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| Undeclared occupants, sub-letting and squatters operational guidelines  Effective date: July 2017 |
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Department of Health

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# Revision history

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| 1.0 |  | 18 March 2016 | Date of issue |
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# When do these operational guidelines apply?

These operational guidelines apply when staff identify a person who is:

* living in a public housing property during a tenancy with the tenant’s permission but not with the permission of the Department of Health and Human Services (the department) as the delegate of the Director of Housing (the Director)
* sub-letting the whole or part of a public housing property from a tenant
* living in a public housing property after a tenancy has been terminated, with prior permission from the tenant (but not the department) to live at the property, or
* squatting in a vacated public housing property.

# Introduction

The Director does not permit a tenant to sub-let or assign their public housing property under any circumstance, or at any time during the tenancy. Where ‘unknown’ persons are identified as living in a public housing property, they generally fall into two categories:

* Undeclared occupants - individuals who are permitted by the tenant to live at the property but without the consent of the department and in contravention of the signed *Residential Tenancy Agreement* that requires all new household members to be approved by the department. In some instances, the undeclared occupant may not have vacated when the tenant has moved out or the tenancy has terminated, or
* Squatters – individuals who unlawfully occupy a vacant public housing property as outlined in the *Summary Offences Act (1966)*. Squatters will likely be identified through an inspection of the property at the end of the tenancy or during the temporary absence of a tenant.

Recognising the different circumstances of these groups, the Director’s overarching objectives in managing the undeclared occupants and squatters processes are to:

* ensure fair and equitable allocation of public housing properties
* support effective management and utilisation of public housing stock, and
* re-let public housing properties to eligible applicants in a timely manner.

Declared household members (for example, residents) who remain in the public housing property following the termination of a tenancy and who were known to the department during the tenancy will be managed in line with the requirements of the *Transfer of tenancy policy*.

The department manages cases of undeclared occupants and squatters through two separate approaches.

1. Undeclared occupants may be provided with the opportunity to be assessed for eligibility for a transfer of tenancy in line with the *Transfer of tenancy policy*. Approval for the transfer will be made while balancing the human rights of the individual against the Director’s objective to fairly and equitably allocate limited public housing properties.
2. The department considers it important to remove squatters in a timely manner to minimise damage to public housing resources. The general position is that an application for transfer of tenancy is not considered, and may be accepted in exceptional circumstances only.

These approaches aim to balance the department’s policy to fairly and equitably allocate limited public housing resources with the human rights of individuals found to be living in a public housing property after a tenancy has been, or is soon to be, terminated.

The following sections of these operational guidelines outline:

* firstly, the overarching requirements that apply including discretion considerations, linking with other departmental supports and human rights considerations
* secondly, the investigation and evidence requirements in the situations where an undeclared occupant is identified or a sub-letting may have occurred
* thirdly, following the termination of the tenancy, the investigation and evidence requirements in determining whether a person previously unknown to the department is a squatter or an undeclared occupant, and
* fourthly, the response options for staff for both undeclared occupants and squatters.

# Discretion under these operational guidelines

Under certain circumstances, such as where family violence, mental health or disability issues are involved, local area management equivalent to the Tenancy and Property Manager or above may take the contributing factors into account prior to determining further action. This may include deciding not to issue a Notice to Vacate.

# Involvement of other programs or supports

Staff will work with the undeclared occupant or squatter to discuss and identify relevant support options available to them. This may include:

* bond assistance
* community service organisations supporting people with complex issues, including but not limited to, family services, financial counselling, mental health or disability support requirements
* other relevant departmental programs
* independent legal advice through government-funded services, and/or
* interpreters (if required).

# Human rights considerations

Staff at all levels of the department are required to consider the potential impact of any proposed action on the tenant’s (and their household’s) rights under the *Charter of Human Rights and Responsibilities* (2006).

By taking a human rights-based approach, the department is able to ensure the person is at the centre of all decisions made. It does not mean that the person’s human rights can never be limited. It means that any decisions made that do limit the person’s human rights must be lawful, necessary, logical, reasonable and proportionate.

