



Community Housing
FEDERATION OF VICTORIA

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Charter of Human Rights and Responsibilities

Submission by the Community Housing Federation of Victoria

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Introduction

The Community Housing Federation of Victoria (CHFV) welcomes the opportunity to make a submission on the Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter).

CHFV is the peak housing body that represents the not-for-profit community housing sector in Victoria. CHFV's member organisations are committed to providing secure, affordable, long term housing for people on low to middle incomes. Members include the registered housing associations and providers plus other organisations and individuals interested in housing. The registered sector owns housing properties and/or manages over 18,000 properties.

This review is of particular interest to CHFV's members in respect of the consideration of the question of whether the application of the Charter to non-State entities is clear or could be more effective.

Most of CHFV's members have community-based origins and already have a commitment to maintaining the security, dignity and human rights of their tenants as part of their organisation's philosophy and daily operation. However, this does not mean that the Charter has been without difficulty for CHFV's members, who have been left to fend for themselves without legal assistance or support from government funding agencies. The concerns of our members include:

- uncertainty concerning whether the Charter applies to them, and whether the Charter applies to all or just some of their housing programs (which exist under a multiplicity of funding arrangements);
- if the Charter does apply to some or all of our members' operations, a lack of clarity around what compliance might require above and beyond the requirements of residential tenancies legislation;
- ensuring the cost of defending Charter matters is not prohibitive in terms of expense or delay; and
- ensuring that the cost of recording day to day compliance with the Charter is realistic, sustainable and properly funded and resourced (and not simply expected to be absorbed into members' already limited operating budgets).

About community housing organisations

It is important to understand the funding and regulatory context in which community housing organisations (CHOs) operate. Most (but not all) CHOs in Victoria are registered under an opt-in regulatory scheme established under the *Housing Act 1983* (Vic). This is usually a pre-requisite for government financial support and contracts.

Most CHOs receive government financial support from the Director of Housing (DoH), the state body established to own and manage public housing in Victoria and part of the Department of Health and Human Services (DHHS). Support is provided under a range of programs, which adapt and evolve along with government's priorities in social and affordable housing. It can be either operational (recurrent) funding, head leases of DoH-owned housing stock or one-off capital grant funding. Following is an overview of the key funding arrangements:

Program	Funding arrangement	Risk allocation
<p>Transitional housing</p> <p>Short- to medium-term supported housing for people who are homeless or at risk of homelessness. This is a pathway to long-term public, community or private market housing.</p>	<p>Funding agreement between CHO and DoH. CHO enters into tenancy agreement as agent of DoH. CHOs are delegated powers by the DoH under the terms of Section 35 of the <i>Housing Act 1983</i> to manage, control and undertake related activities to administer a transitional housing portfolio. CHO remits all rent paid by tenants to DoH. Staff and operating costs are funded by DoH.</p>	<p>DoH bears risks associated with asset management, non-performance of tenancy obligations (rent arrears, damage) and vacancies.</p>
<p>Long-term leased</p> <p>DoH-owned properties. Long-term housing for clients who meet eligibility for public housing.</p>	<p>DoH leases properties to CHO for term of up to 5 years, typically for small head lease rental. Tenants have tenancy agreement with CHO and pay rent to CHO. CHOs retain all rent paid by tenants.</p> <p>No operational funding is provided by DoH.</p>	<p>CHO bears risks associated with non-performance of tenancy obligations (rent, damage, vacancies).</p> <p>CHO assumes most asset management responsibilities. The DoH retains a residual liability for insurable risks.</p>
<p>CHO owned (capital grant funding)</p> <p>Properties owned by the CHO which are used as long-term community housing for people who meet community housing eligibility criteria. These are acquired with financial assistance from government or transferred to the CHO from government.</p>	<p>Capital grant agreement under which DoH provides a one-off capital grant or title to existing assets. Grants are repayable if the property is sold or ceases to be used as community housing. Since 2008 the policy of the DoH has been to provide 75% of total up-front capital cost, with the CHO providing 25%.</p> <p>DoH does not provide any ongoing capital or operational funding.</p> <p>Tenants have tenancy agreement with CHO and pay rent to CHO, used to</p>	<p>CHO bears all risks associated with property, including long-term maintenance liabilities and non-performance of tenancy obligations.</p> <p>DoH has no ongoing responsibilities with respect to the property except to exercise control where the CHO wishes to sell a funded asset.</p>

