



Submission on Building (Swimming Pool and Spa) Regulations 2019

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About Tenants Victoria

Tenants Victoria was founded over 30 years ago to promote and protect the rights of tenants and residents in all forms of residential accommodation in Victoria. We aim to inform and educate tenants about their rights and work for social change to improve conditions for all tenants.

In 1974, a group of disgruntled tenants in Royal Court, Parkville formed a tenants' association to do something about their landlord: Rents were continually rising despite the landlord's failure to carry out repairs. The tenants at Royal Court soon realised that the basic problem was the archaic tenancy laws that still existed in Victoria at the time. They took their story to the media and in the process, raised awareness of tenancy law reform in Victoria. Tenants Victoria was formed as a result of the support and momentum from this brave undertaking.

By the mid-1970s, consumer rights had gained acceptance and the idea that tenants, as consumers, are entitled to basic consumer protection became easier to support in public policy. Once formed, Tenants Victoria – with a number of other community organisations – was instrumental in having the Community Committee on Tenancy Law Reform established, which ultimately led to the Residential Tenancies Act of 1980.

Since its inception, Tenants Victoria has worked continuously to provide advice to as many individual tenants as possible while working towards long-term change for the benefit of all tenants. We successfully campaigned to have caravan park residents included in the 1987 legislation and rooming house residents covered in 1990. After a protracted campaign of more than ten years, an independent Residential Tenancies Bond Authority was established in 1997.

We have assisted more than half a million tenants since that first informal advice service of 30 years ago. The need for basic advice and advocacy for residential tenants is as strong as ever, and we are now assisting more than 16,000 public and private tenants each year.

Tenants Victoria led the "Make Renting Fair" campaign in 2017-2018 which resulted in 130 amendments to the Rental Tenancies Act (RTA). These landmark changes which include minimum standards for all rental properties will be implemented by 1 July 2020. We work in partnership with other Community Legal Centres, housing sector organisations, and strategically with government departments to inform policy development and enhance service delivery.

Changing rental landscape, changing rental legislation and regulation

– limitations of this submission

Changing rental landscape

Tenants Victoria has not searched its client database to establish the number or frequency of contacts from tenants in relation to pools or spas¹. Anecdotally, pool and spa safety for fixed pools has not been common source of complaint by tenants and as temporary or moveable pools are not fixtures, our service would not necessarily see issues about them. However, demographic and legal changes may make such issues more common, and the proposed regulation is likely to have a direct impact on tenants throughout the state. For example, 2016 census had 26.9% of Victorians making their homes in rental properties, and increasingly renting is not a transitory phase preparatory to home ownership. Affordability issues, and changing demographic patterns may mean that many families may live in rental properties.

Changing rental legislation and regulation

Substantial amendments have been made in the past year to legislation about residential tenancies. The *Residential Tenancies Act 1997* (RTA) has been amended by:

- *Residential Tenancies Amendment (Long Term Tenancy Agreement) Act 2018* – commenced 1.2.2019, with new prescribed standard form lease operative from 1.3.2019
- *Disability Service Safeguards Act 2018*, commenced 20.8.2019, with new prescribed form Special Disability Accommodation lease operative from 28.8. 2019.
- *Residential Tenancies Amendment Act 2018* (RTAA) – due to commence 1.7.2020

Among other things, these changes increase the likelihood of landlords and tenants entering long term leases, and bring supported disability accommodation within the RTA. In addition, in preparation for the full implementation of the National Disability Insurance Scheme, vulnerable residents with a disability may choose to enter a standard rental agreement with a landlord. The standard rental agreement under Part 2 of the RTA will be prescribed and a standard rental agreement for SDA residents will also be regulated.

Some of the important changes to the RTA by the RTAA include provisions requiring mandatory pre-disclosure by landlords or property managers to prospective tenants, requirements about safety, changed framework about modifications to premises and widened definition of urgent repairs. With the increasing temperatures and financial stresses, we anticipate a significant increase in the number of portable pools being used by young families and even the elderly as an alternate to staying cool and going to their local pools.