Staff taking action in line with these operational guidelines must:

* understand the objective and rationale of the actions they are taking
* consider the impact of a proposed action on the person’s Charter rights (more than one might be relevant)
* consider whether the proposed impact is balanced and proportionate and necessary to achieve the objectives for these operational guidelines. For example, when considering whether to move towards an eviction, balancing the Director’s aim to ensure fair and equitable allocation of public housing with the needs of undeclared occupant identified following the termination of a tenancy and the impact of eviction on them and their household; and
* choose the least restrictive measure available.

This assessment needs to be individualised for the person, and any other affected household members. It requires staff to follow the process outlined below and ask key questions such as:



*The Charter of Human Rights and Responsibilities – A guide for Victorian public sector workers* is also available to guide staff and their line management when considering human rights as part of the decision making processesat <www.humanrightscommission.vic.gov.au> .

Staff must ensure that all information and evidence gathered as well as rationale and process for decisions made is documented on the Housing integrated information Program (HiiP). Staff must also document discussions with the undeclared occupant, squatter or sub-letter.

# Undeclared occupant identified during a current tenancy

In accordance with the *Residential Tenancy Agreement* (tenancy agreement), tenants are required to notify the department of any changes to their household, including if someone moves in or out.

Undeclared occupants living as part of a current tenancy may be identified through the following:

* through a notification, for example by a neighbour, that a person has recently moved into the public housing property
* a home visit undertaken by staff in line with the *Home visits policy*
* an inspection undertaken by staff in line with the *Access to* *Director owned and managed properties policy*, or
* the processing of a rental rebate application in line with the *Rental rebates policy*.

If a report of an undeclared occupant is received, staff should arrange a time to discuss the circumstances with the tenant, the undeclared occupant and any other household members. Staff should consider arranging:

* a home visit to discuss the issues, with the tenant’s consent, in line with the *Home visits policy*, or
* an inspection because there is reasonable belief the tenant has not complied with the requirements of the tenancy agreement or the *Residential Tenancies Act (1997)*. An inspection should be arranged under s. 86(1)(e): *Ground for entry of rented premises* of the *Residential Tenancies Act (1997)*. It is preferable to arrange an inspection with the tenant’s agreement, however staff and their line management may consider a *Notice to enter* if necessary (refer to the *Access to Director owned and managed properties policy*). A report of an undeclared household member would generally be considered reasonable grounds to issue a notice of entry, to determine if the tenant has breached their duty under their tenancy agreement to gain consent from the Director of Housing to have someone else reside in the public housing property with them.

If it is found that there is an undeclared occupant during a tenancy, it is important for staff to gain an understanding from the tenant, undeclared occupant and any other household members of:

* why the person was not declared to the department, and
* the individual circumstances of the undeclared occupant, the tenant and any other household members including:
* their identity
* their relationship to the tenant
* how they entered the property
* the reason they are occupying the property and how long they have been there.

Prior to considering the undeclared occupant’s inclusion to the household, staff will also need to determine, in consultation with their line management, whether the tenant has been sub-letting the whole or part of the property to the undeclared occupant.

If, during this interview and information gathering process, complex tenancy issues, such as family violence, mental health or disability are identified, staff should work with the household and undeclared occupants to access appropriate supports, including other departmental programs.

# Sub-letting or assignment by tenants of public housing properties during a current tenancy

Sub-letting or assignment occurs when a tenant transfers part (or all) of their interest under a tenancy agreement to another person. The Director does not permit tenants to sub-let or assign their public housing properties under any circumstances at any time during the tenancy as it undermines the Director’s aim to fairly and equitably allocate limited public housing resources.

