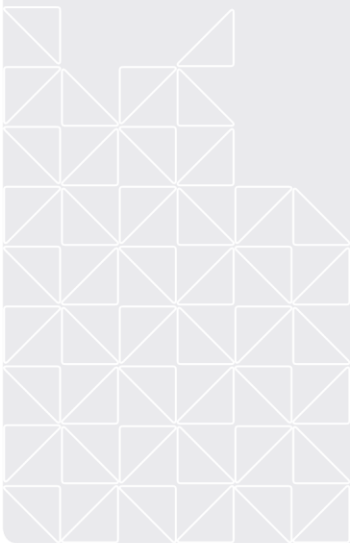


# There's no place like home: Submission on the Security of Tenure Issues Paper

December 2015



## About Justice Connect Homeless Law

Justice Connect Homeless Law (**Homeless Law**) is a specialist legal service for people experiencing or at risk of homelessness.

Homeless Law staff work closely with pro bono lawyers to provide legal advice and representation to over 400 people experiencing or at risk of homelessness each year. Our services are outreach based and client centred, and our two staff social workers allow us to respond to clients' legal and non-legal needs.

In 2014–15 Homeless Law prevented the eviction of 139 clients and their families through legal representation and social work support.

Homeless Law also runs a specialist women's program, the Women's Homelessness Prevention Project (**WHPP**). In its first 12 months of operation, the WHPP provided 62 women with 102 children in their care with a combination of legal representation and social work support. Of these 62 women at risk of homelessness, 95% had experienced family violence. Of the completed matters, 81% resulted in women maintaining safe and secure housing or resolving a tenancy legal issue (eg a housing debt) that was a barrier to accessing housing.

Since August 2014, Homeless Law has provided legal assistance to 96 prisoners, including 54 seen at initial appointments at Port Phillip Prison and 42 at other Victorian prisons or seen outside the monthly clinic through the Debt and Tenancy Legal Help for Prisoners Project. Through the provision of legal representation, Homeless Law has assisted 25 Victorian prisoners to avoid eviction. Through this work we have built a stronger, better informed understanding of the common reasons that prisoners lose their tenancies while in prison and the barriers to finding housing upon release.

Homeless Law uses the evidence from our direct casework to inform systemic change aimed at reducing the negative impact of the law on people who are homeless or at risk of homelessness.

## Acknowledgements

In contributing to the Residential Tenancies Act Review, Homeless Law conducted detailed interviews with five people who had faced eviction and, in some cases, been evicted. We sincerely thank these people for their time in sharing their stories and insights with us. Their names and identifying details have been changed.

Thank you to our pro bono lawyers whose casework continues to generate positive outcomes for our clients and to inform our recommendations for a safer, fairer residential tenancies system.

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# 1. Executive summary and key recommendations

Justice Connect Homeless Law welcomes the opportunity to contribute to the Victorian Government's Residential Tenancies Act Review (**Review**) and to respond to the *Security of Tenure Issues Paper* (**Issues Paper**). This submission is the second of Justice Connect Homeless Law's submissions to the Review. Our first submission, *There's no place like home* (**First Submission**), responded to the *Laying the Groundwork Consultation Paper* (**Consultation Paper**).

We commend the Government for its commitment to 'a modern and dynamic rental market in which tenants are safe and secure, and which meets the current and future needs and expectations of tenants, landlords and their property managers'.

As a specialist legal service for clients who are homeless or at risk of homelessness, Homeless Law sees the impact of a regulatory framework that has failed to keep pace with a changing housing landscape.

As the Consultation Paper and the Issues Paper recognise, the rental market is no longer a stepping stone on the path to home ownership. It is the place people turn for the safety, stability, security and community that a home provides. In a housing environment that is tough on tenants – including a lack of affordable housing options, soaring waiting lists for social housing, and homelessness services that are overwhelmed with demand – we need modern legislation that makes evictions into homelessness a last resort.

Homeless Law welcomes the Government's clear, practical definition of 'security of tenure' as 'the degree of certainty a person has about their residential accommodation: the choice to stay or leave; the legal protections they have over their tenancy; and the sustainability of their tenancy in terms of cost and amenity'. As the case studies, consumer insights and data throughout this submission highlight, too many low income Victorians find themselves missing out on all components of this definition: they are precariously housed; in substandard conditions; vulnerable to rent increases; and exposed to evictions that could and should be avoided.

As we identified in the First Submission, while in some ways homelessness is the 'pointy end' of rental regulation, 40% of Homeless Law's clients facing eviction into homelessness are residing in private rental properties, some have jobs, many have children and all have an acute shortage of options if their tenancy is brought to an end.

While the ability for landlords to terminate tenancies is undeniably an essential feature of a viable rental market, if Victoria is genuinely committed to fairer, safer housing, it is time to recalibrate the legal, policy and procedural framework for ending tenancies. The personal, social and financial costs of preventable evictions have become too significant to ignore.

Informed by the evidence-base from running 304 tenancy matters last year, including 219 eviction matters, as well as the insights of five consumers who have been through the eviction process, Homeless Law makes the following 14 recommendations for a fairer rental sector that recognises and promotes the benefits of security of tenure.

## 14 RECOMMENDATIONS FOR A FAIRER RENTAL SECTOR THAT PROMOTES SECURITY OF TENURE

### Reducing barriers to longer-term leases and stable housing

1. **Minimise the risks for tenants of ending leases.** For some tenants, there are significant personal, social and financial benefits of longer-term leases and the stability they provide. However, Victoria's private housing market distorts tenants' preferences for longer-term tenancies because of its unaffordability and punitive approaches to 'lease breaking' under the RTA and in practice.

Tenants would be better able to access the benefits of longer-term leases if the regulatory framework provided more flexibility for tenants to end leases without the significant financial repercussions currently attached to lease breaking. Specific reforms that could minimise the risk of longer-term leases for tenants include:

- Increasing awareness of the ability to apply under section 234 of the RTA for a reduction of fixed term tenancy agreements in the event of an unforeseen change that causes severe hardship, including through noting this provision in standard form tenancy agreements.
- Amending section 234(3) of the RTA to expressly state that the section does not entitle the Tribunal to make orders for the payment of lease breaking fees, and clarifying that a periodic tenancy is not created where a fixed term tenancy is terminated under section 234.

### Preventing avoidable evictions: measures that encourage evictions as a last resort

2. **Abolish no reason notices to vacate.** The ability of landlords to evict tenants for no specified reason in Victoria creates an imbalance between landlords and tenants, which makes it less likely that tenants will exercise their rights or that landlords will meet their obligations. These notices create a high risk of retaliatory, discriminatory or arbitrary evictions and they remove any role for VCAT to oversee procedural or evidentiary safeguards. They are no longer an appropriate or justifiable feature of the Victorian residential tenancy landscape and they should be removed from the RTA. Specifically, sections 263, 288 and 314 of the RTA, and related provisions, should be repealed.

3. **Time limited compliance orders.** Broad, indefinite compliance orders are open to misuse and can create a perpetual risk of eviction for vulnerable tenants. Compliance orders should be worded as specifically as possible, and should be limited to a period of six months before lapsing. VCAT members should be given more flexibility when determining whether a tenant should be evicted for breach of a compliance order.

4. **Improved notices and information for tenants.** The misleading term 'notice to vacate' should be changed, the form of notices of hearing should be modernised and these documents should provide tenants with referral information to encourage engagement with their tenancy issue and attendance at VCAT. Low rates of attendance in the VCAT Residential Tenancies List result in poor outcomes for tenants, including evictions that should be avoidable.

5. **Notice periods that recognise the realities of the rental market.** Notice periods for 'no fault' evictions should be increased to 120 days to recognise the difficulty tenants face in accessing affordable and appropriate housing.

6. **Postponing evictions based on hardship.** Section 352 of the RTA could be amended to give VCAT discretion to postpone the issue of the warrant of possession for a period of up to 90 days. VCAT could be required to consider the following factors when determining whether to postpone the issue of a warrant of possession:

- The length of time the tenant has resided at the property;
- Whether the tenant is vulnerable, for example, due to disability, illness, mental health, family violence or age; and
- The likelihood the tenant will become homeless.

7. **Making sure unlawful evictions aren't ignored.** Training and policies should be implemented to improve Victoria Police's understanding of their role in enforcing VCAT restraining orders. To ensure that tenants' rights are being upheld, there should be clearer processes for (1) applying

	to VCAT for a restraining order under the RTA; (2) enforcing those orders; and (3) enforcing penalties against landlords that breach restraining orders.
Reducing the impact of rent increases for low income tenants	8. <b>Limit rent increases and allow for the ending of fixed-term tenancies.</b> Rent increases should not be permitted more than once per year and amendments should be introduced that allow tenants to exit a fixed term tenancy where a substantial or unforeseen rent increase will cause them severe hardship.
Removing barriers to accessing safe housing	9. <b>Minimum standards for rented premises.</b> Minimum standards should be introduced to protect the safety, security, amenity and privacy of tenants, which can be enforced by a third party (most likely Consumer Affairs Victoria) that has power to investigate breaches, issue fines and prosecute landlords for systemic non-compliance.
Improving safety and security in rooming houses	10. <b>Strengthening security of tenure for rooming house residents.</b> A variety of measures should be undertaken including to (1) increase residents' awareness about their rights; (2) build the capacity of relevant regulatory bodies to ensure accountability and compliance of rooming house operators; (3) amend section 281 of the RTA to increase the notice period for arrears to 14 days; (4) support rooming house owners and managers to link residents with services and encourage early intervention and mediation of disputes.
Encouraging and supporting landlords to sustain tenancies	<p>11. <b>Legislative and procedural safeguards to prevent unnecessary evictions into homelessness.</b> To make sure that evictions from both social and private tenancies only ever occur as a last resort, Homeless Law recommends:</p> <ul style="list-style-type: none"> <li>• The introduction of a 'reasonableness' requirement for all evictions under the RTA, to give VCAT members discretion to avoid eviction where they are not satisfied it is reasonable in the circumstances; and</li> <li>• Development of a pre-eviction checklist for landlords to satisfy before applying to VCAT for a possession order.</li> </ul> <p>12. <b>Improving accountability for human rights in eviction decisions.</b> To make sure that evictions from social tenancies only ever occur as a last resort, Homeless Law recommends law reform to give VCAT jurisdiction to consider the human rights compatibility of eviction decisions by social landlords.</p> <p>Social housing providers should also be supported with training and resources to adopt Charter-based policies and practices in managing tenancies and making eviction decisions.</p> <p>13. <b>Working with the private sector to support eviction prevention.</b> To support real estate agents and private landlords to sustain tenancies, Homeless Law recommends:</p> <ul style="list-style-type: none"> <li>• That the private sector, including real estate agents, are given guidance and support to act early to avoid evictions for clients experiencing hardship. More specifically, a voluntary 'Code of Conduct for Private Landlords and Real Estate Agents who Support Victims of Family Violence' should be introduced to equip signatories to avoid eviction of victims of family violence into homelessness wherever possible.</li> <li>• Real estate agents should be educated about the benefits of regular and reliable payments through Centrepay and encouraged to make this payment method available for tenants.</li> </ul> <p>14. <b>Investing in services and programs proven to be highly successful at sustaining tenancies.</b> With timely, effective support, the majority of evictions are preventable. We need an investment in services and programs, including integrated legal representation, SHASP and rental brokerage, that are proven to be highly effective at avoiding unnecessary evictions to the benefit of both landlords and tenants.</p>

## 2. Renting, housing and homelessness in Victoria

### 2.1 The changing context of renting in Victoria and the prospect of homelessness

The data and statistics regarding housing affordability and homelessness in Victoria are increasingly well understood:

- A recent snapshot of private rental properties showed that less than 0.1% of rental properties in Metropolitan Melbourne were affordable for single parents relying on the single parenting pension and 0.8% were affordable for these families in coastal or regional Victoria.<sup>1</sup>
- 102,793 people sought assistance from specialist homelessness services in Victoria in 2014–15.<sup>2</sup>
- There are currently 34,726 people on the state-wide public housing wait list, including 9,952 who are eligible for 'early housing' due to urgent needs.<sup>3</sup>
- There are approximately 22,789 Victorians experiencing homelessness. Of those, almost half are women and one-sixth are children under the age of 12.<sup>4</sup>
- 18,459 applications for possession orders were made to VCAT in 2014–15.<sup>5</sup>
- Specialist homelessness services in Victoria currently turn away 108 people each day.<sup>6</sup>
- The recent Rental Affordability Index report found that 'rents are severely unaffordable for households in Greater Melbourne's first income quintile, with non-family households affected most severely'.<sup>7</sup>

As the Consultation Paper recognises, '[a]t the same time that a significant number of households are renting for longer terms, private rental is becoming less affordable, particularly for low income households'.<sup>8</sup>

It is in this context that Homeless Law provides legal representation and social work support to Victorians facing eviction into homelessness. In the 2007–08 financial year, tenancy matters formed 10% of Homeless Law's work and this figure has steadily grown to 67% of our matters in 2014–15. Two-hundred and nineteen of these clients were facing eviction.

The assistance Homeless Law provides to clients with tenancy issues includes:

- Providing legal advice in relation to the rights and obligations of tenants under the RTA;
- Negotiating and advocating with landlords to avoid unnecessary evictions;
- Where social landlords are involved, negotiating and advocating in relation to obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**);
- Representing clients at VCAT in relation to applications for possession or compliance orders; and
- Providing non-legal support, including in relation to housing, health, family violence and brokerage, through our two in-house social workers.

Falling behind in the rent is the most common factor putting Homeless Law's clients at risk of homelessness: 150 of our clients facing eviction were at risk of losing their tenancies due to rental arrears. This was 68% of the total eviction matters. Other reasons that clients found themselves facing eviction into homelessness included: breach of compliance order (7); danger or illegal use (15); no reason (10); abandonment (5); property being sold or the landlord or their family moving in (11); end of fixed term tenancy (4); and illegal sub-letting (2).

<sup>1</sup> On 11–12 April 2015, less than 0.1% of private rental properties in metropolitan Melbourne were affordable and appropriate for a single mother of two children who relies on a parenting pension: Anglicare Australia, *Anglicare Australia Rental Affordability Snapshot* (2015) (**Anglicare Snapshot**) 88. See also Department of Health and Human Services, *Rental Report December Quarter 2014* (DHHS Rental Report): just three in 100 two-bedroom rental lettings in the December 2014 quarter were affordable to a single parent reliant on Centrelink.

<sup>2</sup> Australian Institute of Health and Welfare, *Specialist Homelessness Services: 2014–2015* (2015) (**AIHW Report**).

<sup>3</sup> Department of Health and Human Services, *Public Housing Waiting and Transfer List September 2015* (**Public Housing Waitlist**).

<sup>4</sup> Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2011* (12 November 2012) 12 (**Census 2011**).

<sup>5</sup> Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2014–2015* (25 November 2015) 39 (**VCAT Annual Report**).

<sup>6</sup> See AIHW Report, above n 2, 'Table VIC 5: Daily average unmet requests for assistance, by type of service requested and sex, 2014–15, adjusted for non-response'.

<sup>7</sup> SGS Economics and Planning, *Rental Affordability Index* (November 2015) (**SGS Report**).

<sup>8</sup> State Government of Victoria, *Residential Tenancies Act Review: Laying the Groundwork – Consultation Paper* (June 2015) (**Consultation Paper**).

Through a combination of legal representation and social work support, Homeless Law prevented the eviction of 139 clients and their families in 2014–15.<sup>9</sup> Approximately 48 of Homeless Law's clients were evicted.<sup>10</sup>

Data, case studies and consumer insights from this direct service provision have informed the recommendations in this submission. Any legislative and regulatory reforms should be considered in the environment in which they are taking effect i.e. a highly competitive, deeply unaffordable rental market that is relied on by over 525,000 tenants to provide a safe and stable home.<sup>11</sup>

## 2.2 The personal, social and financial costs of eviction in the current environment

As Victoria increasingly relies on the private market to meet the needs of low income tenants who are unable to get to the top of lengthy waiting lists for social housing, the RTA reform needs to contemplate the true impact of weak regulation of residential tenancies.

In addition to the personal toll on individuals and families, evictions into homelessness come with financial costs to the State. By way of example:

- A 2013 AHURI study identified that people experiencing homelessness had higher interaction with health, justice and welfare systems than people with stable housing and estimated that an individual experiencing homelessness represents an annual cost to government services that is \$29,450 higher than for the rest of the Australian population. Of this increased cost, \$14,507 related to health services, \$5,906 related to justice services, and \$6,620 related to receipt of welfare payments.<sup>12</sup>
- A 2006 Victorian Government paper identified a potential cost of over \$34,000 per year to support a tenant evicted from public housing through homelessness services. This was compared to approximately \$4,300 in service costs per year for a household in public housing.<sup>13</sup>

Using the AHURI figures, Homeless Law's prevention of the eviction of 139 people into homelessness in 2014–15 represents a cost saving of approximately \$4.1 million.

In formulating the appropriate balance between market imperatives for investment and social and consumer protection, it is important to recognise that no-one in the community benefits from allowing people to slip into homelessness where these evictions – and the hardship and social dislocation that comes with them – can be prevented. Victoria needs a regulatory and services system that promotes security of tenure and makes evictions into homelessness a last resort.

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<sup>9</sup> This means that clients either retained their property or the eviction was postponed and new housing was secured.

<sup>10</sup> In a number of these cases the Homeless Law file was closed after a possession order was made, so it is not known whether the client was evicted after this point. There is some chance an eviction was prevented through post-possession order agreement. Note that the remainder of Homeless Law's eviction matters were ongoing at the time of collating these figures.

<sup>11</sup> Consultation Paper, above n 8, 16 citing *ABS Customised Census Report* (2015).