Current and new legislative framework has some challenges for tenants. *Residential Tenancies Amendment Act 2018* (RTAA) enacted numerous changes to the *Residential Tenancies Act 1997* (RTA), however the vast majority of this Act has not yet commenced. In addition, many of the changes require regulations to be made. The RTAA default commencement date is 1 July 2020, and supporting regulations will have to be in place prior to that date, however the Regulatory Impact statement and draft regulations have not yet been published. Tenants Victoria has made some preliminary submissions to Consumer Affairs Victoria on various regulations, but has no information on the final

¹ VCAT database search of RT list shows only three matters that referred to swimming pools. VCAT does not publish reasons for all its decisions, so it's not clear if few properties with pools are rented, or if few disputes arise about these properties, or if these disputes are settled before formal hearing. These matters are: Mikac v Findlay (Residential Tenancies) [2016] VCAT 2190 (6 December 2016), Montgomery v Kitzelmann (Residential Tenancies) [2015] VCAT 518 (4 May 2015); Perpetual Finance Group Pty. Ltd v Chen (Residential Tenancies) [2010] VCAT 638 (28 April 2010)

content of these regulations. The detail of the yet-to-be-drafted Residential Tenancies regulations is likely to affect the legal and practical situation of Victorian tenants who wish to rent or are renting premises with private pools and spas. However, it is impossible to provide definitive submissions because of the uncertainty surrounding the amended RTA and its regulations.

Tenants Victoria considers that:

- Safety is vitally important and strengthening tenants' ability to exercise consumer rights has long been a focus of policy and advocacy by Tenants Victoria.
- Forewarning, for example through mandatory pre-disclosure is useful, but tenants cannot always adequately inspect rental properties; the shortage of rental premises and intense demand for some properties means that an apparent lack of safety will not always preclude prospective tenants renting the property.
- The practical effect of the proposed swimming pool and spa regulations on tenants will be effected by the details in the standard form rental agreements and proscribed clauses that will be included in RTA regulations to be made in the coming months.
- Of immediate concern to our service are those who are financially limited, and who will in all likelihood use portable pools without strict compliance to the proposed fencing standard. Our main concern is tenants currently are not well educated and the process to practically comply with the proposed requirements may be too complex. Failure to comply may also result in notices to vacate being issued by landlords for illegal use of the rented premises.

As the Regulatory Impact Statement (RIS) sets out, the risk to small children posed by swimming pools first resulted in regulation to require mandatory safety barriers in Victoria in 1991, and progressive changes to the regulatory scheme have occurred since, including amendments to the Building Act in 2018 requiring Councils to establish and maintain a register of pools and spas. In light of the importance of both saving lives and preventing harm to small children from private swimming pools and spas, one off mandatory registration of pools holding 300 mm of water is an appropriate step.

Specific comments:

Interaction with Repairs framework in RTA

The RTA provides that a landlord must keep the property in good repair, and that a tenant can seek enforcement of this duty by applying to VCAT. A shortened timeframe applies for VCAT to list an application for urgent repairs, and specific provisions allow a tenant to make an urgent repair without consent and seek reimbursement up to \$1800.

Deficiency in RTA urgent repairs framework & reliance on tenants to enforce

The RTA as amended includes a new definition of urgent repairs:

“Urgent repairs means any work necessary to repair or remedy –

...

(ic) a failure or breakdown of any safety related devices including a smoke alarm or pool fence”

Safety related devices are not defined in the RTA and the new definition of urgent repairs does not include spa barriers or covers. While it is arguable that the meaning 'safety related devices' is likely to impliedly extend to spa covers or barriers, this is by no means certain. For completeness this provision could benefit from the inclusion of an express reference to spa-related barriers.

The urgent repair framework in the RTA requires that the tenant instigate action by reporting the issue to the landlord, by advising of it of the need for an urgent repair and if this is not fixed, making application to VCAT. VCAT then must list the matter for hearing within 2 business days. This is in contrast to the onus under the draft *Building Act* regulations that is placed on the owner, that the owner is required first to register and then maintain compliance with barrier safety standards.