Program	Funding arrangement	Risk allocation
	meet ongoing costs of ownership.	
Independently CHO owned Properties owned by the CHO which are used as community housing and have not had any government contribution to purchase or construction or compulsory conditions regarding eligibility criteria.	No government funding or compulsory conditions regarding eligibility criteria.	CHO bears all risks associated with property, including long-term maintenance liabilities and non-performance of tenancy obligations. DoH has no ongoing responsibilities with respect to the property, nor control over the asset.

Most registered CHOs have received funding from a mixture of sources. The terms of these programs evolve and adapt with changes to government housing policy. For example:

- Since 2006 it has been the policy of successive governments to require CHOs to make their own contribution (or leverage) to new capital programs though debt or other contributions, usually 25% of project cost.
- Since 2013, DHHS has changed its leasing model for DoH-owned properties to move CHOs on to forms of lease which require the CHO to assume more responsibility (and risk) for long-term asset management.

Regulation under the *Housing Act 1983* is intended to compliment the funding model by giving government assurances that the CHOs registered under the scheme are well-governed, financially viable, manage risk appropriately and provide quality outcomes for tenants.

The application of the Charter to Community Housing

Under section 4(1)(c), the Charter will apply to a non-State entity if it is:

an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).

The Charter also contains in section 4(2) a (non-exhaustive) list a of factors to be considered in determining if a function is of a public nature:

- that the function is conferred on the entity by or under a statutory provision;
- that the function is connected to or generally identified with functions of government;
- that the function is of a regulatory nature;

- (d) that the entity is publicly funded to perform the function;
- (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

The background briefing paper issued in respect of the review of the Charter acknowledges that a non-State entity may be a public authority in some respects and not others.

There is uncertainty amongst CHOs about the extent to which the Charter applies to them, and if so, whether it applies to all or just some of the various programs in which CHOs operate.

Applying the factors listed in section 4(2) of the Charter to CHOs and the programs tends to underscore the complexity of this question rather than resolve it. For example:

- Other than in the case of transitional housing (where it could be argued that the CHO, acting as agent for the DoH, exercises DoH's statutory powers) CHOs are not exercising any particular statutory power. They are body corporates entering into and enforcing tenancy agreements in a manner consistent with the ordinary powers of legal persons.
- The degree of connection and identification with the functions of government varies with programs. While public housing is generally identified with government, the provision of housing is generally not identified with government. In Victoria, social housing comprises only 3.4% of all housing stock.¹
- In no aspect are CHOs exercising regulatory functions. The opposite is true - CHOs are themselves regulated by government under the *Housing Act*.
- In all cases other than transitional housing there is no ongoing operational funding provided and CHOs bear most risks associated with property ownership. While there may be some one-off funding in the form of a capital grant or transfer, there is no guarantee that this is adequate to meet all ongoing costs associated with the property. Indeed, regulation requires CHOs to demonstrate that they can remain financially viable without any additional funding from government while meeting long-term costs.²

Existing case law does not offer CHOs much assistance in understanding whether the Charter applies to them. This is because:

- The Victorian Civil and Administrative Tribunal (VCAT) decision in *MetroWest v Sudi*³ (referred to in the background brief) related to the transitional housing program only, which has distinct funding arrangements. Indeed, in that case it was significant that the CHO was acting as the agent for DoH. In long-term housing programs funded by DoH there is no agency relationship.
- There is no decision of the Supreme Court in respect of whether a CHO, in relation to any of its programs, is a public authority for the purposes of the Charter. After the decision in *Director of Housing v Sudi*,⁴ these matters can only be heard in that jurisdiction.