<sup>12</sup> Kaylene Zaretsky et al, *The cost of homelessness and the net benefit of homelessness programs: a national study*, AHURI Final Report No 205 (2013) 4.

<sup>13</sup> Department of Human Services, *Support for High Risk Tenancies Strategic Project* (October 2006) cited in Department of Human Services, *Human Services: The case for change* (December 2011).



## 3. Security of tenure: The needs and preferences of tenants and landlords

### 3.1 Safe and stable housing for Victorian tenants

This part addresses the following questions from the Issues Paper:

1. Why is security of tenure important for Victorian tenants?
2. What factors influence tenants' preferences for stability and flexibility in rental accommodation?

As the Issues Paper recognises, 'security of tenure' is not limited to longer term leases, but rather refers to 'the degree of certainty a person has about their residential accommodation: the choice to stay or leave; the legal protections they have over their tenancy; and the sustainability of their tenancy in terms of cost and amenity'.<sup>14</sup>

It encompasses the idea of being able to live in a safe, appropriate, affordable property with some comfort that you will not unnecessarily be required to leave against your will. You will be given the opportunity to make a home and a life for yourself and your family.

#### 3.1.1 The benefits of secure tenure

The benefits of security of tenure are articulated by a woman Homeless Law consulted with in 2010, Marie, who explained the impact quality, affordable, secure housing had on her and her children.<sup>15</sup>

<sup>14</sup> State Government of Victoria, *Residential Tenancies Act Review: Security of Tenure Issues Paper* (November 2015) (**Issues Paper**), 9.

<sup>15</sup> See Justice Connect Homeless Law (formerly the PILCH Homeless Persons' Legal Clinic), "We Can't Go Private ..." *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria* (2010) (available at: [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/56th/ph/submissions/S103\\_PILCH\\_HPLC.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/56th/ph/submissions/S103_PILCH_HPLC.pdf)).

## A tenant's perspective on the benefits of security of tenure: 'it's the base of everything'

... Aboriginal housing offered me a property and it's the most beautiful house I've ever seen in my life. After over 10 years on the waiting list.

It was brand new, never been lived in. It's the best. It's like heaven! I just feel so lucky.

The impact of getting housing has been huge for the children. Not only because they weren't settled [and] the impact of moving around [but also because] even when you are allocated transitional housing you have to take whatever they offer you.

Well that's all good and well, but the majority of children that are involved in transitional housing or priority housing have experienced some sort of trauma in their life ... because that's the only way you're eligible for it. And the trauma and impact of them actually setting up a life somewhere and then moving once again to somewhere that may be nowhere near triggers other traumatic memories and creates an idea in the children's head that they have no security or stability.

No-one cares that they form friendships with kids at school and then they've got to change schools and even when you're in transitional housing, you can't create a life because you're not going to be there.

Our new house – it's the base of everything. It's the base of the structure of healing. It's everything. I'm just so grateful that I've got this beautiful house and we will always have this and that's all that really matters.

While Marie's comments are about the benefits of being allocated social housing, her perspective provides general insights about the impact of quality, stable, affordable housing on the wellbeing, education and community participation of families and children.

As the Consultation Paper and the Issues Paper recognise, security of tenure is increasingly important for more and more Victorians. The rental market is no longer just a pathway to home ownership. Rather, it is relied on to provide stable and reliable homes by an ever-growing number of Victorians.

For some tenants, including older Victorians, people with a disability or health condition, and low income families, stability has greater importance. For example, Marie's comments highlight the benefits of long-term stable housing for her and her family after an experience of trauma and transience. Her comments also highlight the disruption and dislocation that comes from having to move against your will.<sup>16</sup>

### 3.1.2 Factors deterring tenants from seeking longer-term leases

Longer-term leases in the private market should not, however, be seen as a proxy for the range of reforms needed to improve security of tenure for Victorian tenants.

As research by the Tenants Union of Victoria shows, in the current rental environment, many tenants do not want to be 'locked in' to long-term leases.<sup>17</sup> Homeless Law's understanding, based on our work with low income vulnerable tenants, supports this. For many of our clients, life can be unpredictable. Low paid jobs are less secure than professional jobs; incomes are uncertain; relationships can form or break down; health can fluctuate; and the needs of families and children can change. Where people are already struggling to afford rent, a rent increase and/or a decrease in income can mean the tenancy is no longer viable, and this financial uncertainty prevents people from seeking out long-term commitments.

Furthermore, the fear of serious financial repercussions for having to leave a property before the lease has ended is a source of anxiety for many tenants. As the below case study shows, the RTA's current punitive approach to 'lease breaking' by tenants significantly impacts on the decision-making – and in this case, safety – of tenants in the private rental market.

<sup>16</sup> See Justice Connect Homeless Law (formerly the PILCH Homeless Persons' Legal Clinic), *Keeping Doors Open: Submission in Response to 'Pathways to a Fair and Sustainable Social Housing System'* (31 July 2012) 23.

<sup>17</sup> Tenants Union of Victoria, *Tenure Security for Private Tenants in Victoria* (2015) (available at: [http://www.tuv.org.au/articles/files/housing\\_statistics/tenure-security-2015-summary.pdf](http://www.tuv.org.au/articles/files/housing_statistics/tenure-security-2015-summary.pdf)), which found that a slight majority of tenants favoured the flexibility of short-term leases over the stability of long-term leases. Reasons included to cater for changing circumstances, not wanting to be committed for too long and not wanting to incur the costs associated with breaking a lease.

## Lease breaking costs deter victim of family violence from re-locating

Donna is a 42 year old woman who recently arrived in Australia, having fled her marriage of over 15 years due to ongoing psychological abuse from her husband.

Donna arrived with 3 children who were also traumatised as a result of the violence the family had escaped from. She worked full time in order to support her private rental tenancy, but required urgent assistance to terminate the lease early as she had become aware that her husband now knew her address and was intending to come and see her.

Donna's real estate agent had initially told Donna she was not able to leave unless she could pay a large sum of money upfront, which made her feel trapped and unsafe. There was four months left on the existing fixed term lease. Although Donna was fearful about spending this period of time at the property, she didn't think she could afford to re-locate and carry the costs of breaking the current lease.

With Homeless Law's assistance, Donna was able to negotiate with her real estate agent to give two months' notice prior to vacating, and also avoided any additional lease-breaking costs. Donna now lives in a new private rental property where she feels safe. Given the real estate agent's initial response to Donna's enquiries about ending her lease early, it is unlikely this resolution would have been reached without legal representation.

Marie's story above highlights the significant personal, social and financial benefits of stable, safe, affordable housing, but Donna's story reminds us that Victoria's private housing market distorts tenants' preferences for long-term tenancies because of:

- Its lack of affordability, which means that tenants end up in inadequate and inappropriate housing, and that housing can easily shift from being barely affordable to unaffordable as a result of rent increases and/or decreased household income; and
- Punitive approaches to 'lease breaking' under the RTA and in practice.

Part 3.4 below proposes some measures to address the factors deterring tenants from seeking the benefits of longer-term stability. Even if these changes are made, however, the critical aspect of security of tenure for Homeless Law's clients is more effective protections against eviction. Improving these elements of security of tenure – a choice to stay or leave and legal protections for tenants – will play a more significant role in ameliorating the current imbalance in Victoria's housing market, which sees too many avoidable evictions into homelessness.

## 3.2 The benefits of sustaining tenancies for Victorian landlords

**This part addresses the following questions from the Issues Paper:**

3. What factors influence the preferences of landlords when deciding the period of a tenancy?
4. How important is it for landlords to establish stable tenancies in their rental properties?
5. How important is it for landlords to be able to regain possession of a rental property?

Homeless Law is exclusively a service for people who are homeless or at risk of homelessness, so we don't purport to speak on behalf of landlords. We can, however, highlight the ways in which we see landlords benefitting from sustainment of tenancies.

The clearest example is the fact that it is inconvenient and costly for landlords to terminate tenancies and, accordingly, the needs of the landlord can often be better served by the tenant being quickly supported to comply with their obligations (for example, by addressing arrears owing or remedying other compliance issues), rather than terminating the tenancy.

The example below identifies an outcome which could be described as 'win win' in that the landlord was repaid outstanding rent and a victim of family violence was able to avoid entering homelessness with her children.

## Single mother falls behind in rent, but gets support to catch up. Landlord benefits

Bianca, a single mother who had experienced family violence, lived in a private rental property with her two children. Bianca had a steady job when she entered into the tenancy agreement, but after suffering debilitating mental health issues was forced her to stop work and became reliant on the Newstart Allowance and Family Tax Benefit payments.

As a result of her reduced income, Bianca could no longer afford the \$270 weekly rental payments, and quickly accrued rental arrears. The real estate agent issued a Notice to Vacate and then applied to VCAT for a possession order, putting Bianca and her children's housing at risk.

Bianca approached Homeless Law and was assisted through the Women's Homelessness Prevention Project, which combines legal representation with social work support to prevent women and children entering homelessness.

Bianca's pro bono lawyers negotiated with the real estate agent, including by offering an upfront payment of \$1400 toward the arrears, \$1000 of which was provided through the Launch Housing/REA Group brokerage fund for women who have experienced family violence who are seeking to sustain or obtain private rental. The other \$400 was obtained by Bianca with support of a financial counsellor who Homeless Law's social worker linked her with.

The real estate agent and the landlord were open to negotiation. The proposed payment plan meant the full arrears would be addressed in six months.

The landlord agreed to withdraw their application for a possession order, which meant both parties avoided the stress and inconvenience of a VCAT hearing.

The availability of brokerage and the willingness of the real estate agent to negotiate ultimately led to a successful outcome for both the landlord and Bianca. Bianca and her children could maintain their housing and the landlord was saved the hassle and costs of finding a new tenant.

A barrier to the successful sustainment of tenancies can be the lack of knowledge of, or access to, support services for real estate agents to refer struggling tenants to. In the case of Bianca, it is highly likely that if she had not been provided with legal representation, combined with social work support and access to brokerage, the eviction would have gone ahead. Homeless Law's strong view is that real estate agents need to be better supported to explore alternatives to eviction, including through making early referrals to support services when they identify a tenant having difficulty complying with their obligations. The necessity of early intervention should not be confined to the social housing sector. It is an integral component of making sure private landlords are supported to make choices other than eviction, which is costly for both tenants and landlords.

Furthermore, as the recent establishment of HomeGround Real Estate indicates, there are also private landlords who are committed to providing accessible, appropriate, affordable housing to people who would otherwise face barriers to accessing homes in the private rental market.<sup>18</sup>

<sup>18</sup> See Home Ground Real Estate (available at: <http://www.homegroundrealestate.com.au/>). See also 'Generous landlords have joined a scheme to offer lower rents to those in real need' *News.com.au* (19 December 2014) regarding the innovative partnership between the REA Group and non-profit real estate agency HomeGround Real Estate, which aims to help an extra 1000 people find low-cost housing, including up to 300 who would otherwise become homeless.

## HomeGround Real Estate: A new role for private landlords

HomeGround Real Estate is a not-for-profit real estate agency that reinvests profits derived from its property management service into the community via its Affordable Housing Initiative. HomeGround Real Estate can manage properties at full market rent, at a reduced market rent, or on a philanthropic basis.

Under the Affordable Housing Initiative, property owners can opt to forego a percentage of their rental income, which is instead used to provide affordable rental properties to eligible low income tenants.

HomeGround Real Estate recently entered into an innovative partnership with the REA Group, with the aim of helping an extra 1000 people find low-cost housing, including up to 300 who would otherwise be homeless.

The testimonial of one of the private landlords is:

*“Placing our rental property with HomeGround has been a wonderful experience. We have a small unit that has been renting for \$220 per week but decided we could afford to reduce the rent and provide it to HomeGround and help the community. We receive around \$2,500 per annum less in rent but much, much more in feeling good about helping others in need. Our unit is near the beach and amongst plenty of kids so we decided providing the unit to a single mother trying a fresh start for her and her child was the best fit. Every child deserves an opportunity to play and be happy in a safe and stable environment. Together with HomeGround we are helping to provide this.*

...

*Our experience has been so rewarding we have decided to provide another unit and look forward to the day that we can provide more and charge even less.”*

Initiatives like this highlight the potential of private landlords to act both in their own interests and for the benefit of tenants. It is a progressive and innovative reminder that the interests of landlords and tenants are not necessarily diametrically opposed and the framework for regulating this complex market needs to provide opportunities for both landlords and tenants to benefit from sustaining tenancies.

In designing laws and policies that respond to the needs of landlords and tenants, we also need to keep in mind that research does not support the suggestion that landlords would be deterred from investing or renting by regulation that introduced safeguards against avoidable evictions.<sup>19</sup> Evidence regarding the factors influencing individuals' decisions to buy and sell rental properties does not identify the ability to evict as a relevant consideration. Factors identified include investor age and retirement status, the needs of family members, inheriting money, changing personal circumstances, attitudes to risk and saving and 'to a lesser extent, the market environment'.<sup>20</sup>

Overall, while it is important for landlords to be able to regain possession of their properties in prescribed circumstances, this priority must be balanced against the consequences of easy evictions in the current housing market. As the figures in part 2 and the case studies and consumer insights throughout this submission show, the personal, financial and social cost of evictions into homelessness are high and should only be incurred as a last resort.

## 3.3 Why are tenancies ending?

**This part addresses the following question from the Issues Paper:**

6 What are the main reasons that tenancies end, from both landlords' and tenants' perspectives?

As noted above, falling behind in the rent is the most common factor putting Homeless Law's clients at risk of homelessness: 150 of our clients facing eviction in 2014–15 were at risk of losing their tenancies due to rental arrears. This was 68% of the total eviction matters. Other reasons that clients found themselves facing eviction into homelessness included: breach of compliance

<sup>19</sup> See, eg, Consultation Paper, above n 8, 38 citing Gavin Wood and Rachel Ong, Australian Housing and Urban Research Institute, *Factors Shaping the Decision to Become a Landlord and Retain Rental Investments*, AHURI Final Report No 142 (February 2010) 1, 24, 27–8, 30.

<sup>20</sup> Ibid.

order (7); danger or illegal use (15); no reason (10); abandonment (5); property being sold or the landlord or their family moving in (11); end of fixed term tenancy (4); and illegal sub-letting (2).

We note that the data available from VCAT identifies that in 2014–15, a total of 59,184 new applications were made to the Residential Tenancies List, and 18,459 (31%) were for possession and rent (12,586) or possession, rent and bond (5,873).<sup>21</sup>

The most recent figures from the Australian Institute of Health and Welfare's annual report, *Specialist homelessness services 2014–15*, shows that 46,532 people in Victoria cited financial issues as a reason for seeking assistance from a specialist homelessness service, including 20,663 who cited housing affordability stress.<sup>22</sup>

**Table VIC CLIENTS.13: Clients, by reasons for seeking assistance, 2014–15, adjusted for non-response<sup>23</sup>**

Group	Reason for seeking assistance	Males	Females	Total clients (number)	Total clients (per cent)
<i>Financial</i>		20,678	25,854	46,532	45.7
	Financial difficulties	18,152	22,900	41,052	40.3
	Housing affordability stress	8,825	11,838	20,663	20.3
	Employment difficulties	2,173	2,068	4,241	4.2
	Unemployment	3,544	3,442	6,985	6.9
	Problematic gambling	189	114	303	0.3

What these figures clearly indicate is that high numbers of Victorians are finding it hard to keep up with their rent and this is causing tenancies to end.

While shocking, these figures are not surprising in a rental market that is widely recognised as being highly unaffordable.

<sup>21</sup> VCAT Annual Report, above n 5, 7.

<sup>22</sup> AIHW Report, above n 2.

<sup>23</sup> Ibid.

To put a human face to these statistics, the two case studies below capture the circumstances of two Homeless Law clients who were tenants in the private rental market. Both fell behind in their rent and were ultimately evicted into homelessness. Neither had subsequently found secure, ongoing housing at the time of consultation.

### **Work injury and mental health issues result in eviction from private rental**

Henry lived alone in a rental property. He suffered a work related injury. He also developed depression, which he believed was a result of the impacts that the injury had on his day-to-day life. WorkCover did not acknowledge the link between the injury and his mental health and therefore it began effecting his employment. This in turn impacted his finances, his work hours dropped down to two days a week and his rent became less affordable. Henry fell in to arrears.

Henry's landlord discussed the arrears issues with Henry before proceeding to VCAT where the member granted a payment plan. Unfortunately, he was not able to meet this plan and defaulted resulting in his eviction. His bond was withheld to pay for the arrears, which then put him in debt to the Office of Housing who he had loaned the bond from originally. Until paid, this debt will prevent him from obtaining any further rental bonds.

Henry had nowhere to go after leaving his rental property. He returned to share housing, moving from place to place over the ensuing months. He is still not securely housed and has found the share housing market problematic with its lack of regulation. His privacy has been violated and he has no protections from being asked to leave. He has not been asked to sign rental agreements and no one will give him receipts for his rental payments.

Because of this, he is keen to return to independent living and an environment where there is an agreement in place that protects both him and the person collecting the rent. Unfortunately, as a single adult male on a low income, this has been very difficult to find.

## Single mother evicted from private rental into homelessness

Olivia is a single mother. She has a primary school aged daughter. She works when she can and her income is supplemented by Centrelink payments. She suffers an autoimmune disease that can take its toll particularly in times of stress. A history of family violence has also left her with anxiety and post-traumatic stress. She is trying hard to make a life for herself and her daughter.

Olivia had been living in a private rental but fell in to arrears when her tight budget blew out due to unexpected costs and her illness preventing her from working consistently. By the time the landlord issued a notice to vacate the arrears had grown to around \$1500. She found out about an application for possession that her landlord had made to VCAT while seeking help for rent from a local support service. Having not received the information in the post she was not aware the matter had progressed quite so far.