Staff should discuss with the tenant, undeclared occupant and any household members the action that may be taken if it is found that the tenant has sub-let. This investigation should be undertaken by:

* informing the tenant, either in writing or verbally, of the action that may be undertaken by the department if it is found they have been sub-letting the property
* informing the tenant of the information and evidence gathered (as detailed below) that will be taken into account (either favourable or unfavourable to the tenant) in making the decision. The tenant needs to be able to consider whether to respond to the information and evidence gathered
* providing the tenant an opportunity to respond and present any further information that may be relevant to the decision made or action taken by the department. A reasonable timeframe should be provided to the tenant or household, taking into account any special requirements and the seriousness or urgency of the matter, and
* taking into account any material or information provided by the tenant when making a decision.

Staff will need evidence to support the claim of sub-letting or assignment. This could include:

* evidence that the tenant advertised a room for rent in the rented premises, and the undeclared occupant responded to the advertisement and accepted its terms
* evidence concerning the agreement reached between the tenant and the occupant concerning the terms upon which the occupant is permitted to reside in the rented premises
* evidence as to whether the tenant gave the undeclared occupant the right to part-occupy or exclusively occupy the rented premises
* evidence that the tenant is receiving rental payments from the undeclared occupants, or that the unauthorised occupant is paying the tenant rental payments, for example, through regular payments on bank statements, and/or
* evidence in relation to payment of utilities.

If staff believe they have sufficient evidence to support the alleged sub-letting or assignment, staff and their line management will consult with Legal Services Branch to determine the best course of action in light of the individual circumstances and human rights considerations of the tenant, the sub-letter and any other affected household members.

Where staff uncover evidence as part of this process that shows misleading or false information was provided by the tenant at sign up, staff and their line management should consult with the department’s Legal Services Branch. It may be appropriate to issue a Notice to Vacate under s. 252: *False statement to housing authority* of the *Residential Tenancies Act (1997)*. This section allows the Director to issue a Notice to Vacate if it relied on a statement or information provided by the tenant (which the tenant knew to be false or misleading) to assess their eligibility for public housing and subsequently enter into a tenancy agreement.

If the person is confirmed as an undeclared occupant and there is no evidence that the tenant provided false information or has been sub-letting the whole or part of the property, staff should:

* discuss with the household the requirement to notify the department of any changes to their household composition
* update the household composition to include the previously undeclared occupant as a household member, and
* reassess the household’s eligibility for a rebate or the amount of rebate received.

# Determining status of undeclared occupant or squatter following the termination of a tenancy

Staff will notify their line management when a person previously unknown to the department is identified as living in a public housing property after the tenancy is terminated or is soon to be terminated, for example, due to the death of a sole tenant.

Staff, in consultation with their line management, will need to make an assessment as to whether the person is an undeclared occupant or squatter residing in the property.

Staff should arrange a time to discuss the individual circumstances of the undeclared occupant or squatter. This could be through an interview at the local office or undertaking a visit to the property (see *Home visits policy*).

In deciding what action to take, it is important for staff to gain an understanding from the undeclared occupant or squatter of:

* their individual circumstances including:
* their identity
* their relationship, if any, with the tenant
* how they entered the property
* the reason they are occupying the property and how long they have been there
* any considerations that will help inform the decision making process for staff and their line management
* why the person was not previously declared to the department (in contravention of the *Residential Tenancy Agreement).*

Staff should discuss with the tenant (if contactable), undeclared occupant or squatter the action that may be taken dependent on the outcome of the investigation (for example, if the person is identified to be squatting in the property, the Police may be called to remove the person from the property). Staff should also:

* ask for a response from the person and provide the opportunity to present reasons for why the action should not be taken. A reasonable timeframe should be provided to the tenant or household, taking into account any special requirements and the seriousness or urgency of the matter.
* informing them of the information and evidence gathered that will be taken into account (either favourable or unfavourable) in making the decision. They need to be able to consider whether to respond to the information and evidence gathered, and
* take into account their individual circumstances (by undertaking a human rights assessment) and any material or information provided by them when making a decision.

Staff and their line management should seek advice from Legal Services Branch in the event they have difficulty in determining whether the person is an undeclared occupant or a squatter.

If, during this interview and information-gathering process, complex tenancy issues, such as family violence, mental health or disability are identified, staff should work with the household and undeclared occupants to access appropriate supports, including other departmental programs.

