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| Bankruptcy operational guidelinesEffective date: July 2017 |
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Department of Health

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# Revision history

| **Version** | **Amended section** | **Effective** | **Details** |
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| 1.0 |  | 18 March 2016 | Date of issue |
| 2.0 |  | July 2017 | Incorporation of ‘version control table’ |

# When do these operational guidelines apply?

These operational guidelines apply when the following groups of people have been declared bankrupt under the *Bankruptcy Act* (1966).

* current public housing tenants
* applicants on the public housing waiting list
* clients who have received housing assistance.

# Introduction

These operational guidelines outline the requirements for staff in the event a public housing tenant, applicant for public housing or a client who has received housing assistance (such as a bond loan) is declared bankrupt under the *Bankruptcy Act* (1966).

Tenants, applicants or clients are expected to inform the Department of Health and Human Services (the department) as soon as possible in the event they are declared bankrupt. In discussing the bankruptcy, staff will seek line management advice and guidance in the event complex tenancy issues are identified.

Once a tenant or client is declared bankrupt, the Director of Housing (the Director) cannot take debt recovery action for outstanding charges incurred by the tenant or client up to, and including, the date of the bankruptcy. This includes, for example, debts related to rent and maintenance costs. However, staff will liaise with the trustee appointed to manage the bankruptcy and seek payment of all or some of the debt incurred where there are sufficient assets and/or income to repay the debt over the period of the bankruptcy. The Director’s objectives in managing cases where tenants or clients are declared bankrupt are to:

* assist tenants to sustain their public housing tenancies where possible
* recover the outstanding debts/charges as much as possible, and
* effectively manage outstanding debt.

The following sections of these operational guidelines outline:

* firstly, the overarching requirements that apply throughout the bankruptcy process; discretion considerations; links with other departmental supports; natural justice; and, human rights
* secondly, the evidence requirements when bankruptcy is declared including for any outstanding debt, and
* thirdly, the process and legal requirements for consideration of regaining possession of the property from the tenant following the declaration of bankruptcy.

# Discretion under these operational guidelines

Bankruptcy does not automatically lead to the eviction of an existing tenant or removal of the applicant from the public housing waiting list. Under certain circumstances, for example, where mental health, disability or family violence issues have been identified, local area management equivalent to a Tenancy and Property Manager or above may take contributing factors into account prior to determining the next course of action, including considerations about the person’s on-going access and eligibility to public housing or bond loans.

The Tenancy and Property Manager or equivalent will consider:

* the individual circumstances that led to bankruptcy
* the individual’s history of arrears or failure to pay maintenance charges whilst in public housing
* any support plans or connections with local area support networks in place to mitigate the risk of bankruptcy recurring, and
* human rights, taking into account the individual circumstances of the people involved, the impact the decision will have on the household, and the merit of the proposed decision and action in balancing both the individual rights and the objectives of the Director as mentioned above.

# Involvement of other programs or supports

If complex tenancy issues are identified following a tenant or client declaring bankruptcy, staff may identify that access to appropriate services and support may prevent future problems and more sustainable tenancies for existing tenants. Staff should work with the person declaring bankruptcy to identify and link them to supports such as:

* Financial counselling services
* Family violence services
* Mental health services
* Disability information and support, and/or
* Drug and alcohol services.

In the event the tenant refuses to engage with support services or providers, staff should file note attempts to engage with the tenants.

During the course of dealing with a bankruptcy matter, should staff learn of, or witness a situation that raises concerns regarding a child’s welfare, staff must report their concerns to their line manager and determine the appropriate course of action in line with the *Exchange of information between Child Protection and Public Housing (2015).*

It is mandatory that concerns for a child’s welfare are reported to:

* Victoria Police if there is a reasonable belief that a crime against a child has been committed, for example, a physical or sexual assault
* Child Protection if there is a reasonable belief that a child is in need of protection.

# Human rights considerations

All departmental staff are required to consider the potential impact of any proposed action on the person’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 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, the decision to evict the tenant and household with recurring bankruptcy needs to balance the Director’s aim to recover debt with the needs of the tenant and other household members who may be affected), and
* choose the least restrictive measure available.

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



*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 processes and isat <[www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au)>

# Evidence of bankruptcy

Staff must ensure that all information and evidence gathered, as well as the rationale and process steps taken for decisions, is documented on the Housing integrated information Program (HiiP). Staff will record the following information on HiiP.

* the basis upon which the person has become bankrupt, for example:
* the Sequestration Order of the Court declaring the person to be bankrupt (where bankruptcy has been declared *involuntarily* against the person by the creditor’s petition process)
* the Debtor’s Petition submitted by the debtor (ie. the tenant or client) that initiates *voluntary* bankruptcy, including acceptance of the petition by the Australian Financial Security Authority (AFSA)
* any other documents received in relation to a bankruptcy process, for example any bankruptcy notice issued, and
* the income documentation for all household members (tenants or clients).

Where the above evidence is not provided, the person is not forthcoming on their status of bankruptcy or the situation is unclear, local area management equivalent to a Residential Client Services Manager may approve staff seeking independent confirmation of bankruptcy through completing the *Proof of debt form* available on the AFSA website.