¹ Burke, Stone and Ralston (2013) Forecasting Social Housing Demand – Development of Indicators unpublished report Swinburne University of Technology

² See Housing Registrar, Performance Standards for Registered Agencies.

³ *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009)

⁴ *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011)

We are aware that in recent years some tenants have issued legal proceedings against CHOs which have included pleadings based on the Charter. To our knowledge, all of these have been settled out of court (with the exception of *Metro West*)⁵.

A test case regarding the applicability of the Charter to CHOs is perhaps unlikely as most CHOs are unwilling or unable to pay the significant legal costs associated with Supreme Court litigation. CHOs also risk being liable for the tenant's legal costs if they lose. These legal costs make it difficult to justify contesting a matter from a business perspective, especially in light of the relatively modest costs involved in settling the matter. A CHO who successfully defended Supreme Court litigation would have little prospect of recovery of any of its own their own legal costs from the tenant.

CHOs are independent community based organisations and CHFV believes that it was not intended that they be regarded as public authorities for purposes of the Charter at the time of its introduction in 2006. The fact that they receive funding from the State does not necessarily mean that they are performing functions on behalf of the State. The provision of low cost housing does not mean that they are performing a public function. Private landlords also provide low cost housing.

We suggest that the review consider recommending changes to section 4 to give greater clarity to the definition of 'public authority'. Other legislation which could be considered as a guide includes:

- the Freedom of Information Act 1982, and in particular the definition of "prescribed authority";
- the Privacy and Data Protection Act 2014 (which contains a list of bodies to whom the Act applies and specific provisions about contracted service providers); and
- the Public Administration Act 2004, that contains a list of criteria which must be satisfied in order for a body to be considered a 'public entity'.

If the Charter applies to CHOs, it is unclear what CHOs must do to comply

If the Charter applies to a CHO in some or all of its programs, then CHOs also face uncertainty as to how to comply with the Charter in carrying out their activities.

The Charter states (in section 38(1)) that it will be unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

In the context of decisions about housing, the most relevant human rights are:

- the right not to have family or home 'unlawfully or arbitrarily interfered with' (section 13 of the Charter) and
- section 17, which provides that:
 - families are the fundamental group unit of society and are entitled to be protected by society and the State;

⁵ *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009)

- every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

CHOs are highly experienced in operating within the bounds of the Residential Tenancies Act 1997 (RTA). The RTA is complex legislation which places strict rules on the relationship between landlord and tenant. CHOs take no issue with the RTA – it is justified legislative intervention to protect tenants who are at a significant imbalance of bargaining power with landlords. It also applies consistently across all tenancies – whether private, community or public.

Decisions and actions by CHOs to recover rented premises from tenants in VCAT for a breach of tenancy are not undertaken lightly by CHOs.

CHOs have little guidance on how to act and make decisions that are compliant with the Charter. In the context of proceedings under the RTA that may lead to eviction, this *might* require before issuing a notice to vacate under the RTA, and then again before seeking a warrant for possession under the RTA:

- Giving notice to the tenant setting out the following:
 - informing the tenant that the CHO is considering issuing a notice to vacate;
 - informing the tenant in general terms of the nature of the conduct to be alleged that gives rise to the notice to vacate;
 - notifying the tenant of the time by which he or she should provide any reasons to the CHO as to why the CHO should not proceed to issue a notice, that time being a reasonable time in all the circumstances; and
 - informing the tenant of matters that would likely be taken into account favourably or unfavourably, including any specific matters in relation to that particular tenant, so that he or she can consider whether to address those matters.
- When making the decision, take into account any material provided by the tenant within the reasonable period of time allowed. This will include giving due consideration to the impact of eviction on the tenant and the tenant's household, in light of the tenant's rights under the Charter, the RTA and any applicable policies.