# Responding to undeclared occupants following the termination of a tenancy

Once it is established that a person is an undeclared occupant, staff should discuss with them their current circumstances, and try and understand how they have come to be living in a public housing property without the knowledge of the department. Staff should also discuss with the vacated tenant and any additional household member/s (if contactable), why the person has been living in the public housing property with out the knowledge of the department in contravention of the *Residential Tenancy Agreement*.

Staff should then discuss with the undeclared occupant the option to apply for a transfer of tenancy in line with the *Transfer of tenancy policy*. Staff should also discuss with the undeclared occupant what may happen if they are not successful in their request for a transfer.

As part of the process under the *Transfer of tenancy policy*, the Tenancy and Property Manager or equivalent will need to consider:

* whether the transfer contradicts the department’s policy to equitably and fairly manage the allocation of public housing properties
* the right to home under the Charter of Human Rights and Responsibilities*,* for example, whether the occupant has demonstrated sufficient and continuous links with the premises, including length of occupation
* whether, by progressing to an eviction, any of their other rights under the Charter of Human Rights and Responsibilities are limited, and whether the limitation is reasonable and justified to achieve the department’s objective, and
* whether there are less restrictive measures available which enable the department to achieve its objective.

Undeclared occupants who have been offered a transfer of tenancy are generally not required to vacate the property before the new tenancy agreement is signed. Staff will consult the *Terminating tenancies and deceased estates policy* to determine whether the tenancy agreement has terminated or the steps required to have the tenancy terminated.

If the undeclared occupant does not submit a transfer application, a decision about the property will be made on the basis of the information received to that point.

# Evicting undeclared occupants

If, following this investigation and assessment of a transfer application and the undeclared occupant is found to be ineligible for a transfer of tenancy, staff will send a letter to the undeclared occupant notifying them that:

* any licence or consent to remain in the premises is revoked
* they are to vacate the property
* legal action will commence to recover possession of the property, and
* whether there are other support and accommodation options available to them.

Staff should discuss with their line management and contact Legal Services Branch to confirm the process for preparing an affidavit outlining the specific details of the case in question and undertake the following:

* apply to the Victorian Civil and Administrative Tribunal (VCAT) under s. 344: *Application for possession order if premises occupied without consent* of the *Residential Tenancies Act (1997)* and attach the prepared affidavit and evidence in support of the application, and
* serve the undeclared occupant the application for possession and provide them with a notice of the hearing.

Staff must be able to prepare and provide evidence to VCAT that:

* the property has been previously rented to a person other than the undeclared occupant under a tenancy agreement within the previous 12 months from the date of application to VCAT
* there has been no tenancy agreement entered into with the undeclared occupant of the property, and
* the undeclared occupant entered the property and is remaining in the property without the Director’s consent or licence.

Staff will manage the process and provide a briefing for the Residential Client Services Manager or equivalent regarding the proposed eviction of the undeclared occupant in line with the *Tenancy breaches operational guidelines*.

Should the undeclared occupant refuse to vacate, staff and their line management will consult with Legal Services Branch to initiate processes specific to s. 344: *Application for possession order if premises occupied without consent* of the *Residential Tenancies Act (1997)*.

## Application to VCAT by the undeclared occupant for a tenancy agreement

A person living in the public housing property as their principal place of residency (and not party to the *Residential Tenancy Agreement*) may apply to VCAT requesting VCAT compel the department to enter into a tenancy with them under s. 232: *Application to Tribunal for creation of tenancy agreement* of the *Residential Tenancies Act (1997)*.

If this occurs, staff should notify the local area management equivalent to the Tenancy and Property manager or above who in turn should then contact Legal Services Branch for further advice and guidance.

# Responding to squatters

The department considers that is important to evict squatters in a timely manner to minimise damage to properties and the potential to undermine the aim to fairly and equitably allocate limited public housing resources. The general position in response to squatters is that an application for transfer of tenancy will be approved in exceptional circumstances only.