Olivia went to VCAT where the member granted a further three weeks before a warrant could be executed. Whilst the property only cost \$250 per week, Olivia couldn't pay back the arrears on her tight budget so worked at getting out of the house and trying to find new accommodation. Despite trying to clean and move in an orderly way, the warrant was on the cusp of execution and she couldn't find alternative accommodation so she did what she could before the locks were changed.

Having fled domestic violence she had no family or friends she could stay with locally. This meant she was dependent on support services to help with accommodation. She didn't get her bond back and money was still owed to the landlord, which obstructed her access to further private rental. A bond loan from the Office of Housing had to be paid back before she would be considered for public housing.

As a result, months after the end of her tenancy she was still living in rooming house accommodation. Despite Olivia being very protective, emergency accommodation had exposed her and her daughter to things a child should not have to witness. Ironically, at \$280 per week, the rooming house where they ended up cost more than her private rental and all they got was a small room to share. She had to give up work as managing the day-to-day, the exacerbation in her illness and the appointments to try and get her finances and housing back on track was too difficult. Olivia continues to work with a support worker to try and establish new housing.

These two case studies show the impact of an unaffordable rental market on low income tenants who are living so close to the edge financially that an unexpected expense or illness can quickly lead to eviction. The case studies also highlight the personal toll of eviction on individuals and families, and touch on the broader financial cost of homelessness for Victoria. Both Henry and Olivia's ability to work was impacted by their eviction, their health deteriorated, they became more reliant on services and found themselves in unsafe and unsuitable housing.<sup>24</sup>

In talking about her eviction and inability to secure alternative housing, Olivia said:

*Because of the timeframe it took for me to get out, I wasn't able to leave the property in a state, to be able to get my bond returned even though I'd fixed anything that needed to be fixed ... I didn't get my bond back which has affected me in getting [new houses] because it hasn't been repaid ... I understand there are people out there that deserve it [to have their bond withheld] but when you are in a situation like myself and you want to rebuild your life and not have a bad mark against your name when you are trying your best to survive.*

...

*The anxiety and the depression behind it escalated, the panic attacks, the feeling of being helpless you have just got everything ripped out from underneath you. You have no control you don't know where you are going or what you are doing. You are basically lost. It impacted a great deal, I was always getting sick ... it made me want to quit.*

Olivia also described the impact on her primary school aged daughter:

<sup>24</sup> See also Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana & Stephanie Ramsey, Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: legal need in Australia* (2012) (**LAW Survey**), which found that people who are homeless or in basic/public housing are at significantly increased risk of experiencing three or more legal issues. The LAW Survey found that people experiencing homelessness had a greater prevalence of legal problems of any type and a significantly higher number of problems. Specifically, it found that: 85% of people experiencing homelessness experienced at least one legal problem, compared to 54% of those in basic or public housing; 50.5% of those who identified as homeless experienced three or more legal issues, compared to 22.8% of those in basic/public housing, and only 15.7% in other types of housing; and people who were experiencing homelessness lived with multiple disadvantages having an average of 2.2 types of disadvantage compared to people in basic/public housing (1.9 types), and those in non-disadvantaged housing (1.1 types).



*My daughter, the impact on her, her behaviour change, the lashing out, the instability from being moved from places in motels where ... I won't even go into the stories, things she witnessed that she shouldn't have to have witnessed.*

These figures and stories highlight that a lack of affordability is making it difficult for low income tenants to sustain their tenancies. While it is indisputable that landlords are entitled to receive their rent, the prevalence and consequences of eviction for rental arrears, should prompt us to carefully consider what can be done to prevent these evictions.

Part 8 below discusses that need for early intervention, support services and brokerage to make evictions for falling behind in rent a last resort. These measures, coupled with an improved role for VCAT on the frontlines of determining evictions, would play a significant role in balancing the needs of tenants to stay in their housing with the needs of landlords to receive rental revenue.

At the end of the day, if we are going to continue to rely on the private rental market to house low income people with complex lives, we need to recognise that it is not feasible to do this without a system of financial and professional support in place to make these tenancies sustainable.

### 3.4 Longer leases: hard to get, hard to sustain, hard to exit

This part addresses the following questions from the Issues Paper:

#### Matching tenant and landlord preferences

- 7 What are the obstacles in the rental market for tenants who prefer longer tenure from achieving this?

#### Lease terms

- 8 What are the obstacles (including any provisions in the Act) to tenants and landlords entering long leases?
- 9 How do industry practices influence lease terms and the duration of tenancies more generally?
- 10 What role would long (five to ten year) leases play in strengthening security of tenure?
- 11 What factors or circumstances would make longer leases attractive to tenants and landlords?
- 12 If long term leases were provided for in the Act, what protections (if any) would be required for tenants who are seeking only short term leases?

Part 3.1 above discusses the significant personal, social and financial benefits of safe and stable and the disruptive effect of unplanned or unwanted re-locations for tenants and their families. It also identifies the obstacles preventing tenants from getting longer-term tenancies in the private rental market, including that unaffordable and often poor quality housing deters tenants from seeking out longer-term leases. The unaffordability of the housing market means that Homeless Law's clients often end up in properties and areas where they don't necessarily want to stay long term.

In addition, the financial repercussions of ending a lease early under the current RTA act as a disincentive for tenants who might otherwise like the certainty of a longer term lease. Fluctuating incomes, health and circumstances can make committing to a long term arrangement a stressful prospect for low income tenants.

In addition to the barriers preventing tenants seeking longer-term leases, are the decisions and preferences of landlords, including:

- **No incentive for landlords** – In a highly competitive housing market where it is easy to find tenants, landlords have few incentives to enter into long-term leases. Landlords are taking advantage of their position of power in the market and generally entering into shorter-term leases. By doing so, landlords have greater freedom to change tenants and alter rent.
- **Standard industry practice** – As noted in the Issues Paper, current industry practice favours offering short (six to twelve month) leases.
- **Perception of risk and discrimination** – For particular groups of tenants, such as those with low incomes, some landlords perceive a heightened level of risk with entering into a long-term contract. Accordingly, landlords are more likely to favour short-term leases. As identified by the Victorian Equal Opportunity and Human Rights Commission, discrimination in the private rental market is widespread, which can also contribute to preconceived ideas about risk and reluctance to enter longer term tenancy agreements (or any agreement at all).<sup>25</sup>

<sup>25</sup> Victorian Equal Opportunity and Human Rights Commission, *Locked out: Discrimination in Victoria's private rental market* (August 2012).

The combination of these tenant and landlord driven factors perpetuates an insecure private rental market, where tenants find themselves in a vulnerable position, competing for unaffordable housing, reluctant to request longer-term tenancies or better standards of housing, facing discrimination, struggling to sustain their housing and at risk of being evicted into homelessness.

While section 234 of the RTA provides an important mechanism for reducing fixed term tenancies, tenants remain unaware of this provision and rarely exercise their rights to have the tenancy reduced where there has been an 'unforeseen change in [their] circumstances', and they will suffer 'severe hardship' if the term of the agreement is not reduced, which would be greater than the hardship which the landlord would suffer if the term were reduced.<sup>26</sup> Homeless Law's experience suggests that real estate agents do not alert tenants suffering severe hardship about section 234. Rather, standard tenancy agreements typically include unenforceable clauses about the upfront payment of lease breaking fees and are otherwise silent about the reduction of a fixed term tenancy agreement due to hardship.

The operation of section 234 also presents a number of issues that could be easily remedied by minor clarifying changes to the RTA:

- **Compensation** – Section 234(3) of the Act states that “the Tribunal may determine the compensation (if any) to be paid by the applicant for the order to the other party because of the reduction in the term of the tenancy agreement.” The section enables the Tribunal to determine the compensation payable, but does not describe the circumstances in which an order of compensation may be made. Homeless Law has experienced inconsistent interpretations of section 234(3) amongst VCAT Members, with some Members interpreting section 234(3) as empowering the Tribunal to make orders for lease breaking fees. Homeless Law considers that the purpose of section 234 is to allow for an alternative method of reducing a fixed term tenancy in circumstances involving severe hardship and it is therefore inappropriate for section 234(3) to enable VCAT to order the payment of lease breaking fees.
- **Periodic tenancy** – Presently, it is unclear whether section 230 operates to automatically create a periodic tenancy when a fixed-term tenancy is terminated pursuant to section 234, especially where the termination is not with the consent of both parties so as to enliven section 218. Homeless Law considers that a periodic tenancy should not be created upon the termination of a tenancy under section 234, primarily because the purpose of section 234 is to assist an applicant who will, due to an unforeseen change of circumstances, suffer severe hardship if the term of the lease is not reduced. In our view, it would be fundamentally contrary to the purpose of section 234 if an applicant who is able to satisfy this stringent criteria is then forced automatically into a new periodic tenancy, which will be on the same terms and conditions as the previous fixed term agreement. Positively, we understand that it is the current practice of VCAT members not to order the creation of a new periodic tenancy agreement after making an order under section 234 that a fixed term lease is terminated. However, we note the Tribunal's approach in this regard may be based on obtaining the consent of the parties to an agreed date of termination of the lease, which in turn enlivens the operation of section 218 (termination by consent). This approach may be problematic where an application under section 234 is strenuously opposed by the respondent, including where a respondent seeks to raise the operation of section 231 in their favour.

In considering regulatory measures that encourage longer-term leases, it should be recognised that, in the current environment, the consequences for the landlord of a tenant unexpectedly seeking to end a fixed term tenancy agreement are relatively minor. There is a high demand for rental properties and significant competition. This should be balanced against the implications for tenants who need to end their tenancies early, who will likely face difficulty securing an alternative property in a highly unaffordable rental market.

The proposed recommendations aim to reduce some of the barriers to un-locking the benefits of longer-term leases for Victorian tenants and landlords.

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<sup>26</sup> *Residential Tenancies Act 1997* (Vic) s 234(2).

## Recommendation 1: reducing barriers to longer-term leases

For some tenants, there are significant personal, social and financial benefits of longer-term leases and the stability they provide. However, Victoria's private housing market distorts tenants' preferences for longer-term tenancies because of:

- Its lack of affordability, which means that:
  - tenants end up in inadequate and inappropriate housing that they do not want to stay in long term; and
  - housing can easily shift from being barely affordable to unaffordable as a result of rent increases and/or decreased household income; and
- Punitive approaches to 'lease breaking' under the RTA and in practice.

Tenants would be better able to access the benefits of longer-term leases if the regulatory framework provided more flexibility for tenants to end leases without the significant financial repercussions currently attached to lease breaking. Specific reforms that could minimise the risk of longer-term leases for tenants are:

- Increasing awareness of the ability to apply under section 234 of the RTA for a reduction of fixed term tenancy agreements in the event of an unforeseen change that causes severe hardship, including through noting this provision in standard form tenancy agreements.
- Amending section 234(3) of the RTA to expressly state that the section does not entitle the Tribunal to make orders for the payment of lease breaking fees.
- Amending section 230 of the RTA to clarify that a periodic tenancy is not created where a fixed term tenancy is terminated under section 234.

While the benefits of longer-term leases in certain circumstances cannot be denied, for the vast majority of Homeless Law's clients, the availability of longer-term leases would not address the insecurity they face. Enhancing security of tenure through improving protections against unnecessary or avoidable evictions would more effectively target the current uncertainty and inequality our clients face in the rental market.

Accordingly, part 4 provides recommendations for improving security of tenure by reducing unnecessary evictions.

## 4. Safeguards against unnecessary evictions

This part addresses the following questions from the Issues Paper:

### Tenancy terminations

- 13 What issues are there regarding the way in which terminations provisions in the Act affect security of tenure?
- 14 How much notice would be appropriate for the tenant to give to the landlord when providing a notice of intention to vacate?
- 15 How much notice would be appropriate for the landlord to give to the tenant when issuing a notice to vacate?
- 16 What are the reasons why landlords use the 'no specified reason' notice to vacate?
- 17 Rather than relying on a notice to vacate for 'no specified reason', how could the Act cater for landlords with legitimate grounds for terminating a tenancy for reasons that are not otherwise prescribed?
- 19 What would be the impact of removing the notice to vacate for 'no specified reason' from the Act?

Homeless Law's First Submission refers to the 2006 AHURI study, *Evictions and Housing Management*, which, after interviewing 150 'evictees', concluded that 'evictions generate a number of challenges for the public sector',<sup>27</sup> including:

- A percentage of evictees ending up in high cost hospitals or other institutions;
- Children separated from their parents;
- The education of children disrupted;
- Additional demands placed on the public housing sector, as well as emergency housing; and
- The majority of evicted persons ending up homeless, with a small proportion experiencing the worst forms of primary homelessness.<sup>28</sup>

These findings are consistent with what Homeless Law sees through our work, with what our clients tell us and with what the current data regarding housing and homelessness shows.<sup>29</sup> It is in this context that Homeless Law is focussing on improving safeguards against unnecessary terminations as a critical aspect of security of tenure. For Homeless Law's clients, unnecessary evictions are the most significant factor that deprive them of secure tenure and its benefits.

With this in mind, this section proposes six reforms that would reduce the number and consequences of terminations that could and should be avoided:

- Removing the ability to evict for 'no specified reason';
- Introducing timeframes and discretion in relation to compliance orders and evictions for breach of compliance orders;
- Improving engagement of tenants and attendance at VCAT when their tenancy matters are being determined;
- Increasing the notice period for 'no fault' notices to vacate to 120 days;
- Amending VCAT's discretion to postpone the issue of a warrant to allow for postponement of up to 90 days in recognition of the acute difficulty tenants now face in securing alternative accommodation in the current 30 day period; and
- Implementing training and policies to improve Victoria Police's understanding of their role in enforcing VCAT restraining orders to ensure that tenants' rights are being upheld.

<sup>27</sup> Andrew Beer, Michele Slatter, Jo Baulderstone and Daphne Habibis, Australian Housing and Urban Research Institute, *Evictions and Housing Management*, AHURI Final Report No 94 (June 2006), Executive Summary (**AHURI Evictions Report**).

<sup>28</sup> Ibid.

<sup>29</sup> See above part 2.

## 4.1 Evicting without reason: 'No specified reason' notices to vacate

### 4.1.1 No reason notices to vacate in a changing housing environment

Under section 263 of the RTA, a landlord can give a tenant a notice to vacate without specifying a reason for giving the notice. The notice must specify a termination date that is not less than 120 days from the date of the notice.<sup>30</sup> The RTA commentary on these provisions recognises: 'A landlord will of course normally actually have a reason for giving the notice. The point is that the reason need not be specified in the notice to vacate'.<sup>31</sup>

The rationale for the no reason notice is to provide flexibility to private landlords in managing their properties.<sup>32</sup> The four month notice period acknowledges that tenants should be given a reasonable notice period when being evicted without a clear or articulated reason. As has been made clear throughout this submission and the First Submission, however, for low income tenants, even a four month period will not necessarily be adequate to secure alternative appropriate housing.

In addition to creating a risk of arbitrary evictions and homelessness, the no reason notice to vacate creates significant inequality in the relationship between the tenant and the landlord. This inequality and lack of transparency can make tenants reluctant to act on their rights, including in relation to maintenance or quiet enjoyment of their homes.

These concerns were flagged in Parliament at the time of the Second Reading Speech for the RTA (the *Residential Tenancies Act 1980* (Vic) had provided that eviction for no reason required six months' notice; the RTA reduced this to 90 days and this was subsequently increased to 120 days by the *Residential Tenancies (Amendment) Act 2002* (Vic)):

*Disreputable landlords will be able to bypass serving notice for specific reasons and will not have to argue their cases in the Residential Tenancies Tribunal if there has been a breach of the tenancy agreement. The security of tenure for tenants will become very precarious. They will be unlikely to raise legitimate concerns about maintenance or improvements that need to be made on a property for fear of being served with a 90 day notice to vacate for no specified reason. Fair and reasonable legislation must ensure that tenants are judged only by tenancy performance and not by imputed characteristics. The change to the legislation will allow for that discrimination to occur.*

...

*As I have already said of the changes: there is no need for them given that the Real Estate Institute of Victoria considers the current act to be fair and equitable; they will discriminate against people and allow landlords to remove people to whom they have taken a personal disliking; they will affect the affordability of the private rental market, which is already incredibly expensive; and they will establish an unequal relationship between landlords and tenants.*

*I repeat also that the proposal will discourage tenants from raising legitimate concerns. Given that it costs \$1000 to relocate to another property and in the current environment it is difficult to find rental premises, tenants will be reluctant to rock the boat. The proposed changes favour landlords and work against tenants – they do not strike a balance and will lead to severe discrimination against tenants at the low end of the market, which is where the most vulnerable tenants are likely to reside.<sup>33</sup>*

In 2002, the notice period was extended in recognition of the risks created by the no reason notice to vacate:

*The bill provides that this notice period will increase to 120 days. This amendment is intended to deter property owners from using the no reason notice to vacate inappropriately. This is an important provision that will increase the security of tenure for tenants and residents; however, it does not limit landlords' proprietary rights, as the act provides a series of specific-purpose notices to vacate as an alternative to the revised 120-day notice. This is a balanced and even position, supported by key stakeholders, that places Victoria at the forefront of reform in this area.<sup>34</sup>*

The risks that were identified in 1997 and 2002 are even greater in the current environment where low income tenants have extremely limited options for securing alternative housing. In this environment, the personal and financial consequences of eviction are harsher and the disadvantage of tenants relative to landlords is greater, such that it is no longer possible to suggest that being able to evict tenants for no reason is a fair and balanced feature of the regulatory scheme for residential tenancies.