This has been taken from the judgment in *Burgess v Director of Housing*,⁶ which related predominantly to whether DoH was obliged to act with procedural fairness and in accordance with its own policies. The Charter may however require something quite different from CHOs if they are considered 'public authorities'. However, it seems that something more than strict compliance with the RTA is required. In the realm of residential tenancies, 'public authorities' may, at the very least, be required to:

- undertake additional processes to consider a tenant's Charter rights before taking action under the RTA; and
- in some circumstances, decline to lawfully exercise rights under the RTA on the basis that a tenant's Charter rights might be infringed.

⁶ Burgess v Director of Housing [2014] VSC 648 para 164.

This has three implications for CHOs:

- The process of considering a tenant's Charter rights and then recording the details of that consideration adds time and complexity to the process of tenancy management. This is in addition to the usual VCAT processes under the RTA. Staff and management of CHOs, accustomed to working only within the bounds of the RTA will need to be trained in undertaking a process more commonly associated with administrative law and the operation of public bodies.
- An inevitable consequence of these processes is that CHOs will continue to house tenants who might otherwise have had their tenancies ended owing to a breach of their tenancy agreement that was not remedied. This exposes CHOs to an increased risk of costs associated with failed tenancies such as non-payment of rent, property damage or neighbourhood disturbances.
- CHFV's members have not received any support or guidance from DHHS about its expectations, or instructions on how to comply with the Charter. DHHS has not made resources available to CHOs and leasing or capital grant programs are not adjusted to provide additional funding. To the best of our knowledge, compliance with the Charter is not a condition of any funding agreements between DHHS and CHOs. This means that if the Charter applies to CHOs, then CHOs are effectively being asked to absorb the costs associated with these extra management obligations and risks into their operating model. This may mean less resources to provide good customer service, ensure properties are maintained to an acceptable standards and to construct new affordable homes.

Forum for resolving disputes

If the question of the applicability of the Charter were resolved by a test case or via legislative reform to the Charter itself, then (to the extent the Charter did apply) claims by tenants of non-compliance with the Charter would nonetheless continue to have to be heard in the Supreme Court. This is a consequence of the decision in *Director of Housing v Sudi*⁷ which held that VCAT, as a creation of the Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act), did not have jurisdiction to hear claims that a public authority had acted in contravention of the Charter.

This would place CHOs in a difficult situation when action under the RTA (e.g. for recovery of rented premises) is challenged by a tenant based on non-compliance with the Charter. Contesting the matter in the Supreme Court would involve significant legal costs and would be an inefficient use of a CHO's resources.

CHFV expects that CHOs may withdraw from the relevant RTA action even when the CHO firmly believes that their actions are justified in light of the tenant's conduct and the way the CHO has handled the matter. This has serious implications for the ability of CHOs to effectively manage their own assets and remain financially viable, and their duties to other tenants and neighbours who may also be at risk.

Accordingly, CHFV believes that the review should give consideration to possible changes to the Charter and the VCAT Act to confer VCAT with jurisdiction to determine, concurrently its RTA jurisdiction, whether a landlord that is a public authority has acted inconsistently with the Charter.

⁷ *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011)

The Supreme Court should retain jurisdiction as to questions of the applicability of the Charter as this is a question of law. This would test whether VCAT has jurisdiction to hear a particular matter in respect of compliance or non-compliance with the Charter by a landlord that is a public authority. A CHO would have the option of seeking that a VCAT hearing be stayed pending Supreme Court proceedings if it wished to test the applicability of the Charter to it.

The benefits of this proposal are:

- VCAT is quick and cost effective forum for the resolution of disputes. CHOs can appear in VCAT without legal representation. This places questions of compliance with the Charter in an accessible and affordable forum which allows development of a body of practice regarding how the Charter applies to actions under the RTA by a landlord that is a public authority.
- Where a Charter issue arises out of a residential tenancy dispute, the factual basis for the various claims (breach of the Charter and breach of the RTA) are likely to be the same. It is efficient for one decision maker to hear all of the evidence and facts and be in a position to make a determination on all of the relevant issues.

