually happened in the example above, magistrates are able to make appropriate interim orders that preserve a respondent's residency rights pending the outcome of a further hearing – *provided* they are equipped to identify a rooming house situation when it first presents itself. As this information may not always be disclosed by an applicant, it may be a matter of magistrates knowing what to look for.

Recommendation 29: *Magistrates dealing with Personal Safety Intervention Order (PSIO) matters should receive training in order to be able to identify rooming house situations and better balance the interests of both parties.*