<sup>30</sup> See *Residential Tenancies Act 1997* (Vic) ss 263, 288 and 314 for tenancies, rooming houses and caravans respectively.

<sup>31</sup> John Billings, Jacquelyn Kefford, Alan Vassie, *VCAT Annotated Residential Tenancies Act* (2015) [263.01] (**Annotated RTA**).

<sup>32</sup> See, eg, Minister Knowles, *Hansard*, Residential Tenancies Bill Second Reading Speech (20 November 1997) 717: 'Consultants reviewed the draft provisions in accordance with competition policy and recommended a number of amendments to ensure that anti-competitive elements were removed. The most significant of these were: the removal of any restriction on the period between rent increases, while maintaining mandatory notice periods; and the reduction of the notice period for a notice to vacate for no reason from six months to three months'.

<sup>33</sup> Lynne Kosky, Member for Altona, *Hansard*, Residential Tenancies Bill Second Reading Speech (18 November 1997) 1180.

<sup>34</sup> Bronwyn Pike, Minister for Housing, *Hansard*, Residential Tenancies (Amendment) Bill Second Reading Speech (14 May 2002) 1399.

## 4.1.2 Problems with no reason notices to vacate and their impact

Homeless Law has three key concerns with no reason notices to vacate:

1. **Open to misuse for retaliatory or discriminatory reasons.** The lack of transparency or accountability means that no reason notices are susceptible to misuse, including for retaliatory or discriminatory reasons. As identified by the Victorian Equal Opportunity and Human Rights Commission, discrimination in the private rental market is widespread and '[i]f private rental is to be a viable, long-term housing option for people leaving public housing, or an alternative for those seeking public housing, it is crucial that barriers to the private rental market, including unlawful discrimination, are also removed'.<sup>35</sup> The no reason notice to vacate makes it difficult to tackle or reduce discrimination in the private rental market, because there is no oversight or accountability and it is very easy for the real reason for the eviction to go undetected. The landlord is in a position where their concerns with the tenant's race, religion, sexuality, mental illness or social status, for example, can be 'legitimately' acted upon by way of the no reason notice. In addition to discriminatory reasons, landlords are well positioned to use the no reason notice to avoid acting on a tenant's requests for maintenance or for peace and quiet in the property. While there is some recourse in the RTA to challenge these notices, it is often difficult to prove that the notice was issued 'in response to' the exercise of rights under the RTA as required under section 266 of the RTA.<sup>36</sup> On top of this, a challenge on the basis of retaliation relies on people seeking out legal advice, rather than leaving the property in response to the notice to vacate.
2. **Fear and insecurity amongst tenants can prevent them from exercising their rights.** The no reason notice to vacate is one of the strongest examples of an imbalance in favour of landlords in the current RTA. When considered in the context of a highly competitive and unaffordable housing market, including the costs and personal disruption of relocation and the risk of homelessness, the risk of eviction deters tenants from exercising their rights. Tenants may be reluctant to 'rock the boat' by requesting repairs or peace and quiet in the property because of the risk that landlords will choose to terminate the tenancy rather than adhere to their obligations.<sup>37</sup> Tenants who have the least alternative accommodation options if evicted are also more likely to be forced to rely on repair rights during their tenancy (because they are more likely to be renting older properties in worse condition). This reluctance to assert their rights can leave tenants and their families living in substandard accommodation, which distorts the obligations under the RTA because landlords are not accountable for complying with their responsibilities.
3. **VCAT's role is limited and there are no safeguards to prevent arbitrary, unfair or avoidable evictions.** As flagged in the commentary to the RTA, it is often the case that the landlord does have a reason for giving the notice, but the reason is not specified. In this way, the no reason notice to vacate can be used in response to concerns about compliance, for example nuisance, danger, hoarding or illegal use, but no details or evidence of these concerns are provided. The RTA provides clear mechanisms for landlords to deal with concerns regarding tenant non-compliance, which require that the tenant is notified of the landlord's concerns or allegations. These provisions, including compliance proceedings and evictions for cause, allow the tenant to understand and respond to the allegations and provide procedural and evidentiary safeguards to prevent unfounded or disproportionate evictions.<sup>38</sup> There is room for VCAT's discretion regarding eviction decisions to be improved, but even the limited oversight VCAT currently has in the form of checking that the legal and evidentiary requirements are met, are set aside when the no reason notice to vacate is used. It means that tenants have no ability to defend the proceeding; it also means that they don't have any opportunity to understand or rectify the conduct. The tenant has no insight about whether the notice to vacate is legitimate or not because there is no transparency and there are limited options for resolving disputes or concerns. In short, these notices close the door to

<sup>35</sup> Victorian Equal Opportunity and Human Rights Commission, *Locked out: Discrimination in Victoria's private rental market* (August 2012).

<sup>36</sup> See Dr Nathalie Wharton and Dr Lucy Craddock, 'A Comparison of Security of Tenure in Queensland and in Western Europe' *Monash University Law Review* 37(2), which discusses the analogous provision, s 291(3) in the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) and identifies that it is ineffective in protecting tenants from being abusively evicted.

<sup>37</sup> See also Tenants' Union of Queensland, *Avoidable Evictions ... Our Next Move* (2012) 28 (**TUQ Report**): '[U]nder the Act, there is no requirement for specific reasons to be provided and the lessor can simply record "without ground" on the notice. This provision can result in evictions in all manner of circumstances including unreasonable circumstances ... This provision can also undermine tenants' willingness to pursue other tenancy rights, such as, repairs and their right to quiet enjoyment, due to their concerns over losing their home and tenancy as well as potentially jeopardising future tenancies'.

<sup>38</sup> See, eg, *Smith v Director of Housing* [2005] VSC 46 (unreported), which identified that for a notice to vacate to be valid it must, on its face, have identified with a sufficient degree of particularity and precision the facts said to constitute the alleged breach (in that case danger under s 244 of the RTA). The Annotated RTA notes that this requirement 'should be complied with when preparing a notice to vacate under any section that states a breach by a tenant or resident and under any section that states an intention of the landlord or owner to use the premises for a purpose incompatible with the continuation of the tenancy' [319.03].



any potential for negotiation; they don't contemplate alternatives to eviction; they make eviction inevitable and risk turning VCAT into a rubber stamp.

As this case study sets out, the consequences of eviction for no reason for tenants are increasingly harsh in a competitive and unaffordable rental market. For Sandra, these consequences included deteriorating mental health, severe stress as a result of fear she and her daughter would be homeless during her daughter's year 12 exams (she made approximately 30 applications for alternative housing) and an increased reliance on housing services, financial counselling and legal services.

### Single mother and daughter finishing year 12 evicted for no reason

Sandra is a single mother. She is university educated but has been dependent on Centrelink payments for income since her last job ended and she had some physical health issues that limited her ability to work.

She has two children, one of whom was completing year 12. The last few years for Sandra have been difficult, and have included a traumatic relationship break down, physical health issues and a subsequent change in her income.

She had lived in her private rental property for about two years and she had been a reliable tenant. Occasionally she made her rent payments two or three days late but she would always inform the real estate agent if there were any issues. The month prior to receiving a 120 day no reason notice, she found herself in a situation where she attempted to pay her rent via credit card but due to systems issues at the real estate agent, the payment did not process for three weeks. Shortly afterwards, she was sent a 120 day no reason notice. She had heard rumours that the house was going to be sold but the notice was not issued for this reason. Without a stated reason, she believed that the notice had to do with the more recent rent issue.

Sandra had no way to defend herself against the notice, she attempted to negotiate with the real estate agent for more time because the move would land right in the middle of her daughter's crucial exam period. The real estate agent was uncompromising. Shortly after the notice was issued, the landlord moved his business from one real estate agent to another. The matter went to VCAT by which time Sandra had sought advice and representation. At VCAT the member agreed to a 30 day postponement of the warrant, pushing out the eviction to allow the family to remain until exams were over.

Sandra managed to move in to a new rental property with a different real estate agent just days before the eviction date. She had applied for upwards of 30 properties. To add to her stress, after leaving the property the landlord applied to withhold some of the bond for cleaning and repairs despite Sandra spending over \$600 on services to get the property clean following her departure. Feeling she had done everything she could to be a good tenant, between the no reason notice and the bond issue she reflects 'it is extremely difficult for a tenant to fight the whole thing ... I find that really frustrating.'

During Homeless Law's consultation with Sandra, she made the following comments about the no reason notice to vacate process:

- "I thought it was serious but I thought there would have been ability to negotiate. I did try and negotiate myself ... then I rang VCAT ... they said there was nothing that could be done".
- "The 120 day notice appeared and that was the first time there had ever been a delay [in rent] ... so I feel it was mainly because of that issue where I could have paid it day one had they been set up for it ... I think that was why we got moved out of there".
- "I didn't feel it was fair because I wasn't behind in my rent, I'd only had that one issue [with rent]".

Sandra described the impact of receiving the notice to vacate and the risk of homelessness:

*I am not stupid, I have a university education, it was horrendous to go through [the previous issues] ... it was no picnic I can tell you. I have suffered from depression, this [the tenancy issue] just put me in a bad place, I felt extremely vulnerable. I started applying for houses. They said when I went to court that I hadn't applied for enough [properties] ... [My current real estate agent] wouldn't allow me anything ... they manage the majority of the rentals in my area ... so I*

*was going to open homes and it just wasn't happening ... If I didn't go to 40 open homes I'd be surprised. I might've put 30 applications in. I know being single, I mean someone said to me once two incomes will be taken over one ... It got very close; I was quite scared that we would have nowhere to go. I had a friend that had said to me that I could go there but you know I was really starting to cry, I was really starting to feel it because I felt that we would end up homeless.*

The tenancy issue was financially disruptive as she lost some of her bond and had to outlay to clean the old house, get a removalist and pay for the new property. In addition to the psychological stress of the move, Sandra's recovery from her physical health issues was set back an estimated four months by the stress of the move and exacerbation of the injury. Her daughter also got sick around the time of the move.

### 4.1.3 No reason evictions from community housing

It is not only in the private rental market that no reason notices to vacate can lead to avoidable evictions. Community housing providers also use no reason notices to manage their tenancies, including:

- Issuing 120 day notices at the commencement of a transitional tenancy; and
- Using no reason notices to evict tenants where they are reluctant to use the cause-based provisions in the RTA (for example, regarding danger, breach of compliance order, illegal use or successive breaches).

### Managing transitional tenancies

Prior to the Court of Appeal's decision in *Director of Housing v Sudi (Sudi)*, VCAT members were considering whether or not a social landlord had complied with section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) when determining applications for possession and, in *HomeGround v Mohamed*,<sup>39</sup> Member Perlman considered the common practice of transitional housing providers using the no reason notice to vacate as a mechanism for managing their limited supply of short-term accommodation. Member Perlman found that in making the decision to issue the no reason notice to vacate under section 263 of the RTA, the landlord had not given proper consideration to the tenant's right not to have his home or privacy unlawfully or arbitrarily interfered with and that the decision was unlawful under section 38 of the Charter.

This VCAT decision, although not binding, made it clear to many organisations who engaged in similar practices that blanket application of policies is not an appropriate mechanism to meet the needs of vulnerable clients and was unlikely to be permitted under the Charter. This VCAT decision drew attention to the fact that this practice risked pushing people into a revolving cycle of rough sleeping and emergency accommodation and, gradually, social housing providers stopped issuing tenants with no reason notices to vacate as standard practice.

The problems with the use of no reason notices to vacate by transitional housing managers were also recognised in the 2010 Inquiry into the *Adequacy and Future Directions of Public Housing in Victoria*, which recommended that the 'Victorian Government reviews the Transitional Housing program to determine its effectiveness in the context of extensive waiting times to access public housing and in context of broader changes to social housing provision'.<sup>40</sup>

In *Sudi*, the Court of Appeal held that, in determining an application for a possession order, VCAT does not have jurisdiction to consider whether the public authority landlord has complied with section 38 of the Charter in making its decision to proceed with eviction.<sup>41</sup> As a result, these questions must be raised via judicial review in the Supreme Court, which is a costly, complex, daunting and inaccessible forum for both tenants and social landlords. There is therefore no accountability for Charter compliance as part of eviction proceedings at VCAT.

Post-*Sudi*, some social housing providers have re-commenced the use of 120 day no reason notices to vacate to manage tenancies and residencies. While they will not always act on these notices and may choose to 'roll over' to a new 120 day tenancy, the fact that an instrument called a notice to vacate, the first step in the eviction process, is issued to tenants at the commencement of their tenancy and can then be acted on by the social landlord if they choose to is a problematic mechanism for managing social housing.

<sup>39</sup> *HomeGround Services v Mohamed* [2009] VCAT 1131 (6 July 2009).

<sup>40</sup> Family and Community Development Committee, *Inquiry into the Adequacy and Future Directions of Public Housing in Victoria* (September 2010) xxxiii.

<sup>41</sup> *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**): Warren CJ [43]; Maxwell P [62]–[63]; Weinberg JA [284]. Their Honours held that, when exercising original jurisdiction, VCAT has no power to undertake a collateral review of the Director's purported administrative decisions on judicial review grounds. Warren CJ stated: 'VCAT should treat relevant purported administrative decisions as being valid unless and until set aside by a court of competent jurisdiction'.



## Managing conduct

Homeless Law also notes that these notices are not just being used to manage short-term tenancies, but are also used by social housing providers to deal with fraught tenancies where landlords are reluctant to use the compliance-based mechanisms under the RTA. Some community housing providers indicate that they are unable to use compliance or breach provisions in the RTA because these notices have a higher evidentiary threshold and certain procedural requirements (such as identifying the reason for the notice to vacate with a sufficient degree of particularity to enable the tenant to understand and respond to the allegations),<sup>42</sup> which can be difficult to satisfy at VCAT. In some cases, community housing providers indicate that they are unable to gather sufficient evidence of breaches, danger or illegal use because witnesses are fearful of giving evidence.

In addition, by issuing a 120 day no reason notice at the beginning of a tenancy, a community housing provider who is not satisfied with a tenant's behaviour can then apply for a possession order after the 120 day period expires. In these circumstances, a tenant is unable to challenge the 120 day no reason notice as retaliatory, as it was issued prior to any disputed conduct occurring. In this way, some community housing providers are able to use the 120 day no reason notice as a way of controlling tenants' behaviour, in circumstances where that behaviour would not be sufficient for the landlord to issue a different type of conduct-based notice to vacate.

Homeless Law appreciates the challenging role of social housing providers in managing complex tenancies with limited resources, but we reiterate that these situations are where accountability is essential. The below case study provides an example of the use of a no reason notice to vacate in response to concerns about conduct. It highlights the importance of procedural safeguards and oversight in these matters.

### Using no reason notices to vacate to deal with compliance

Zoe lived in a rooming house managed by a community housing provider. She received a 120 day notice to vacate for no specified reason. Zoe's landlord applied to VCAT for a possession order and Zoe approached Homeless Law for assistance.

Zoe was on the priority list for transitional housing with her partner Brett, but she had not been able to find suitable accommodation. Zoe is on the disability support pension and suffers from health issues and post-traumatic stress disorder. Zoe believed that she was being evicted because her partner Brett regularly came to visit her at the property and sometimes let himself in, using Zoe's key. Brett had also been accused of threatening and abusing two other residents and did not get along well with one of Zoe's neighbours.

Homeless Law attempted to negotiate with the landlord to find an alternative to evicting Zoe, however the landlord refused to negotiate and insisted that the matter be heard at VCAT. Homeless Law represented Zoe at the VCAT hearing, but there was no ability to defend the application for possession because the notice to vacate was given for 'no reason'.

On Zoe's instructions, Homeless Law asked the VCAT member to adjourn the application on the basis that Zoe would make any undertakings required to address any of the landlord's concerns. The landlord was unwilling to accept this offer. The VCAT member was unwilling to order an adjournment on the basis that there was nothing incorrect about the issuing of the notice to vacate. An order for possession was made, with Zoe given 30 days before a warrant for possession could be executed.

Homeless Law acknowledges the need for community housing providers to manage conduct and to balance the safety and comfort of other tenants or residents. Homeless Law's firm view, however, is that concerns about conduct should be managed via the breach and compliance mechanisms or the cause-based eviction provisions (such as danger, illegal use, successive breaches or breach of compliance order) set out in the RTA. These mechanisms clearly identify the alleged breach and give the tenant or resident an opportunity to address it. If the matter does proceed to VCAT, there are procedural and evidentiary requirements that the landlord must satisfy and the tenant has an opportunity to defend the possession application.

In relation to the suggestion that witnesses are sometimes fearful of giving evidence, Homeless Law reiterates that VCAT is not bound by the rules of evidence and the burden of proof is limited to the balance of probabilities. While some evidence is – and should – be required, hearsay evidence, evidence from police or written statements can all be put to the Tribunal. Homeless Law also reiterates that, in our experience, these situations are extremely rare and it is important to distinguish between the

<sup>42</sup> *Smith v Director of Housing* [2005] VSC 46.

administrative burden of preparing for a compliance or cause-based eviction hearing and the genuine inability to do so. In Homeless Law's experience, as shown by the case study above, no reason notices are being used in response to situations that could and should be addressed via the breach or compliance mechanisms provided for in the RTA.

As Zoe's case highlights, when landlords use no reason notices to vacate to manage conduct, transparency and accountability, and the accompanying safeguards against arbitrary eviction, are lost.