Staff, via local area management equivalent to the Tenancy and Property Manager will notify Financial Services, Financial and Corporate Services Group (central office) in the event that they are informed that a person who has received housing assistance from the department becomes bankrupt.

# Bankruptcy and public housing applicants

Applicants who have outstanding charges that are subject to bankruptcy may still be approved to the waiting list. Outstanding public housing debts/charges that are subject to bankruptcy are not required to be paid prior to an offer of housing being made.

Vacated tenants with outstanding public housing debts /charges subject to bankruptcy who require further assistance from the department must provide evidence of their bankruptcy.

If the vacated tenant is no longer bankrupt, they should be asked to confirm that the bankruptcy has been discharged by providing a Certificate of Discharge.

# Bankruptcy and current tenants

Where one tenant in a joint tenancy is declared bankrupt, the outstanding rental arrears or maintenance debt is generally written off by the Director. This practice recognises the difficulties to practically pursue a shared debt for rental arrears.

In exceptional cases where staff consider the circumstances warrant payment of outstanding debt by the non-bankrupted joint tenant, the matter should be discussed with the Tenancy and Property Manager. Advice is to be sought from the department’s Legal Services Branch and Financial and Corporate Services Group before proceedings are commenced.

# Bankruptcy and bond loans

Where one client in receipt of a bond loan is declared bankrupt, the outstanding debt is generally written off for all joint applicants in recognition of the difficulties to practically pursue a shared debt for bond loans.

# Debt recovery

Once the tenant or clients is declared bankrupt, the Director cannot take debt recovery action for outstanding charges incurred by the tenant or client up to, and including, the date of the bankruptcy. This includes, for example, debts related to rent and maintenance costs. However, staff will liaise with the trustee appointed to manage the bankruptcy and seek payment of all or some of the debt incurred where there are sufficient assets and/or income to repay the debt over the period of the bankruptcy.

Tenants must list the department as a creditor in the event they have debt with the department at the time of bankruptcy. Staff should check that this has occurred. In the event that the Director is not declared a creditor and money is owed to the department, staff will advise the Australian Financial Security Authority (AFSA) via a *Proof of debt form*.

Staff and their line management will consult with Legal Services Branch in relation to the Director being paid any monies through the bankruptcy administration process during the period of the bankruptcy (in the event that the tenant is to come into assets or significant income, which is eligible for distribution to creditors).

Where payment of owed monies through the bankruptcy administration process is made, staff will contact Financial Services, Financial and Corporate Services Group to ensure the payment is allocated against the previously written off debt.

Tenants and clients are still liable for payment of any debt accrued after the date of bankruptcy. Staff will recover any outstanding charges that accrue after the date of bankruptcy in line with relevant policies including the:

* Rental arrears operational guidelines
* Tenancy breaches operational guidelines, and
* Bond loan policy.

# Transfer of tenancy if a tenancy is ‘disclaimed’

Bankruptcy does not mean automatic ending of tenancy agreements already in place.

The process to ‘disclaim’ (terminate) a lease is usually commenced by ‘notice’ from the trustee in bankruptcy. If the tenancy agreement is disclaimed through the bankruptcy process ((pursuant to s.225: *Termination by disclaimer* of the *Residential Tenancies Act (1997)*) and the Director intends to continue with a tenancy in relation to the bankrupt tenant, a transfer of tenancy process may be undertaken.

If a new tenancy agreement is required because the previous tenancy agreement has been disclaimed, staff will seek written approval from the Tenancy and Property Manager or equivalent prior to commencing transfer of the tenant’s tenancy in line with the *Transfer of tenancy policy*.

# Terminating the tenancy

In some circumstances, the Director may decide to terminate an existing tenancy (or not to proceed with a new tenancy) because of a tenant’s bankruptcy.

The Director may instead seek to regain possession of the property. This may occur in situations where a tenant has declared bankruptcy more than once and there is a risk of the tenant continuing to fall into arrears.

Staff will undertake a human rights assessment in line with the *human rights considerations* section of these operational guidelines prior to deciding to regain possession of the property.

Advice from Legal Services Branch is to be sought in all such cases given the requirement to ensure the department has considered all relevant legislative matters, including obligations on public authorities under the Charter of Human Rights and Responsibilities.

Staff will also need to consult Legal Services Branch to identify the appropriate mechanism to be used such as:

* issuing a Notice to Vacate under s.246: *Non-payment of rent* or s.263: Notice to Vacate for no specified reason of the *Residential Tenancies Act (1997)*, or
* applying for possession under s 344: *Application for possession order if premises occupied without consent* of the *Residential Tenancies Act (1997)*.

# Arrears accrued following date of bankruptcy

The tenant is still liable to pay rent and any other charges post the date of bankruptcy.

If a tenant falls into rental arrears again, an additional Notice to Vacate can be issued (after 14 days in arrears) in line with *Rental rebates policy.*

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Available at [<www.dhs.vic.gov.au>](http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies%2C-guidelines-and-legislation/tenancy-management-manual/bankruptcy)