If, after the investigation and interview process staff determine that the person in the vacated property is a squatter, staff should complete a *Squatters information sheet* available through HiiP*.* Staff will then prepare a briefing for sign off by the local area manager equivalent to the Residential Client Services Manager or above outlining:

* the evidence obtained through the interview and information gathering process in relation to the squatter, including attaching a completed *Squatters information sheet* available through HiiP
* opportunities for the person to provide information to the department and respond to the evidence that they are squatting in the property
* the rationale for determining the person is a squatter
* the recommended course of action which balances the needs of the individual with the objectives of these operational guidelines, and
* the human rights considerations for the squatter, including:
* the consideration of right to home under the *Charter of Human Rights and Responsibilities (2006),* for example, whether the squatter has demonstrated sufficient and continuous links with the premises, including length of occupation
* whether, if it is deemed necessary to progress to an eviction (if that is the recommended course of action), any of their other rights under the *Charter of Human Rights and Responsibilities Act (2006)* are limited, and whether the limitation is reasonable and justified to achieve the Director’s objective, and
* whether there are less restrictive measures available which enable the Director to achieve its objective.

In making their decision, the local area manager equivalent to the Residential Client Services Manager or above should consider that unless exceptional circumstances are identified, squatters are not eligible to apply for a transfer of tenancy. This is in recognition of the scarcity of public housing properties and the right of access afforded to applicants who have followed departmental processes in applying for public housing properties.

## Removing squatters from the property

If the decision is made that it is necessary to evict the squatter occupying the public housing property, staff will provide an *Authority of owner of property form* to the Residential Client Services Manager or equivalentfor signature. Staff will then upload the *Authority of owner of property form* onto HiiP.

Staff will also, as soon as possible after the decision is made, notify the squatter to advise they do not have the consent of the department to remain in the property. Staff should:

* refer the squatter to local support services and alternative housing options, and
* advise the squatter that should they fail to vacate the property within five days, the police will be requested to attend the premises.

Staff will then contact the police to request assistance to remove the squatters from the property under s. 9: *Wilful destruction, damage etc. of property* of the *Summary Offences Act* (1996). Under this section, squatters who are neglecting or refusing to leave a department-owned property after being notified to leave the property and have no lawful excuse to be there, will be considered guilty of an offence.

The police must cite the *Authority of owner of property form (*available through HiiP) and identification before proceeding with any action to remove the squatters. Staff should provide the police with all information gathered about the squatters, particularly in relation to children or any support requirements.

If there are any concerns regarding the welfare of a child in this process, staff will contact Child Protection staff in line with the *Information Exchange between Child Protection and Public Housing (2015)* and the *Tenancy breaches operational guidelines*.

The day before the five-day period to vacate the property lapses, staff should visit the property to determine whether the squatters have left the property of their own accord. Staff should attend the property and be accompanied by another staff member during the visit. If it is determined that the squatter has left the property, staff should notify the police, complete a *Squatters action sheet* and record the outcome on HiiP.

If the squatters have not vacated the property, staff will complete a *48 hour briefing* (available to staff via HiiP).

Staff should also arrange a contractor to attend the eviction and change the locks to secure the property once it is vacated.

On the day of the eviction, prior to implementing the official removal process, staff should ask the squatters to leave voluntarily and to remove their goods from the property. Staff should again discuss alternative housing options and/or supports available to the squatter.

If the squatters refuse to leave, the police will direct staff, as the delegated owner of the property, to read out a three-staged *Statement of formal demand* and the squatter will be evicted.

Once the squatter has left the property, the locks of the property are to be changed.

Staff will complete a *Squatters action sheet* once the squatters have been removed from the property, and record all actions on HiiP. Staff will provide follow up information on the eviction process and outcome to the recipients of the *48 hour briefing*.

Any remaining goods or property left at the public housing property by the squatter should be managed in line with the *Abandoned property and goods operational guidelines*.

If any damage has been caused to the property by squatters, staff will refer the matter to Legal Services Branch.

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Available at [<www.dhs.vic.gov.au>](http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/tenancy-management-manual/illegal-occupancy-and-squatters)