#### 4.1.4 Removing eviction for no specified reason from the RTA

We encourage the Government to look to other jurisdictions in considering the recommendation to remove evictions for no specified reason as a feature of Victorian tenancy law. The following examples may be helpful:

- **Tasmania:** the *Residential Tenancies Act 1997* (Tas) does not allow landlords to terminate periodic tenancy agreements without reason. Section 42, which lists the potential reasons available for a lessor to serve a notice to vacate, does not include a 'no reason' provision (despite being amended on 5 March 2004, 6 May 2005 and 1 October 2014 to include additional grounds for eviction).<sup>43</sup>
- **France:** tenancy law is governed at a national level by the *1989 Tenancy Act* 8541. Article 10 of the *1989 Tenancy Act* provides that where the landlord is an individual, tenancies must generally be made for a minimum duration of three years (absent special circumstances), and on expiration of the term, the tenancy must be renewed for the same period if it has not been terminated by the parties in the meantime. Article 15 provides that the contract can only be terminated for a 'serious and legitimate ground', such as the tenant having breached the tenancy agreement, or a close family member will be living on the premises. There is no provision for termination on no grounds. Article 15 also provides:
  - if the tenant is over the age of seventy and has limited resources, the landlord cannot terminate the tenancy unless the landlord is over sixty or has a low income; and
  - no evictions can take place during the winter months (from 1 November to 15 March).<sup>44</sup>
- **Ontario, Canada:** the *Residential Tenancies Act 2006* does not allow landlords to terminate tenancies for no cause. Even where the tenancy is a fixed term tenancy, a tenant can continue to occupy the premises until:
  - the tenant decides to leave and gives notice; or
  - the landlord and tenant agree to end the tenancy; or
  - the landlord has a specified ground to terminate (e.g. overcrowding, persistent late payment of rent).

The removal of no reason notices to vacate from the Victorian residential tenancy landscape may be resisted on the basis that it will be a disincentive to property investment. As the Consultation Paper recognises, however, evidence regarding the factors influencing individuals' decisions to buy and sell rental properties does not identify the ability to evict for no reason as a relevant consideration. Factors identified include investor age and retirement status, the needs of family members, inheriting money, changing personal circumstances, attitudes to risk and saving and 'to a lesser extent, the market environment'.<sup>45</sup> It is important that any potential impact that removal of this mechanism would have on the decision-making of investors is not exaggerated when considering this reform.

On balance, in the current environment, it is difficult to justify retaining an ability to evict without a clear and transparent reason for doing so.

<sup>43</sup> See Wharton and Craddock, above n 36.

<sup>44</sup> See *ibid* for a detailed discussion of French tenancy law.

<sup>45</sup> Consultation Paper, above n 8, 38 citing Gavin Wood and Rachel Ong, Australian Housing and Urban Research Institute, *Factors Shaping the Decision to Become a Landlord and Retain Rental Investments*, AHURI Final Report No 142 (February 2010) 1, 24, 27–8, 30.

## Recommendation 2: remove no reason notices to vacate from the RTA

The ability of landlords to evict tenants for no specified reason in Victoria creates an imbalance between landlords and tenants, which makes it less likely that tenants will exercise their rights or that landlords will meet their obligations. These notices create a high risk of retaliatory, discriminatory or arbitrary evictions and they remove any role for VCAT to oversee procedural or evidentiary safeguards.

They are no longer an appropriate or justifiable feature of the Victorian residential tenancy landscape and they should be removed from the RTA. Specifically, sections 263, 288 and 314 of the RTA, and related provisions, should be repealed.

## 4.2 Broad and indefinite compliance orders and the perpetual risk of eviction

### 4.2.1 Compliance orders and the eviction process

Where a tenant breaches a duty provision, the landlord may give a breach of duty notice to the tenant under section 208 of the RTA.

If a breach notice is not complied with or the breach is not remedied within the timeframe, the landlord may apply to VCAT for a compensation order or a compliance order.<sup>46</sup> If VCAT is satisfied that the landlord was entitled to give the breach of duty notice and it was not complied with, VCAT may make an order requiring the tenant to remedy the breach and/or require the tenant to refrain from committing a similar breach.<sup>47</sup>

Under section 248 of the RTA, the landlord may give the tenant a notice to vacate if the tenant fails to comply with a compliance order and, if the tenant fails to vacate, the landlord may apply to VCAT for a possession order.<sup>48</sup> VCAT *must* make the order if it is satisfied that the landlord was entitled to give the notice to vacate.<sup>49</sup> VCAT *must not* make an order if it is satisfied that:

- The failure to comply with the order was trivial or has been remedied as far as possible; and
- There will not be any further breach of duty; and
- The breach of duty is not a recurrence of a previous breach of duty.<sup>50</sup>

In Homeless Law's experience, compliance orders are commonly used by landlords to regulate tenant behaviour by requiring them to refrain from breaching one of the following duty provisions:

- A tenant must not cause nuisance or interference;<sup>51</sup> or
- A tenant must keep rented premises clean.<sup>52</sup>

Homeless Law sees that the use of compliance orders under the current legislation places a significant burden on tenants, because of the often indefinite risk of eviction once a compliance order is made. This is particularly the case for tenants who are more likely to be alleged to have breached their duties, including tenants: living in close proximity to neighbours, with children, experiencing family violence, or dealing with mental health or substance dependence issues. In addition to being more likely to be the subject of a compliance order, these tenants are also at greater risk of homelessness in the event of eviction.

The two key features of the compliance process under the current legislation which place tenants at risk are:

- There is no requirement for VCAT to specify a timeframe on a compliance order, or to state that it lapses after a period of compliance. Tenants can be indefinitely subject to these orders, which can place tenants at perpetual and ongoing risk of eviction and reduce their stability and security in their homes; and

<sup>46</sup> *Residential Tenancies Act 1997* (Vic) s 209.

<sup>47</sup> *Residential Tenancies Act 1997* (Vic) s 212.

<sup>48</sup> *Residential Tenancies Act 1997* (Vic) s 322.

<sup>49</sup> *Residential Tenancies Act 1997* (Vic) s 330.

<sup>50</sup> *Residential Tenancies Act 1997* (Vic) s 332(1).

<sup>51</sup> *Residential Tenancies Act 1997* (Vic) s 60.

<sup>52</sup> *Residential Tenancies Act 1997* (Vic) s 63.

- Compliance orders are a stepping stone in the eviction process. When making a decision to evict a tenant based on breach of a compliance order, VCAT has limited discretion to consider the tenant's circumstances and vulnerabilities, and no discretion to consider whether the eviction is a reasonable option and justified given the circumstances of the breach.

#### 4.2.2 The risks of broad and indefinite compliance orders

The RTA does not specify that compliance orders should be time limited, either by requiring VCAT to set a timeframe when making a compliance order or by prescribing a period that compliance orders remain in effect for. It is common that compliance orders made by VCAT have no fixed timeframe so last the entire length of the tenancy, and are so general that a wide range of behaviours could be suggested to breach the order.

The ability to evict on the basis of an alleged breach of a broad and indefinite compliance order can impose particular hardship on tenants in social housing who may have experienced periods of homelessness, have often waited extended periods for their housing and had hoped to have ongoing tenancies where they could establish a safe and stable home.

The way in which compliance orders can be misused when relationships with neighbours break down – and the severe stress and anxiety that this can cause for tenants – is apparent from the two case studies below.

##### **Young man with history of homelessness faces eviction for dog barking and playing music**

After years of homelessness and a traumatic childhood and adolescence characterised by periods in state care and foster homes, Zac was finally securely housed in an Office of Housing property. He had been waiting a long time for a home and shared his apartment with his two cats and dog.

After years in the property and without his knowledge, a neighbour started complaining to the Office of Housing about his dog barking and his music being up too loud. Despite being open to feedback from neighbours, none was given directly to him, instead he was asked to a meeting with housing staff, which he didn't attend. Before he knew it, he found himself in VCAT, unrepresented, alone and unaware of what was about to unfold. He felt, for the most part, the complaints were unfounded. The start of the hearing went well but when the witnesses provided their evidence he became upset, felt targeted and 'ganged up on' and left the hearing. A compliance order was granted.

Zac admits to intentional non-compliance with the order in the days following the hearing, as he was hoping this might provide Office of Housing impetus to act on a request for a transfer. He was seeking a transfer because he had been experiencing discrimination from other tenants on the basis of his sexuality. They would yell offensive names at him, spit at him and throw things through his window. He quickly learnt that despite his desire to move, non-compliance was not a solution and only increased the risk of him being evicted. With this realisation, he started complying and made significant changes to ensure that he couldn't be breached and wouldn't be at risk of having a possession order made against him.

Despite these changes, the other tenant kept complaining. The Office of Housing acted on these complaints and threatened to evict Zac but before applying for a possession order, they offered the opportunity for mediation with the tenant making complaints. Zac attended and felt it went well. He was able to take a support person and the mediation was completed by an independent party. He has maintained his housing but is still hopeful to be able to move out of the property so he can live peacefully with his animals elsewhere.

During Homeless Law's consultation with Zac, he said didn't feel like he was given fair opportunity to share his side of the story, or for the issue to be remedied outside of VCAT. In terms of the pressure that Zac felt once a compliance order had been made he said:

*It just meant that basically I have been creeping around in my own home. I have been so strict on my dog. Because the complaints haven't ceased even when I have been making huge changes in not only my own personal lifestyle but also my home environment.*

*I am anxious here all the time ... it takes me ten minutes to psych myself up before I even walk out the door.*

Zac made the following comments about the compliance order process:

- *"I think there could have been a lot more investigation in terms of the legitimacy of complaints ... there has to be a fine line – what is a warranted complaint and something people just need to get told ... You've all got to live in a small environment, so you are all going to do things that aren't going to sit well with each other every now and then ..."*
- *"I am not unreasonable and if you've got a problem just come and talk to me. Don't call the police, don't call housing, come and talk to me."*
- *"If he had come to me and I had refused to turn it [the music] down, I would say warranted complaint, but he's never even spoken to me about it, so I don't understand why that legitimises the complaint – if you don't tell people how can they know?"*
- *"I didn't realise ... when the hearing happened that the resident [who had made the complaints] would be there ... that he would bring his partner ... and ... that she would basically tarnish my character ... I totally felt like I had walked in to a trap and they were manipulating the situation."*

### **Single mother with two children who has experienced family violence and homelessness facing eviction for dog barking and children making noise in the backyard**

Amy is a single mother with two children. Having fled a violent relationship, she became homeless. Since that time she has spent a number of years trying to recover from the impacts of the violence with the assistance of services and supports. She was finally offered more permanent accommodation through the Office of Housing.

Shortly after moving in to the property with her two children, one neighbour quickly began having issues with her. She was not fully aware of what his complaints were, her only indication was yelling over the fence at her children playing in the backyard or at the dog when it was barking. He didn't approach her to speak about it or explain why this upset him.

She received breach notices for things like playing the music too loud and excessive noise. She spoke with her landlord about these notices citing her concern that the landlord had not actually witnessed the alleged behaviour and querying the extent of the issue. Amy also had some evidence that during some of the times that the alleged breaches were taking place, she was not home. She felt it was unfair that she was simply issued with written notices and then expected to remedy the behaviour when it was her sense that she was doing nothing wrong. She would have also liked the neighbour to approach her to speak about it rather than complain to her landlord. She had had tenancies before and they were uneventful, and even at this property she was surrounded by five houses yet only one neighbour appeared to have an issue.

Despite making some attempts to remedy the issue by restricting her children's time in the backyard and removing the stereo from her house, before long, Amy ended up in VCAT facing a compliance order. Rather than issuing the order, the member ordered mediation but the neighbours declined to participate.

At the time of consultation, the matter had not yet returned to VCAT.

Amy's case study highlights that the compliance order process at VCAT escalates issues very quickly, which are often neighbour disputes that can't be effectively remedied with a compliance order. In her case, the VCAT member ordered mediation which is unusual but an approach that Homeless Law encourages. It was clear for Amy that her neighbours who were the complainants were not interested in resolving the issues, which reinforced her sense that the complaints were vexatious and unwarranted.

Amy made the following comments about the compliance order process:

- *"I don't think it's fair that they send you out a bunch of notices ... as your breach and then you just have to deal with it and go to court. There needs to be a process before, whether it be mediation with the neighbour or whoever is complaining."*

- *“It’s not fair. My daughter was asking me permission to go in the backyard. That’s our home, she doesn’t need permission to go in the backyard. If she wants to go in the backyard, she is allowed to go in the backyard when she wants.”*
- *“There needs to be a better process. You can’t just go from an owner or someone making a complaint to going to VCAT because it’s all one way there. The person in [public] housing doesn’t feel like they have a leg to stand on. I don’t think it is very fair.”*

Amy would have been homeless again if the issues had escalated and she was evicted from the property. She couldn’t afford a private rental property and, although she had applied for a transfer to remove herself from this situation, transfers take years in public housing.

### 4.2.3 VCAT’s decision-making when evicting for non-compliance

Both Amy and Zac felt persecuted, anxious and uneasy in their social housing properties, which were intended to provide them with safety and stability after periods of trauma and homelessness. The allegations against them were not serious and were arguably realities of day-to-day living in close proximity to others. For both Amy and Zac, the complaints that made them the subject of compliance proceedings emanated from one neighbour and both felt that there were factors other than genuine breaches contributing to the complaints (in Zac’s case his sexuality and in Amy’s her neighbour’s general dislike of public housing tenants).

In other cases, for example Jessica’s, there will be genuine concerns regarding compliance, but it will be clear that eviction is not an appropriate or proportionate response.

#### **Hoarding, mental health and imminent eviction for breach of compliance order**

Jessica contacted Homeless Law and instructed that her landlord, a community housing provider, had recently obtained a possession order from VCAT, and would soon be purchasing a warrant for her removal from the premises. Jessica’s landlord was concerned about the condition of the premises, and in particular, the accumulation and cluttering of personal items at the property which had become an issue for several neighbours. Jessica was being evicted for breaching a compliance order.

Jessica had previously told her landlord that the clutter was a symptom of her mental illness and that she was continuing to see medical professionals to assist with this. Jessica instructed that her previous housing manager was aware of her mental health issues and had not sought to evict her as a result of the clutter. Her new housing manager, however, had decided to take legal action against Jessica for breach of a compliance order. Without local family supports or other long-term accommodation options, Jessica was fearful of losing her housing as the instability of homelessness would significantly exacerbate her mental health issues.

Homeless Law assisted Jessica by negotiating with her landlord not to purchase a warrant to remove her from the property. Homeless Law’s negotiation encouraged the social housing provider to explore other options that might help to address their concerns. Homeless Law asserted that, as a provider of low-cost housing to vulnerable tenants on behalf of the government, the community housing provider was a functional public authority under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**). Under section 38 of the Charter, the housing provider was required to give proper consideration to Jessica’s Charter rights, particularly the right to privacy, and to act compatibly with those rights.

As a result of the negotiations, a detailed agreement was entered into between Jessica and her landlord. The agreement allows Jessica to remain in the premises provided that she continues to engage with relevant support services, and to make efforts to address her landlord’s concerns in relation to the premises.

Jessica has kept her housing and this stability has allowed her to continue engaging with relevant support workers to improve her health and address the clutter that had accumulated at her property.

As the RTA currently stands, there is limited room for the complexities behind compliance proceedings to be considered either in the compliance process or in subsequent eviction proceedings. As mentioned above, when VCAT is determining an application for a possession order based on breach of a compliance order, it must not make the order when it is satisfied that:



- The failure to comply with the order was trivial or has been remedied as far as possible; *and*
- There will not be any further breach of duty; *and*
- The breach of duty is not a recurrence of a previous breach of duty.<sup>53</sup>

The requirement to cumulatively meet these criteria makes it difficult to satisfy VCAT that a possession order cannot be made under section 332 of the RTA.

Further to this, there are no formal steps that landlords or tenants are required to take to resolve or mediate any issues that have led to compliance proceedings. This means that often, the tenant will not have had any opportunity to discuss the behaviour or concerns which may have led to the complaints, breach notices, and subsequent compliance order proceedings. This process at VCAT can be daunting for tenants, particularly where they have not had an opportunity to discuss the circumstances which lead to the allegations outside the Tribunal room. As outlined in Zac's case study, this can be problematic because even if a tenant has made an effort to change their behaviour, it may not prevent them from having complaints made against them and feeling victimised and at a loss in terms of secure housing.

While Amy and Zac were both offered mediation (discussed in the First Submission and to be addressed in more detail in response to *Issues Paper 6: Dispute Resolution*), in Homeless Law's experience, it is rare that mediation is initiated by the landlord or ordered by VCAT. In Jessica's case, for example, while her mental illness was clearly contributing to her conduct and she was working with a support team to address these issues and remedy her non-compliance, VCAT made a compliance order and subsequently a possession order i.e. the limited discretion under section 332 was not sufficient for VCAT to decline to make a possession order. It was only through robust negotiation with the landlord that Jessica's eviction into homelessness was able to be prevented.

## 4.2.4 Improving compliance mechanisms under the RTA

In designing reforms to the compliance regime, the Government should consider the following jurisdictions:

- **Australian Capital Territory:** the ACT Civil and Administrative Tribunal (**ACAT**) is empowered, in relation to an application about a tenancy dispute or occupancy dispute, to make an order requiring performance of a residential tenancy agreement or occupancy agreement.<sup>54</sup> If the tenant breaches an order, the landlord may apply to ACAT for a termination and possession order. ACAT may make an order if it is satisfied that it made the order, that the order was breached and that the breach justifies termination.<sup>55</sup> However, ACAT has discretion to refuse to make a termination and possession order, if it is satisfied that:
  - It is appropriate and just to do so; and
  - The tenant:
    - has remedied the relevant breach; or
    - undertakes to remedy the breach within a reasonable specified period and is reasonably likely to do so.<sup>56</sup>
- **Scotland:** the Scottish model is discussed in more detail in the Annexure, but in brief, as part of Scotland's commitment to homelessness prevention, the *Housing (Scotland) Act 2001* provides that for certain types of tenancy agreements, the court must be satisfied that the landlord has a statutory ground for the recovery of possession and that 'it is reasonable to make the order' for possession. The reasonableness test incorporates consideration of the nature, frequency and duration of the action by the tenant leading to the application to evict, the degree which the tenant is responsible for the eviction proceedings, the effect of the tenant's conduct on others and whether the landlord has considered other possible courses of conduct.