CHFV acknowledges that there are also difficulties with this proposal. These include:

- Some VCAT members in the Residential Tenancies list may not be comfortable or skilled in hearing submissions on the Charter; and/or suitably experienced or qualified to determine issues arising regarding the Charter.
- VCAT is not bound by the traditional rules of evidence or precedence. VCAT is therefore not bound by its own prior decisions, leaving room for inconsistent rulings on the Charter.
- VCAT members would still need to consider questions of applicability of the Charter in deciding whether to exercise jurisdiction to consider Charter claims (although this difficulty could be addressed by adequate revision of the Charter's applicability criteria).

Current position

CHFV acknowledges that there are diverse views amongst our membership and stakeholders about the appropriateness of the application of the Charter to community housing. Some CHOs are concerned that complex and often legalistic processes under the Charter force community housing to adopt a rigid and less flexible approach. Others believe there is no reason in principle why community housing tenants should have fewer rights than tenants in public housing.

In the face of this uncertainty and a lack of policy direction from DHHS, CHFV advises that its members voluntarily give due consideration of tenants' human rights, fairness and natural justice into their tenancy management policies and practices:

- in order to mitigate the risk of facing claims in the Supreme Court for non-compliance with the Charter; and
- as a matter of good practice, consistent with the mission and values of community housing to seek to sustain tenancies and provide assistance to some of the community's most marginalised people.

We recommend that our members voluntarily adopt this standard while reserving their position with respect to the applicability of the Charter to them and emphasising that the CHO remains, consistent with their status as charitable bodies, an entity independent of government.⁸ We also believe that CHOs who take this approach build a stronger case to government for an expanded role for our sector in our social housing system.

Conclusion

The implications of the Charter for CHOs are poorly understood (or ignored) by policymakers and advocates in this space. Community housing is not simply a funded service where costs are borne by the public through funding agreements. The duality of a CHO’s operating model – both funded by public subsidy and running on rents paid by tenants – sits at the heart of this tension.

The current situation is however untenable. It should not be up to the CHO sector to fund a lengthy and expensive test case in the courts to clarify the issue. DHHS, as the funding agency, should provide leadership to the CHO sector and provide adequate resources, funding and support to enable the CHO sector to comply on a voluntary basis.

Matters involving both residential tenancies and the Charter should be resolved in a low-cost forum and in a way that helps all concerned understand what the Charter requires of them.

Recommendations

Term of reference.	CHFV Recommendation
1. Ways to enhance the effectiveness of the Charter:	
e. the application of the Charter to non-State entities when they provide State-funded services.	<p>That the review give consideration to amendments to section 4 of the Charter to give greater certainty to CHOs as to whether the Charter applies to them.</p> <p>To the extent that the Charter does apply to CHOs, then to enhance the effectiveness of the Charter, DHHS should be instructed to develop, in consultation with the CHO sector, a development and resourcing plan to ensure that funded CHOs are adequately funded and supported to voluntarily comply with the Charter.</p>
2. Any desirable amendments to improve the operation of the Charter, including, but not	

⁸ Purely governmental bodies - which are constituted, funded and controlled by government and perform the accepted functions of government - operate to promote the welfare of the community generally and are unlikely to be public benevolent institutions (see Australian Taxation Office Taxation Ruling 2003/5: Income tax and fringe benefits tax: public benevolent institutions)

limited to	
a. clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations	The review should give consideration to amendments which clarify the manner in which a public authority that is a landlord is required to act in order to comply with the Charter when taking action under the RTA.
b. clarifying the provision(s) regarding legal proceedings and remedies against public authorities	The review should give consideration to possible changes to the Charter and the VCAT Act to confer VCAT with jurisdiction to determine, concurrently with its RTA jurisdiction, whether a landlord that is a public authority has acted consistently with the Charter.