There are some instances where the RTA repairs framework and Building regulations interaction may not be so clear. Complexity could arise where the owner (that is, the registered proprietor(s) on title s 3 in Building Act) is not the landlord, i.e. in a sublease arrangement. In this situation, the tenant could seek orders against the head tenant or landlord using the urgent repair framework in the RTA TA, but the head tenant or landlord would not necessarily be subject to relevant compliance provisions in the Building draft regulations. A head tenant or landlord could seek to argue that RTA is not applicable as the owner is the responsible under the Building regulations.

Similar and related issues could arise in respect of pools managed by Owners Corporations, and causes of action/remedies which may be available under the Owners Corporations Act.

These scenarios are provided as observations, and unfortunately we have not had time to explore all the possible legal scenarios.

Tenants must make sure a barrier is “operating effectively”.

Under the scheme proposed by these regulations, tenants are occupiers under r147G, and required to take all reasonable steps to ensure that the pool or spa barrier is “operating effectively” (whether or not the pool and barrier has been installed by the landlord). Failure to comply is an offence attracting up to 50 penalty units.

The landlord has a duty under s68 RTA to keep premises in good repair. A tenant may have reported the issue to the landlord as required by s62 RTA. Tenants Victoria is aware of many instances where a tenant’s report under s62 is not acted on by the landlord.

This then raises the question whether the tenant’s report under s68 is not sufficient to meet the “all reasonable steps” requirement in the proposed draft r147G.

Further, under the proposed scheme, if the landlord does not repair, is the tenant required to go further and to make application to VCAT to seek an order that the landlord comply with his/her s68 duty? Tenants Victoria is concerned that while the intention of the regulations is to promote safety, they may create a further obligation on tenants. A tenant could incur a penalty pursuant to the proposed r147G in circumstances where the tenant has fulfilled all duties under the RTA but the landlord has failed to discharge corresponding duties in the same Act! A potential solution may be to include in the proposed regulations that an occupier has fulfilled the reasonable steps requirement under r147G if they have reported the issue to their landlord. In Tenants Victoria’s experience, the vast majority of tenants are too scared to apply for urgent repairs to things like stoves and heaters; and this reality is not likely to change where the urgent repair is needed to a pool fence. It would be ideal for the tenant to be able to report it to local council, and that local council can take action.

Safety related activities – s27C(2) RTA and standard rental agreements

The RTA creates safety related duties under S27C(2). Tenants Victoria has advocated for the landlord to be responsible for maintenance of pool and spa gates and barriers as part of landlords’ mandated safety related activities. Further Tenants Victoria has advocated that any standard form agreement must include the landlord’s safety related repairs and maintenance requirements under s.68A. These should therefore include maintenance of pool and spa gates and barriers.

Tenants Victoria appreciates that a range of actions and objects can make a barrier ineffective, e.g. Propping a gate open, putting climbable objects against a barrier or allowing tree branches to be used for Tarzan-like swing into a pool. However, as set above, tenants should not be responsible for acts or omissions outside their control. For example, they may not be allowed under their residential tenancy agreement to trim or cut back branches overhanging a pool barrier, and the proposed regulations should not create further uncertainty or obligations.

Answers to specific questions

Chapter 6 - Relocatable pools

Tenants Victoria understands that some relocatable pools (such as those not requiring component assembly) are not regarded as “structures” under the Building Act and are therefore outside the scope of existing and proposed regulations. Further, the regulatory scheme requires that the occupier (including the tenant) of the land is responsible for erecting a barrier to a relocatable pool, however only the landowner may register and apply for a building permit for the pool barrier. However, if a tenant is undertaking “building work” by erecting a relocatable pool, it appears there is an obligation to have a compliant barrier.

In our submission, the core issue is a deficiency in the Building Act and it may not be possible to adequately deal with temporary pools without amendment of that Act so an occupier or tenant can apply for a building permit for a pool barrier. The Act does not define a pool (whether temporary or relocatable), despite including a head of power to regulate pools under s15A. We note that s52 already requires that occupiers (in relation to some temporary structures used for entertainment) must obtain building permits. A similar provision in relation to pools, and better definition could rectify the issue.