Compliance orders which are broad and often indefinite in length can place tenants at perpetual risk of eviction. They are susceptible to misuse in disputes between neighbours, and can be a blunt tool for dealing with complex circumstances of tenants who need support to meet their obligations and whose vulnerabilities will be significantly exacerbated if they lose their housing.

<sup>53</sup> *Residential Tenancies Act 1997* (Vic) s 332(1) (emphasis added).

<sup>54</sup> *Residential Tenancies Act 1997* (ACT) s 83(b).

<sup>55</sup> *Residential Tenancies Act 1997* (ACT) s 48(1)(b).

<sup>56</sup> *Residential Tenancies Act 1997* (ACT) s 48(2)(a). Alternatively, ACAT can suspend a termination and possession order (for a maximum period of 3 weeks) if the tenant would suffer significant hardship if it was not suspended (s 48(2)(b)).

In an environment where eviction of vulnerable people carries a significant risk of homelessness, the compliance regime under the RTA should be revisited to minimise the risk of arbitrary, unreasonable or avoidable evictions.

### **Recommendation 3: compliance orders should be time limited and eviction for breach should be subject to a reasonableness requirement**

Compliance orders should be worded as specifically as possible, and should be limited to a period of six months before lapsing. Only where subsequent orders are needed should there be discretion for them to be extended for a period of up to 12 months.

VCAT members should be given more flexibility when determining whether a tenant should be evicted for breach of a compliance order, including:

- Amending section 332(1)(b) of the RTA so that each of the subsections are alternative bases on which a possession order can be refused; and
- Giving VCAT members discretion to consider whether eviction for non-compliance is reasonable in the circumstances (which includes consideration of the nature, frequency and duration of the action by the tenant leading to the application to evict, the degree which the tenant is responsible for the eviction proceedings, the effect of the tenant's conduct on others and whether the landlord has considered other possible courses of conduct).

## **4.3 Meaningful protection of rights: Improving engagement and attendance at VCAT**

As the Issues Paper identifies, crucial elements of security of tenure are the tenant's choice to stay or leave and their legal protections regarding their tenancy. As the statutory body responsible for determining disputes between landlords and tenants, VCAT has a central role to play in upholding these protections, including through adjudication of eviction proceedings and applications for compliance, compensation or repairs.

Unfortunately, rates of tenant engagement with, and attendance at, VCAT hearings remain low, which means rights are not being exercised and protections are not being realised. Homeless Law frequently assists tenants who have had a VCAT possession order made against them in their absence. In many instances, Homeless Law clients were unaware that a hearing was taking place, or were otherwise unable to attend the hearing due to a range of circumstances outside their control (eg incarceration, illness or caring obligations).

This lack of engagement further weakens the position of tenants relative to landlords and increases the risk that evictions will proceed with limited oversight or accountability.

Based on our casework and the experiences of our client group, Homeless Law recommends the following measures to improve tenant attendance at VCAT:

- Changing the name and content of the current notice to vacate; and
- Changing the form and content of VCAT's notices of hearing for residential tenancies matters.

The current notices weaken security of tenure for tenants by discouraging them from understanding or exercising their rights. The proposed measures would make it more likely tenants would understand their rights and seek to assert them through the VCAT process.



### 4.3.1 The extent of tenant non-attendance at VCAT

Within VCAT's nine lists, the Residential Tenancies List is busiest, accounting for almost 70% of VCAT's entire case load in 2014–15.<sup>57</sup> VCAT members sitting in the Residential Tenancies List determine a range of different matters, but most commonly determine applications by landlords for possession and compensation orders due to rent arrears.<sup>58</sup> Once made, these orders allow landlords to purchase warrants to evict tenants, and to be compensated for financial loss out of a tenant's bond.

Available data from VCAT's 2014–15 annual report confirms that landlords use VCAT far more often than tenants, with more than 92% of the 59,184 applications received by the Residential Tenancies List in 2014–15 being initiated by landlords, and only 6% by tenants or residents. Worryingly, the most recent available information about the rates of tenant attendance at VCAT indicates that in 2010, up to 80% of hearings were unattended by tenants.<sup>59</sup>

This data indicates that there are currently significant numbers of possession and compensation orders being finalised in the absence of affected tenants. Although the issue of tenant non-attendance has been formally acknowledged by VCAT in 2010, apart from the introduction of SMS hearing notifications in 2009 there have been no significant steps taken to increase tenant attendance rates at VCAT for over five years. Homeless Law is also not aware of an evaluation of the effectiveness of the SMS hearing reminder model, or any revised tenant non-attendance rate since the 2010 figures were published.

### 4.3.2 The benefits of increasing tenant attendance at VCAT

Homeless Law routinely assists tenants who have missed VCAT hearings by helping them lodge applications for review, which often leads to the underlying VCAT order being revoked and varied under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**). The most common example of this occurs when Homeless Law assists a tenant to apply for a possession order for rent arrears to be re-opened and replaced with a negotiated payment plan. This outcome gives the tenant a chance to avoid eviction with a plan in place to prevent the landlord from incurring financial loss.

#### The importance of tenant attendance: 10 eviction decisions reversed

In the first 12 months of Homeless Law's Women's Homelessness Prevention Project (**WHPP**), 62 clients were assisted and 33 finalised outcomes were recorded for clients at risk of eviction for rent arrears. Of this number, 25 women were able to maintain their existing tenancy. In 10 of these cases, the Homeless Law lawyers lodged a review application in relation to a possession order that had been made in the client's absence. All 10 review applications were accepted by the Tribunal, which prevented further action being taken to end the tenancy.

These results indicate that for many tenants facing eviction proceedings, attendance at VCAT can significantly alter the outcome in their favour, and provide an important opportunity to avoid eviction and work towards repaying their rent arrears.

In addition to playing a critical role in avoiding unnecessary evictions into homelessness, from VCAT's perspective, ensuring tenants can access appropriate legal advice and assistance as early as possible when eviction proceedings are commenced is likely to result in fewer VCAT hearings being required, because:

- There is an increased likelihood that matters will resolve by consent, which may remove the need for a VCAT hearing; and
- There is a decreased likelihood that tenants will fail to appear at their initial hearings and subsequently submit applications for review upon obtaining information about their legal options after the hearing.

It is vitally important for tenants to be aware of their legal rights and to participate in the VCAT process. An informed tenant who participates in proceedings is far more likely to be able to maintain their tenancy than an uninformed tenant who fails to appear. The notices received by tenants should play a critical role in conveying important information about the process and the tenant's options. It is extremely important that this documentation clearly and accurately communicates important information about the proceedings to tenants and puts them in a position to understand and engage with their rights in relation to their tenancy. The current confusing and opaque notices do not facilitate this understanding or engagement and therefore undermine security of tenure.

<sup>57</sup> VCAT Annual Report, above n 5, 20. In this period, VCAT's Residential Tenancies List finalised 58,146 cases.

<sup>58</sup> Ibid.

<sup>59</sup> The Hon Justice Iain Ross, *Transforming VCAT* (Discussion Paper, VCAT 2010) 9.

### 4.3.3 Terminology and content of notices to vacate

In Homeless Law's view, there are a number of ways that the current terminology and content of notices to vacate could be improved to increase tenants' awareness of their rights and the likelihood that they will engage with VCAT hearings relevant to their tenancy.

- **Amending the misleading title:** the term 'notice to vacate' is misleading as it creates the impression of finality, rather than identifying that it is only the initial step in an eviction process that in many cases is avoidable for a tenant. Homeless Law staff routinely provide advice to tenants who have received a notice to vacate from their landlord, and have interpreted it as a finalised order to vacate their home by the specified date. Many of these tenants are initially of the belief that failure to comply with the notice will result in penalties being imposed, or additional costs being incurred. For this reason, they are more likely to vacate a premises prematurely, and less likely to attend any subsequent VCAT hearings to present their case or defend the eviction proceedings. In our view, by replacing the term 'notice to vacate' with something that more accurately reflects the legal status of the notice (e.g. 'request to vacate' or 'notice of intention to end tenancy agreement'), fewer tenants would be likely to prematurely vacate their premises, and would be more likely to attend relevant VCAT hearings without fear of penalties being imposed for failure to comply with a request.
- **Providing information on notices to vacate about legal services that can assist tenants:** the lack of any referral information for tenants on the notice to vacate represents a missed opportunity to encourage tenants to engage with their rights and subsequent VCAT processes. Currently, the prescribed form of a notice to vacate set out in the regulations does not require any referral information to be included with a notice to vacate, other than a notation that a tenant can contact VCAT if they wish to challenge the validity of a notice to vacate.<sup>60</sup> In practice, most notices to vacate that Homeless Law sees do not contain this notation, and instead refer tenants to Consumer Affairs Victoria for assistance. This is true of notices to vacate issued by private landlords, real estate agents, and the Director of Housing in relation to public housing properties. While representatives of both VCAT and Consumer Affairs Victoria may be able to provide initial assistance to tenants who have received a notice to vacate, neither of these organisations will be able to provide legal advice or ongoing casework to tenants, and would need to refer tenants elsewhere for that type of assistance. In Homeless Law's view, the prescribed form of a notice to vacate rented premises could easily be amended so that contact details and websites of relevant legal services (e.g. Victoria Legal Aid, Tenants Union Victoria, Homeless Law and local community legal centres) are instead included on these notices.

These changes would increase tenants' ability to understand their options and to obtain legal advice and representation at the earliest stage in the eviction process. This has significant potential to increase the number of negotiated outcomes and potentially avoid the need for a VCAT hearing. It would also reduce the need for urgent review applications to be lodged where tenants have missed VCAT hearings and are seeking legal advice in the final stages of the eviction process when they are at imminent risk of forced removal from the rented premises.

### 4.3.4 Form and content of VCAT notice of hearing

Once a party has made an application to VCAT and a hearing date has been set by the Tribunal, a notice of hearing must be sent to all parties, notifying them of the time, date and location of hearing, along with other information deemed relevant by VCAT.<sup>61</sup> Notices of hearing for matters in the Residential Tenancies List (both initial hearings and hearings to determine an application for review under section 120 of the VCAT Act) are presented as a double-sided folded and sealed document that, until opened, provides a recipient with no indication that details of an upcoming VCAT hearing are contained inside.

There are a number of ways that the current VCAT notice of hearing could be improved to better engage with tenants and encourage their attendance at the Tribunal.

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<sup>60</sup> Residential Tenancies Regulations sch 1 sets out form of the notice to vacate.

<sup>61</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 122.

- **Review the form of the notice of hearing:** the physical form of the notice of hearing is confusing, difficult to open and provides no indication of the importance of the enclosed information. Tenants could mistake the notice for junk mail and discard or ignore it. Homeless Law understands that VCAT has continued to use these difficult to access notices of hearing because of technological limitations, but given the ongoing issue of tenant non-attendance and the increased likelihood of preventable evictions that this presents, we strongly recommend that a newer and more accessible form be introduced.
- **Review the content of the notice of hearing:** the information contained on VCAT's notice of hearing does little to assist people to understand their rights in relation to an upcoming VCAT hearing, and where they might seek legal assistance in relation to it. Notably, in 2010 then-President of VCAT Justice Bell acknowledged this widespread feedback in relation to the notices of hearing, along with the need to ensure that relevant information was presented in plain English.<sup>62</sup> Despite this consistent feedback, VCAT's notices of hearing for Residential Tenancies List matters do not provide any information for tenants about legal or other services that can assist them prior to their hearing. As outlined above in relation to the current prescribed form for a notice to vacate, inclusion of this information would be straightforward and could lead to a significant increase in tenant attendance, as well as a reduction in matters proceeding to VCAT, and an increase in matters that do proceed to hearing being resolved by consent. In addition to this referral information, the detail provided in the current notice of hearing for residential tenancies matters could be better targeted towards tenants, and include: a clearer step-by-step process for making adjournment requests; email contact information for the residential tenancies registrar; and information about the right to apply for VCAT ordered payment plans for rent arrears evictions. Targeting the information towards tenants in this way would be appropriate given that the vast majority of applications in VCAT's Residential Tenancies List are made by landlords against tenants, and it is therefore more likely that landlords will already be cognisant of their rights and options.

The protection of tenant rights and the meaningful ability to choose whether to stay or leave a property are seriously jeopardised if tenants are not supported or encouraged to understand or exercise their rights. In a market that is already weighted against tenants in terms of availability, affordability, quality and rights, it is critical that the documentation regarding tenancy proceedings aims to facilitate tenant engagement. The current documentation is inadequate and should be amended as a matter of priority.

#### **Recommendation 4: Amend the existing notice to vacate and VCAT notice of hearing to better engage with tenants and improve attendance rates at VCAT hearings**

Homeless Law recommends:

- Amending the RTA to change the term 'notice to vacate' to prevent tenants interpreting these notices as a final requirement to leave.
- Amending the current prescribed form for notices to vacate to include referral information for relevant legal services that may be able to assist tenants.
- Changing the physical form of the VCAT notice of hearing to ensure the information provided is reaching as many tenants as possible.
- Changing the information provided in VCAT notices of hearing for Residential Tenancies List matters to provide relevant information for tenants, including referrals to legal services that can assist them pre-hearing.

<sup>62</sup> See, eg, The Hon Justice Kevin Bell, *One VCAT – President's Review of VCAT* (25 February 2010) 23: 'The need to redesign forms and correspondence in plain English was frequently emphasised' (**One VCAT Review**).

## 4.4 Notice periods that recognise realities of the rental market

The RTA contains a number of ‘no fault’ termination provisions, which allow a landlord to end a tenancy where the tenant is not suggested to have done anything wrong. Under these provisions, a landlord is entitled to give a tenant a notice to vacate with a termination date not less than 60 days after the date the notice is given, including where:

- The landlord intends to repair, renovate or reconstruct the premises and the works cannot be properly carried out unless the tenant vacates the property (section 255).
- The landlord intends to demolish the premises (section 256).
- The premises are, immediately after the termination date, to be used for the purposes of a business or for any purpose other than letting for use principally as a residence (section 257).
- The premises are, immediately after the termination date, to be occupied by the landlord or the landlord's partner, son, daughter, parent or partner's parent or another person dependent on the landlord (section 258).

As reiterated throughout this submission, since 1997 when the RTA was introduced, the rental market has changed considerably, becoming more competitive and unaffordable (as discussed in parts 2 and 4.1 above). In this environment, it is no longer reasonable to expect tenants to be able to secure alternative accommodation in a two month period.

Revisiting no fault notices in the context of the current rental market requires acknowledgement that the risk to tenants of being unable to access appropriate and affordable housing in 60 days has come to outweigh the landlord's need for flexibility in relation to no fault evictions. The potential consequences for tenants include homelessness and the social isolation and risks to health and wellbeing that it brings.

Accordingly, the notice required under sections 255 to 258 of the RTA should be increased to 120 days.

### **Recommendation 5: Notice periods for ‘no fault’ evictions should be increased**

The current shortage of affordable housing means that it is no longer appropriate or justifiable to maintain the 60 day notice period for no fault notices to vacate. To properly reflect the difficulty of finding alternative accommodation, the required period of notice should be increased to 120 days.

## 4.5 Postponement of warrants in recognition of hardship

Where Homeless Law is unable to avoid possession orders for our clients – either via negotiation or successful defence of an application for possession – we frequently rely on section 352 of the RTA, which allows VCAT to postpone the issue of a warrant of possession for up to 30 days if it is satisfied that the tenant would suffer hardship greater than any hardship that the landlord, site owner or mortgagee would suffer because of the postponement.

Homeless Law strongly supports this provision in the RTA as one of the few mechanisms which gives VCAT discretion to contemplate the tenant's hardship, including their lack of alternative accommodation options and the potential impact of eviction on their health and wellbeing.

We note, however, that in the context of the competitive and highly unaffordable rental market, combined with lengthy waitlists for social housing, 30 days is no longer a sufficient postponement to minimise the tenant's hardship by allowing time to access alternative accommodation.

In line with the review's focus on modernising the RTA and balancing the needs of landlords and tenants in a dramatically different housing landscape to that which existed in 1997, section 352 should be amended to allow for a postponement of up to 90 days.

## Recommendation 6: VCAT should have discretion to postpone evictions for up to 90 days

Section 352 could be amended to give VCAT discretion to postpone the issue of the warrant of possession for a period of up to 90 days. VCAT could be required to consider the following factors when determining whether to postpone the issue of a warrant of possession:

- The length of time the tenant has resided at the property;
- Whether the tenant is vulnerable, for example, due to disability, illness, mental health, family violence or age; and
- The likelihood the tenant will become homeless.

## 4.6 Lack of enforcement under the RTA undermines security of tenure

Through our eviction prevention work, Homeless Law has become increasingly aware that the enforcement of non-monetary orders made by VCAT – most commonly orders restraining a landlord from carrying out an unlawful eviction or requiring that a tenant be given re-entry to the property after an unlawful eviction – is an area of tenancy regulation that is not functioning effectively and, accordingly, that is putting tenants at risk.

In Homeless Law's experience, Victoria Police are the authorised officers most commonly called upon to enforce non-monetary orders and offences under the RTA, however, there is a lack of process, understanding and communication between VCAT and Victoria Police which means tenant-landlord disputes are regularly dismissed as 'civil issues' that do not warrant police involvement.<sup>63</sup>

In summary, the regulatory framework is:

- **Application:** a tenant can make a general application to VCAT under section 452 of the RTA on the basis that a dispute has arisen under the tenancy agreement or there has been a breach of the tenancy agreement.
- **Order:** under section 472 of the RTA, VCAT can make an order restraining action in breach of a tenancy agreement, including by restraining a threatened unlawful eviction or compelling the landlord to allow the tenant re-entry to the property if an unlawful eviction has occurred.
- **Provision to Victoria Police:** VCAT registry staff fax a copy of the order to the local police station, but without any general guidance about the role or powers of Victoria Police in relation orders of this nature. The RTA does not compel VCAT to send the order to Victoria Police.
- **Offence:** section 480(1) of the RTA provides:

### *Offence to fail to comply with determination of Tribunal*

*A person to whom a determination of the Tribunal under this Act applies must comply with that determination.*

*Penalty: 20 penalty units and 5 penalty units for each day the non-compliance continues after the time within which the person is required to comply with the determination, up to a maximum of 60 penalty units.*

The maximum penalty under section 480 of the RTA was increased in 2010 and the Second Reading Speech at the time acknowledged: 'at current levels, penalties for breaches of the [A]ct do not provide an adequate deterrent to illegal action'.<sup>64</sup>

<sup>63</sup> See *Residential Tenancies Act 1997* (Vic) s 510C which identifies authorised officers as including a member of the Victoria Police force, the Director of Consumer Affairs Victoria, or a person authorised by the Director. In practical terms, Victoria Police are most frequently called upon to enforce non-monetary VCAT orders with minimal involvement from Consumer Affairs Victoria.

<sup>64</sup> *Hansard*, Residential Tenancies Amendment Bill Second Reading Speech (12 August 2010) 3316.

- **Enforcement:** under section 508 of the RTA, proceedings for an offence under the RTA can be brought by a member of Victoria Police or by the Director of Consumer Affairs Victoria (or someone they authorise).

In practice, however, when Victoria Police are called upon to enforce these orders, they regularly state that they do not have a part to play in the enforcement of the RTA, and that tenants are expected to enforce their rights themselves.

This is not accurate. While interactions between landlords and tenants are traditionally considered to be civil matters rather than criminal law issues, members of Victoria Police are empowered to prosecute offences under section 508 of the RTA, and it is a summary criminal offence to breach orders made by VCAT under section 480 of the RTA.

As the two case studies below show, inaction from members of Victoria Police in relation to breaches of restraining orders issued by VCAT puts tenants at risk of unlawful eviction and homelessness.

### **Refusal to enforce VCAT order leads to woman sleeping rough**

After roughly a month of renting, Rachel came home to find that the locks to the property had been changed, and she was unable to access her home and belongings. This had happened without being issued with a notice to vacate, and no possession order had been obtained by the landlord.

Rachel sought recourse through VCAT and a restraining order was made in her favour, which ordered the landlord to grant her access to the property. With this order she attended a police station nearby the residence with the hope that the police would facilitate her access to the property. The police however, stated that the VCAT order wasn't enough, and that a warrant would additionally be required for them to assist in the matter.

As a result of the police's reluctance to enforce the order, Rachel was unable to gain access to her property and she was concerned about her possessions that were still in the property. Rachel called the real estate agent about accessing her possessions and she was informed that her personal property from inside the apartment had been left in the stairwell. When she went to gather her things, they weren't there. At this point, Rachel only had the clothes that she was wearing when the locks were changed, and she has been unable to reclaim any of her possessions.

Despite attending VCAT on three occasions with orders for the landlord to allow her access to the property, no authorised body would enforce the orders on her behalf. She had to use what little money she received from her Disability Support Pension on hotels, and she was forced to shower and eat at homelessness services.

The money she could have used to secure another private rental ran out and she found herself sleeping rough.

### **Police treat unlawful acts of landlord as a minor dispute**

Tammy was a tenant in a private rental with her daughter. As a result of losing custody of her daughter in a Family Court hearing, her income was reduced to a Newstart Allowance and her tenancy became unaffordable. Tammy soon began to fall behind in payments, and she was issued with a notice to vacate for rental arrears, but it was invalidly issued.

When Tammy realised that the tenancy was too expensive to maintain, she started to pack her belongings and prepared to move out prior to the landlord issuing proceedings at VCAT. During this time however, the landlord came the premises without giving the required notice and he attempted to force his way through the front door. He asserted that Tammy needed to be out of the premises by that day, and proceeded to turn the water off and padlock the water metre.

Tammy contacted Homeless Law and we assisted her to apply for a restraining order from VCAT, which was granted. Despite this, the landlord attended the premises on two further occasions and Tammy called the police looking for assistance. In the second instance Tammy feared for her safety and locked herself in her car. Tammy indicates that it took two calls to the police and then another thirty minutes for the police to arrive. They appeared to dismiss the restraining order and the severity of the matter and approached it more like a casual dispute which they were helping resolve, rather responding to a breach which had criminal implications.

Wanting to seek a remedy for the landlord's actions, Tammy successfully applied to VCAT for compensation from the landlord for interfering with her rights to exclusive possession and quiet enjoyment of the property. The slow and unresponsive action by the police had however left her unsure and uncertain about her protection from unlawful eviction.

The uncertainty regarding Victoria Police's ability to enforce non-monetary orders made by VCAT presents a risk these orders will be meaningless and that tenants will have no protection against unlawful evictions or other interference with their rights as a tenant.

### **Recommendation 7: Training and policies to improve Victoria Police's understanding of their role in enforcing VCAT restraining orders**

To ensure that tenants' rights are being upheld, there should be clearer processes for (1) applying to VCAT for a restraining order under the RTA; (2) enforcing those orders; and (3) enforcing penalties against landlords that breach restraining orders.

VCAT's correspondence to Victoria Police should inform police of permitted action in enforcing these orders.



## 5. The impact of rent increases in a highly unaffordable rental market

This part of the submission addresses the following questions from the Issues Paper:

- 20 What issues are there regarding the way in which provisions for rent increases in the Act affect security of tenure?
- 21 What would be an appropriate alternative to the current frequency of allowable rent increases of no more than one every six months?
- 22 What would be an appropriate alternative notice period for rent increases to the current 60 days?
- 23 What would be an appropriate arrangement for rent increases during fixed term agreements to provide both tenants and landlords with certainty and choice?

As the figures and case studies in part 3.3 above make clear, Victorian tenants are struggling to afford their rent and their tenancies are failing as a result: 46,532 people in Victoria sought assistance from a specialist homelessness service in 2014–15 because of financial issues, including 20,663 who cited housing affordability stress as the reason they needed this assistance.<sup>65</sup>

### 5.1 Tenants living in housing stress

For many renters, rental payments are their primary monthly expense. As the Consultation Paper recognises, 'private rental is becoming less affordable, particularly for low income households'.<sup>66</sup> In this climate of unaffordability and high demand for properties, many Victorian renters are forced to spend a very high proportion of their weekly income on rental payments. Accordingly, for renters with limited disposable income, even small increases in rent can dramatically increase the likelihood of rental arrears and eviction.

To demonstrate the effect a rental increase can have on low income tenants, below is a fortnightly budget from one of Homeless Law's clients, Tessa. As a result of an increase in rent, Tessa incurred rental arrears and was forced to move into a youth refuge. Tessa's budget indicates that 59% of her fortnightly income was spent on rent. Prior to the increase in rent, Tessa was already incurring hundreds of dollars of debt each fortnight in order to pay for child care, fuel and groceries. Tessa's budget had no room to absorb an unexpected increase in rent, resulting in her eviction.

Income per fortnight	
Government allowance	\$1,099
<b>TOTAL INCOME</b>	<b>\$1,099</b>
Expenses per fortnight	
Rent	\$652
Telephone/mobile	\$22.50
Groceries	\$150
University/TAFE fees	\$60
Books and uniform	\$60
Fuel	\$150
Medicines	\$30
Child care	\$330
Restaurants and take away	\$80
Movies and DVDs	\$10
<b>TOTAL EXPENSES</b>	<b>\$1,544.50</b>
<b>FORTNIGHTLY NET RESULT</b>	<b>-\$445.00</b>

As the above budget indicates, even an increase in rent that is objectively small can impose significant hardship on low income tenants.

<sup>65</sup> AIHW Report, above n 2.

<sup>66</sup> State Government of Victoria, *Residential Tenancies Act Review: Laying the Groundwork – Consultation Paper* (June 2015) (Consultation Paper).



## 5.2 Reducing the impact of rent increases on security of tenure

The following amendments could be made to the RTA to reduce the impact of rent increases on security of tenure for Victorian tenants, including through protecting against unreasonable and/or retaliatory increases in rent by a landlord:

- **Limiting rent increases to once every 12 months:** Section 44(4A) of the RTA provides that a landlord must not increase the rent payable under a tenancy agreement at intervals of less than 6 months. Given the serious consequences a rent increase can have, landlords should not be entitled to increase rent at intervals of less than 12 months. This would more fairly balance the flexibility afforded to landlords against the stability and predictability needed by tenants. This is consistent with the position in Tasmania, where rent increases are limited to once every 12 months.<sup>67</sup>
- **Reduction of fixed term tenancy due to increase in rent:** Recognising the extent of unaffordability in the Victorian rental market, increases in rent during fixed term tenancies (permitted if the agreement provides for a rent increase within the fixed term under section 44(4) of the RTA), should be a factor that can be considered in an application for a reduction of the fixed term tenancy agreement. Some options for achieving this include:
  - Amending section 234(2A) of the RTA to refer to a substantial increase in rent as a factor indicating that the applicant has experienced an unforeseen change in circumstances (noting that although the rent increase was provided for in the agreement, the amount of the increase or its impact on the tenant may still be unforeseen). Whether or not a rental increase is substantial could be determined with reference to the amount of the increase and the applicant's financial capacity.
  - Enacting a similar provision to section 66(3) of the *Residential Tenancies Act 1986* (NZ). The section provides that the a fixed term tenancy can be terminated where there is a rent increase that:
    - (a) Is substantial;
    - (b) Is of an amount that the tenant could not reasonably foresee when he or she entered into the tenancy agreement; and
    - (c) Has caused, or will cause, serious hardship.

These provisions would operate compatibly with the sections 45 to 47 of the RTA, which provide a mechanism for tenants to seek an order declaring that the proposed rent is excessive and directing what the rent will be for a specified period. Sections 45 to 47 of the RTA operate where the tenant is seeking to maintain the tenancy, whereas the above reforms recognise that tenants may need to forfeit the tenancy in response to the rent increase and that they should not be penalised for doing this.

### Recommendation 8: Reducing the impact of rent increases on security of tenure

In a deeply unaffordable private rental market, increases in rent are undermining security of tenure and putting tenants at risk of homelessness. Rent increases should not be permitted more than once per year and amendments should be introduced that allow tenants to exit a fixed term tenancy where a substantial or unforeseen rent increase will cause them severe hardship.

<sup>67</sup> *Residential Tenancies Act* (Tas) s 20(3). The Scottish Parliament is also currently considering a minimum 12-month period for rental increases. See the Annexure for more details about the Private Housing (Tenancies) (Scotland) Bill.

## 6. Repairs and maintenance: Barriers to safe and secure housing

This part of the submission addresses the following question from the Issues Paper:

### Repairs, maintenance and modifications

24 What issues are there regarding the way provisions for repairs, maintenance and modifications in the Act affect security of tenure?

In the context of a highly unaffordable, deeply competitive rental market with weak protections for tenants, tenants can be reluctant to ‘rock the boat’ by requesting repairs, maintenance or modifications to their property because of the risk that landlords will choose to terminate the tenancy rather than adhere to their obligations.<sup>68</sup> As the case study below identifies, tenants who have the least alternative accommodation options if evicted are also more likely to need their repair rights during their tenancy (because they are more likely to be renting older properties in worse condition). This reluctance to assert their rights can leave tenants and their families living in substandard accommodation that undermines security of tenure. Even the limited rights and protections that are available to tenants in relation to the quality of their housing are meaningless in the face of the significant imbalance in power between landlords and tenants in Victoria.

### 6.1 Power imbalance for low income tenants asserting repair rights

As discussed throughout this submission, eviction for rent arrears is the most common reason Homeless Law’s clients are at risk of homelessness: it made up 68% of all eviction matters Homeless Law ran in 2014–15. Many Homeless Law clients at risk of eviction for arrears are experiencing rental stress and in some cases severe rental stress (i.e. paying 50% or more of their income toward rent). In addition to making an existing tenancy precarious, this can also severely limit alternative housing options in the event of eviction given the wait times for access to social housing and the increasing unaffordability of private rental properties for low income individuals. This dynamic can contribute significantly to the power imbalance between tenants and their landlords, and can be a barrier to these tenants asserting their rights in relation to repairs required at the rented premises.

For some tenants, the risk that a repairs request will result in their landlord deciding to terminate a tenancy agreement rather than investing resources to rectify the maintenance issues can be a major deterrent from exercising their rights under the current RTA repairs framework. In addition, it is more likely that rental properties targeted at lower income tenants will require upgrades, or be fitted with lower-quality fixtures and components, which increases the likelihood that a tenant may need to rely on their repair rights. In this way, the tenants who have the least alternative accommodation options if evicted are also more likely to need to rely on repair rights during their tenancy.

The following case study provides an example of the ways in which vulnerable tenants can face retaliatory action when seeking to assert their repair rights, as well as the way in which effective legal representation can help to correct the power imbalance that becomes apparent in these situations.

<sup>68</sup> See also Tenants’ Union of Queensland, *Avoidable Evictions ... Our Next Move* (2012) 28 (TUQ Report): ‘[U]nder the Act, there is no requirement for specific reasons to be provided and the lessor can simply record “without ground” on the notice. This provision can result in evictions in all manner of circumstances including unreasonable circumstances ... This provision can also undermine tenants’ willingness to pursue other tenancy rights, such as, repairs and their right to quiet enjoyment, due to their concerns over losing their home and tenancy as well as potentially jeopardising future tenancies’.

## Single mother of five avoids eviction for rent arrears but faces retaliation due to repairs requests

Nicola is a 38 year old woman with five children in her care. She lives in a private rental property and her only source of income is Centrelink payments. She had recently experienced family violence which led to a large child care bill being incurred whilst she was in hospital and unable to look after her children. This contributed to rent arrears as Nicola prioritised her child care bill over her rental obligations.

When Nicola came to Homeless Law for assistance, a VCAT possession order had already been made against her due to rent arrears and she was at immediate risk of eviction. Nicola also told the Homeless Law lawyers that soon after moving in she'd realised the dishwasher didn't work, and that there were other repair issues at the premises. Despite repeated requests over several months, the landlord was refusing to replace the dishwasher until the arrears were repaid. Nicola had been issued with a 120 day no reason notice to vacate when she came to Homeless Law, which she thought was in retaliation to her repairs requests.

The Homeless Law lawyers assisted Nicola to re-open the VCAT possession order for arrears and got a payment plan in place for her to repay the outstanding rent arrears. The lawyers also obtained a VCAT order that urgent repairs be conducted at the premises, and lodged a pre-emptive challenge to the no reason notice to vacate on the basis that it had been issued in retaliation to Nicola's repair requests.

As the matter progressed, the landlord continually failed to comply with the VCAT repairs order and ultimately, the Homeless Law lawyers lodged a compensation claim with VCAT that exceeded the amount of arrears the client owed. By consent, Nicola was able to move out of the property at a convenient time, into more affordable housing that Homeless Law's social worker helped her to obtain, and with the landlord paying her more than \$1000 compensation due to faults at the premises. Homeless Law's social worker helped source brokerage to clear an existing bond loan debt, which helped Nicola transition into a more affordable private rental property.

Unless Nicola had been facing imminent eviction for arrears, she may not have sought legal advice or representation in relation to the repairs issue or the no reason notice to vacate. Without the intensive support of Homeless Law's social worker, Nicola and her five children may not have been in a position to secure alternative housing and would likely have faced homelessness after being evicted from a substandard property.

## 6.2 Legislated minimum standards for rented premises

Homeless law often assists tenants at risk of eviction living in rented premises that are in poor physical condition. In a context where there are no clear minimum standards that apply to rented premises, tenants are forced to rely on the urgent and non-urgent repairs processes in the RTA, and must demonstrate that their complaint fits within that existing framework.<sup>69</sup>

While Homeless Law does not assist clients whose sole legal issue is repairs related, we do occasionally assist tenants with repairs issues when these arise as ancillary matters in the context of eviction proceedings. We also regularly refer clients with repairs issues to legal services who can provide advice to assist them to assert their rights, including Victoria Legal Aid and the Tenants Union of Victoria.

Through our exposure to tenants who have repairs issues in rented premises, we see that many vulnerable, low income renters experience trepidation about exercising their repairs rights under the existing RTA framework, often due to fear that they will be evicted or face a retaliatory increase in rent. In addition, many tenants are unclear about the extent to which the RTA's repair provisions can be used to address pre-existing defects at the property which weren't detected prior to the tenant taking possession, and may be otherwise deterred by the long wait times, particularly in relation to non-urgent repairs requests.<sup>70</sup>

<sup>69</sup> See also National Association of Tenant Organisations, *A Better Lease on Life – Improving Australian Tenancy Law* (2010); Jane Berry, Footscray Community Legal Centre Inc, *Home Sweet Home – Act for the House Not the Tenant* (2013); Victorian Council of Social Services, *Decent Not Dodgy. 'Secret Shopper' Survey* (2010).

<sup>70</sup> A non-urgent repairs notice gives a landlord 14 days to rectify the issue. If no action is taken in this period, a tenant must then apply for an inspection by Consumer Affairs Victoria, which may take up to an additional week. After this inspection, if a landlord still won't remedy the issue, a tenant must apply to VCAT for a non-urgent repairs order, which can take a further period of time to be listed depending on how busy the Tribunal is.