In addition, we note Victoria’s compliance with National Construction Code, that requires a barrier to the appropriate Australian Standard at time of erection (currently AS 1926.1 -2012) and that the Commonwealth Consumer Goods (Portable Swimming Pools) Safety Standard requires mandatory labelling. However, this labelling is not specific, and a buyer of a relocatable pool would not easily find the requirement to install a compliant safety barrier. In our submission, it is incumbent on Victoria to require that goods sold in Victoria should be sold with relevant information, so buyers know what steps they must take under Victorian law to lawfully erect and use their pool. This requirement may not be possible within the regulations proposed, but should be considered to promote consumer education and the likelihood of complying with State safety requirements.

For example: If we were to advise a young adult couple on a tenancy agreement, that *“in order for you use your \$49 Kmart 10 foot pool set, you need to spend approximately \$1000 on pool fences, gates and safety locks plus installation, get permission from your landlord, pay for certification for the fence, register with local council and then also pay for the restoration costs at the end of the tenancy”*...you would expect most tenants will consider this to be somewhat prohibitive.

Accordingly, an important practical issue is that the potential high cost of compliant barriers will prevent tenants installing a relocatable pool (and limit their enjoyment of the property), or may mean that there is continuing non-compliance with the proposed regulation. The proposed r147N is therefore problematic.

It is likely that people will continue to purchase and use such products. The labelling proposed to accompany the new regulations is really grossly adequate for there to be meaningful change in market behaviour and use of these products.

In relation to tenants, a further issue regarding the registration of pools arises in relation to family violence. Victims of family violence may be endangered by the publication of their name and address, enabling perpetrators to locate them if Councils are not required to appropriately manage this information. The importance of privacy for these individuals and families has led to redaction of details (by request of the victim) or limited search functions. Measures to protect victims should be included in the proposed regulations.

39. *Are there alternative means for ensuring that landlords are not unfairly burdened by the actions of their tenants in relation to the erection of a relocatable pool? Please explain your response.*

The RIS states that existing portable pool requirements already require an approved pool barrier, but are exempted from the requirement to have a building permit if they are in place temporarily, and the proposed regulations would define “temporary”, so that a pool erected for 3 days or more will need to be registered.

We note that the currently wording of the proposed r147N is confusing and unclear. Given that the majority of parties in conflict about this will have to defer directly to the law, the law should be emphatically clear. The currently wording and its intent is not clear.

In our view an additional statement to make the application of the regulation clearer is necessary.

I.e. Section 147N(1) should read “*subject to sub-section (2), an owner of landlord on which... etc.*”

Subsection 2 would then read:

“If, on or after 14 April 2020, a relocatable pool is erected and contains more than 300mm of water for a period of more than 3 days, the pool must be registered with local Council and have compliant and certified pool fencing in accordance with section xxx.”

If a pool is not registered under sub-section 2, it is/is not still required to have a compliance pool fence”.

Given the operation and importance of this provision, it must be clear. The *Consumer Goods (Portable Swimming Pools) Safety Standard 2013*, is simply inadequate as a deferral to the State. The State must take a more active approach to clarify its position at the time of the consumer purchasing the product.

Tenants Victoria does not provide advice to landlords. The relationship between landlords and tenants is regulated by the RTA, and specific provisions can be included in the lease. For example, a clause requiring notification of intention to put up a pool could specify that the tenant comply with provisions to fence the pool and provide for the tenant to indemnify the landlord for cost of registration and ongoing costs relating to compliance certification.

Unless the 3-day exemption is made clear, we are seriously concerned about the conflicts that are likely to arise between landlord and tenants. Tenants would be overborne by paperwork and the necessary confrontation of making the request, or a landlord observing a portable pool during an open inspection would cause numerous disputes.

It is also important that there is a clearer link in relation to the Commonwealth definition of a “portable swimming pool”, and the State definition of a “relocatable swimming pool”. Harmonization or clearer definitions in this regard would be beneficial.

42. *Do you agree that it is reasonable to only require the registration of a relocatable pool or spa once it has remained erected for three consecutive days? Please explain your response.*

In Tenants Victoria's view, limiting the requirement to erect a barrier for a relocatable pool to pools erected for 3 days or more is reasonable. It is likely that a pool installed for the short term will mean that the adults in the household will be vigilant about safety, such as when a pool is erected for a long weekend. This time limit balances the administrative burden and cost of obtaining a pool with the need to ensure safety of relocatable pools. However as set out above, redrafting of the proposed regulation is needed to create the improved safety anticipated by these draft regulations.

Chapter 10—Implementation, evaluation and forward work program

52. *Do you believe including information regarding certificates of pool and spa barrier compliance in the due diligence checklist under sale of land obligations would promote the safety of swimming pools and spas across Victoria? Please explain your response.*

This is a useful step but not sufficient. Purchasers will want to know that the property they are buying has complied with any relevant provisions of the Building Act, and permits were obtained at the relevant times. As purchasers will already search for this information, and it is relevant to the costs to be incurred by the purchaser when taking on a property, these requirements should be included in the in s32 Sale of Land Act disclosures.

53. *Do you think amending regulation 51(1) of the Building Regulations so potential purchasers can request information regarding the existence of a certificate of pool and spa barrier compliance from the relevant council is sufficient to allow them to fully inform themselves regarding the status of a pool or spa? Please explain your response.*

No – the onus for compliance under this scheme is on the current owner. The owner should therefore be required to declare the compliance status of the barrier.

55. *Do you think including a compliance certificate as part of the prescribed information under the Residential Tenancies Act 1997 would promote the safety of swimming pools and spas across Victoria? Please explain your response.*

Yes – Tenants Victoria's submission about mandatory pre-disclosure requirements by landlords to prospective tenants sought disclosure of matters that affect or could affect the safety of tenants (e.g. potential hazards such as asbestos on the property, existence of mould, repairs for mould, proof that gas and electricity safety checks are current). Requiring mandatory pre-disclosure of pool barrier compliance details should also be required.

Note that the terms of the standard residential tenancy lease could also support pool safety, e.g. if a pool/spa is part of property, the standard form lease could require that the landlord maintain barriers, and that the landlord comply with Building Regulations (as amended from time to time), and warrant that all/any changes to barriers etc. comply with Building Regulations.

In our view, like electrical and gas checks, that these items should be required to be periodically inspected is one of the best monitoring solutions. This empowers tenants to blow the whistle if there isn't an up to-date report either during the tenancy or when they leave the property.

56. Do you think including a certificate of compliance on the condition report for residential rental properties would promote the safety of swimming pools and spas across Victoria? Please explain your response.

Yes – details of the current compliance certification should be included in the condition report provided to tenants prior to occupation of a rental property. This should include information expiry dates, Barrier Improvement Notices or similar that are outstanding.

58. Have you ever rented a property with a swimming pool or spa? What was the condition of the barrier? If the barrier was in a poor condition, did the owner repair the barrier?

Tenants Victoria has not searched its database to establish the number or frequency of contacts from tenants in relation to pools or spas. Anecdotally, pool and spa safety has not been common source of complaint by tenants. However, demographic and legal changes may make such issues more common.

For example, 2016 census had 26.9% of Victorians making their homes in rental properties, and increasingly renting is not a transitory phase preparatory to home ownership. Increasingly families make their homes in rental properties and there is no evidence that this trend is decreasing. s68B RTA requires that a landlord *must comply with any prescribed requirements for the keeping and production of gas and electricity safety checks conducted at the rented premises.*

Given the known danger to small children posed by pools and spas, this provision should be amended in future to cover pool safety compliance certificates required by the Building Act Regulations.

Other General Comments in relation to pools in tenancies

One of the broader areas of conflict in relation to pools, is around maintenance obligations and how the quality of the water is expected to be maintained i.e. is it the tenants cleaning duty? Or, is it the landlord's maintenance duty?

It is often this impasse that means both parties find the pool is not useable and it becomes dilapidated and the pool equipment fails. While beyond the scope of this consultation, practical considerations about the use of the pool, tiling or boundaries also contribute to issues of frustration for both parties.

Other considerations in relation to pools generally include water evaporation, water use and disposal of large amounts of water under the Water Act, and also the location of pools on some large building roofs, their safety requirements and weight bearing tolerances, and how water from pools is disposed of so that it does not cause nuisance or damage to the building.