The provision of clear minimum standards for rented premises with the creation of associated obligations and enforcement powers in the RTA would provide much needed clarity in this area. These reforms would assist all parties to a tenancy agreement to better understand the obligations of a landlord to provide and maintain rented premises that meet basic repair and amenity requirements.

These standards could address the lack of clarity many tenants experience in relation to the existing repairs processes, and would also improve the quality of rented premises at the time they are advertised for lease. In addition to improving the health and quality of life of tenants, this would likely lead to a reduction in the number of disputes that arise once a tenancy has commenced. The introduction of minimum standards would also provide an opportunity to create a more streamlined and efficient process for addressing repair issues in rented premises, which would prevent tenants experiencing the delays often associated with more general repairs processes currently set out in the RTA.

## 6.3 A model for enforceable minimum standards in rented premises

The risks and uncertainty many tenants face when seeking to enforce their repair rights under the RTA could be addressed by introducing clear regulations containing minimum standards for rented premises that are enforceable under the RTA.

These minimum standards should set out basic requirements in relation to the premises, which if not met or maintained during the course of a tenancy, would give tenants a clear right to initiate legal proceedings to ensure compliance and seek compensation where appropriate. The relevant minimum standards should also include parallel offence provisions in the RTA giving enforcement powers to a third party agency, most likely Consumer Affairs Victoria (CAV), who would be able to respond to reports from tenants and investigate non-compliance with minimum standards, and impose penalties where appropriate.

An analogous framework already exists in Victoria in relation to the 15 minimum standards that address safety, security, amenity and privacy for residents in rooming houses. Together with these minimum standards, infringement notice provisions for owners who fail to comply with the standards were introduced and CAV is able to investigate alleged breaches of the minimum standards on behalf of residents, and impose penalties against rooming house operators where an alleged breach is proven.<sup>71</sup> CAV's 2013–14 Annual Report indicated that as a result of their minimum standards compliance program, 99% of registered rooming houses in Victoria were compliant with the minimum standards, and there had been a range of infringement notices issued for non-compliance, as well as court proceedings initiated against certain rooming house operators for systemic non-compliance with the minimum standards regime.<sup>72</sup>

These results suggest that a third party enforcement model for minimum standards in rented premises could also prove effective, particularly in circumstances where a tenant experiencing rental stress is reluctant to take personal action to enforce relevant minimum standards against a landlord.

### **Recommendation 9: Introduce minimum standards for rented premises to improve the safety, security and amenity of rental properties**

Homeless Law recommends the introduction of minimum standards to protect the safety, security, amenity and privacy of tenants, which can be enforced by a third party (most likely Consumer Affairs Victoria) that has power to investigate breaches, issue fines and prosecute landlords for systemic non-compliance.

<sup>71</sup> The minimum standards for rooming house accommodation were introduced in 2012 via the *Residential Tenancies (Rooming House Standards) Regulations 2012* (Vic). Under ss 120A, 142B and 142C of the RTA, rooming house operators who fail to comply with the minimum standards can be investigated by CAV and penalised.

<sup>72</sup> Consumer Affairs Victoria, *Annual Report 2013–2014* (2014) 17.

## 7. Safety and security in rooming houses

This part of the submission addresses the following questions from the Issues Paper:

### Rooming Houses

25. What issues are there regarding the way in which security of tenure is provided for rooming house residents under the Act?
26. How can the needs for security of tenure for residents be appropriately balanced with the need to protect other residents' rights to peaceful enjoyment of shared spaces in rooming houses?
27. Do the currently prescribed reasons and notice periods to terminate a rooming house resident's residency rights strike the right balance for security of tenure, and if not what alternatives are appropriate?

Homeless Law regularly assists clients who reside in rooming houses. In 2014–15, Homeless Law assisted 13 clients living in rooming houses with their legal matters. These clients were particularly vulnerable: all were reliant on Centrelink; six disclosed mental health issues; six had a history of drug or alcohol dependence; two were recent victims of violent crime; and two were sleeping rough immediately prior to moving into the rooming house.

Our clients most commonly live in rooming houses because the acute shortage of affordable housing means they have little other choice. They are on low incomes and may have other vulnerabilities and they are at high risk of exploitation and arbitrary eviction. They frequently lack all elements of secure tenure (i.e. the right to choose whether to stay or leave, legal protection of their rights, and sustainability in terms of rent and quality).

The comments of a 24 year old man Homeless Law previously consulted with highlight the vulnerability of individuals forced into rooming houses because of an inability to access alternative housing:

*We were renting private and then the owner died and his son who took over sold the entire block of flats. Since that time we have been homeless. We tried to get into other private rental but no one wanted to take low income earners who were on Centrelink. Also, we just couldn't afford it.*

*We waited four years for public housing. We were homeless for six years.*

*When we were homeless we had nowhere to go, we didn't have any good food and we couldn't cook like everyone else cooks. We had to go into a rooming house. A guy died while we were living in there, he overdosed. There were syringes on the tables and drugs, lots of alcohol. People used to punch holes in the walls, kick the toilets and break them. We lived there for 6 months ... We had a hard journey.<sup>73</sup>*

We commend the Victorian Government for making it a priority to improve the accountability of rooming house operators in Victoria, including through the consultative drafting of the Rooming House Operators Bill 2015 (Vic), which provides for a 'fit and proper person' licensing scheme.

### 7.1 Growth of rooming houses in Victoria

There has been significant growth in smaller rooming houses in Victoria in response to the lack of alternative affordable housing.<sup>74</sup> The 2011 Census recorded 4,397 people living in rooming houses as part of Victoria's homeless population and this is thought to be a significant underestimate.<sup>75</sup> Associate Professor Chris Chamberlain has identified that the rooming house population may in fact be approximately 12,568 people, mostly in suburban Melbourne.<sup>76</sup> Chamberlain found that 82% of rooming houses in suburban Melbourne were small rooming houses accommodating between four and nine people.<sup>77</sup> This was supported by the Rooming House Standards Taskforce, which stated:

<sup>73</sup> Justice Connect Homeless Law (formerly PILCH Homeless Persons' Legal Clinic), *Keeping Doors Open Submission in response to 'Pathways to a Fair and Sustainable Social Housing System' Public Consultation Discussion Paper* (July 2012), consultation participant, 28.

<sup>74</sup> See, eg, Rooming House Standards Taskforce, *Chairperson's Report* (September 2009) 6 (**Rooming House Taskforce Report**).

<sup>75</sup> Australian Bureau of Statistics, *Census of Population and Housing, Estimating homelessness 2011* (12 November 2012) 16 (available at: [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/EB59F237159F7102CA257AB100170B61/\\$File/20490\\_2011.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/EB59F237159F7102CA257AB100170B61/$File/20490_2011.pdf)) (**ABS Estimating Homelessness Report**).

<sup>76</sup> Chris Chamberlain, 'Counting Boarding Houses: Reflections on Homelessness Research in Australia' (Paper Presented at the Homeless Research Conference, Melbourne, 19–20 April 2012) (**Chamberlain Report**).

<sup>77</sup> Ibid 14–15.

*The new model emerging in the rooming house sector is characterised by small rooming houses, operated for profit. In many cases, this accommodation utilises suburban homes with multiple bedrooms – or sometimes commercial properties not designed as residential accommodation – which are lawfully or unlawfully modified to accommodate larger numbers of people ... This segment of the rooming house market is growing rapidly, particularly in suburban areas that have previously not been traditional rooming house territory. Much of this growth is difficult for enforcement agencies to monitor if owners do not willingly comply with regulatory requirements as these premises often appear indistinguishable from other forms of residential or commercial property.<sup>78</sup>*

In addition to the rise of small, for-profit rooming houses, Homeless Law notes that there are people operating rooming houses who are not aware that they are doing so. In 2012 Homeless Law and the Tenants Union of Victoria (TUV) made submissions to a Coroner's Inquiry into the January 2008 deaths of three international students in a fire in Footscray (**Patel Inquiry**). Homeless Law and TUV submitted that the property was a rooming house, the students were experiencing homelessness and had no other option but to accept the dangerous and over-crowded accommodation.<sup>79</sup>

In that situation, the dwelling was a three-bedroom house in Footscray which, at its peak from March 2007 to December 2007, was occupied by 10 people. Four, and at times five, international students (including the three who were killed in the fire) lived in a single bedroom. The dwelling was owned by Phong Tan Nguyen, his sister, Hue Thi Nguyen and girlfriend, Nhi Thuy Pham. Mr Bhavin Zinzuwadia was the tenant. He signed the lease in October 2005 and lived there with his wife and daughter. They paid approximately \$1083 per calendar month.

Mr and Mrs Zinzuwadia described the other residents as 'friends of friends'.<sup>80</sup> All residents in the dwelling had recently arrived in Australia from India, most of them to study. Mr Zinzuwadia had invited them to live in the house because it was hard for overseas students to find a place to stay in Melbourne.

The Zinzuwadias were not aware that they were operating a rooming house within the definition of the RTA but the students did not have exclusive possession of their room so they were not sub-tenants, and the dwelling fell within section 3 of the RTA, which defines a rooming house as a building in which there is one or more rooms available for occupancy on payment of rent in which the total number of people who may occupy those rooms is not less than four.

Although the definition of 'rooming house owner' under section 3 of the RTA is a person who conducts the business of operating a rooming house, there is no requirement that the rooming house operator has the intention of running a rooming house.

Accordingly, there are rooming houses being operated, without the knowledge or intention of the tenant / rooming house operator. Despite not having the intention to operate a rooming house, Mr Zinzuwadia was operating a dangerous, overcrowded dwelling and the end result was that three young men lost their lives.

It is clear that these dwellings also need to be regulated to improve safety and reduce the risk that people who are unable to access alternative accommodation find themselves in dangerous, unregulated rooming houses.

## 7.2 Strengthening security of tenure for rooming house residents

Residents in Victoria's rooming houses are often deprived all aspects of security of tenure: they have no meaningful choice about when to stay or leave; their rights are not protected; the rent is highly unaffordable; and the quality is notoriously poor.

Recognising that vulnerable people are pushed into these establishments because of a lack of alternative accommodation, Homeless Law recommends the following reforms to strengthen security of tenure for rooming house residents:

- **Concerted education (of rooming house operators and residents) and enforcement** – Any consideration of reforms intended to improve security of tenure for Victorian rooming house residents must recognise that residents are frequently unaware of, or reluctant to enforce, their rights, including due to fear of eviction. As a result, only a small proportion of breaches by rooming house operators are reported or prosecuted and effective reforms need contemplate how the regulatory bodies – including Consumer Affairs Victoria and local councils – will be resourced to undertake both the enforcement and the education needed to ensure that rooming house operators are being held accountable for their compliance with the improved regulatory regime.

<sup>78</sup> Rooming House Taskforce Report, above n 74, 6. See also, Department of Human Services, Parliament of Victoria, *Proposed Residential Tenancies (Rooming House Standards) Regulations Regulatory Impact Statement* (August 2011) 17.

<sup>79</sup> Justice Connect Homeless Law (formerly the PILCH Homeless Persons' Legal Clinic) and the Tenants Union of Victoria, Coroner's Court of Victoria, Inquest concerning the deaths of Mr Sunil Patel, Jignesh Sadhu and Deepak Prajapati, *Submissions by the Public Interest Law Clearing House Homeless Persons' Legal Clinic and the Tenants Union of Victoria* (24 December 2012).

<sup>80</sup> *Pham & Ors v Parissis Pty Ltd* [2012] VCC 895, 11, witness statement from Kinjal Zinzuwadia dated 3 January 2008, 1.



- **Avoiding rapid evictions for rent arrears** – Presently, section 281 of the RTA enables a rooming house owner to give a resident a notice to vacate in 2 days' time where at least 7 days of rent is owing. In light of the high level of vulnerability of rooming house residents and the lack of alternative accommodation options, it is difficult to justify such a swift eviction process from Victorian rooming houses. Homeless Law recommends that the notice periods for arrears in rooming houses should be made consistent with tenancies i.e. a rooming house owner may give a resident a 14 day notice to vacate if the resident owes at least 14 days rent to the landlord. Given the heavy reliance of residents of rooming houses on Centrelink payments, this timing would enable residents to receive at least one fortnightly Centrelink payment and give them a chance to repay the arrears before the eviction process is commenced.
- **Balancing complex needs** – Rooming houses are volatile environments that are home to thousands of Victorians, many of whom have complex circumstances. Overwhelmingly, residents in rooming houses are there because they have no other housing options. With this in mind, it is imperative that evictions from rooming houses are only used as a last resort. While the challenge of managing these complex dynamics is significant, fast evictions are not the solution to the problems encountered in Victorian rooming houses. As the small sample of Homeless Law clients indicated, there is a high prevalence of mental illness and substance dependence amongst residents, combined with histories of homelessness and trauma. Residents and rooming house managers and operators must be supported to maintain housing, including through access to services, mediation of disputes and early intervention in relation to problematic conduct. These points are discussed in part 8 below (i.e. mechanisms for encouraging landlords to sustain tenancies / residencies).

## Recommendation 10: Strengthening security of tenure for rooming house residents

Overwhelmingly, residents in rooming houses live there because they have no other housing options. Residents are frequently unaware of, or reluctant to enforce, their rights, including due to fear of eviction. Measures to improve security of tenure for Victorian rooming house residents should include:

- Increasing residents' awareness about their rights and where they can get advice.
- Building the capacity of the regulatory bodies – including Consumer Affairs Victoria and local councils – to undertake both the enforcement and the education needed to ensure that rooming house operators are complying with their obligations under the RTA and, once enacted, the Rooming House Operators Bill 2015 (Vic).
- Amending section 281 of the RTA to increase timeframes so that residents are given 14 days to vacate if they fall 14 days behind in their rent.
- Supporting rooming house owners and managers to link residents with services and encourage early intervention and mediation of disputes, to minimise the risk of evictions into homelessness, while managing the needs of other residents. The safeguards against evictions recommended in part 8 of this submission should apply equally to rooming houses.



## 8. Encouraging landlords to maintain tenancies

This part of the submission addresses the following questions from the Issues Paper:

### Tenancy Terminations

18 What options or initiatives could be used to encourage landlords to choose to maintain tenancies rather than issuing a notice to vacate?

Through Homeless Law's eviction prevention work, we see that it is currently too easy for Victorian tenants to be evicted into homelessness.

While the RTA provides VCAT members with discretion not to make a possession order in limited circumstances (for example, rent arrears evictions where financial arrangements to avoid loss to the landlord can be made)<sup>81</sup> and, when making a possession order, VCAT members can postpone the eviction by up to 30 days if they are satisfied that the tenant would suffer hardship without the postponement and that this hardship would be greater than the landlord's hardship,<sup>82</sup> ordinarily the RTA provides that VCAT members *must* make an order of possession if the landlord proves they were entitled to serve a notice to vacate.

As the statistics in part 2 make clear, even with an extension of 30 days, it can be extremely difficult to locate alternative affordable housing for low income Victorians. Also, where tenants do not attend the VCAT hearing or are not represented and are unable to present a case for remaining in the property or having additional time, the VCAT member will ordinarily make an order for their removal from the premises and allow the warrant to be purchased immediately.

In a system where evictions are relatively easy, with little discretion for the decision-maker, no requirements of reasonableness and few safeguards, security of tenure is precarious and eviction is often the first resort. Furthermore, landlords – both private and social – often do not have access to the referral pathways and supports they need to intervene early and to choose options other than eviction.

Victoria needs a legal, policy and cultural framework where evictions into homelessness are only occurring as a last resort, including:

- A 'reasonableness test' in eviction decisions and a 'pre-eviction checklist';
- Effective use of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) when making eviction decisions and balancing competing obligations for public and community landlords;
- Support for private landlords and real estate agents to sustain tenancies, including through voluntary guidelines and use of Centrepay; and
- Stronger services and programs, including SHASP, access to legal representation and brokerage that are highly effective at intervening early and preventing evictions into homelessness.<sup>83</sup>

### 8.1 Making sure evictions are 'reasonable' and a last resort

Approximately 40% Homeless Law's clients facing eviction in 2014–15 were living in private rental properties.

For these tenants, the RTA is the only layer of legal protection against eviction into homelessness. As mentioned above, while the RTA does provide VCAT members with discretion not to make a possession order in limited circumstances (for example, rent arrears

<sup>81</sup> *Residential Tenancies Act 1997* (Vic) s 331.

<sup>82</sup> *Residential Tenancies Act 1997* (Vic) s 352.

<sup>83</sup> See, eg, *Joint Submission to the Royal Commission into Family Violence on Housing, Homelessness and Family Violence* (May 2015) endorsed by 129 organisations, which sets out recommendations for investment in services to prevent evictions into homelessness: (1) Strengthening programs such as Safe at Home responses, costed at \$7.6 million to provide Safe at Home measures to 1521 households (\$5000 per package); (2) Extending funding for the Social Housing Advocacy and Support Program (SHASP), costed at \$3 million to provide an additional 1500 case management episodes per year; (3) Continuing and extending legal representation for women facing eviction, costed at \$1.8 million to provide 500 women at risk of eviction with legal representation and social work support, based on the WHPP model that has assisted 62 women in 12 months at an annual operating cost of \$220,000; (4) Increasing private rental brokerage schemes, costed at \$1 million to double existing private rental brokerage packages to approximately 600 packages in total; and (5) Establishing a rapid re-housing program to assist women and children escaping family violence to be quickly re-housed with appropriate supports in place, costed at \$10 million per year to provide over 1000 women and their children with support to search for properties and medium term rental subsidies to ensure rent remains affordable.

evictions where financial arrangements to avoid loss to the landlord can be made), ordinarily the RTA provides that VCAT members must make an order of possession if the landlord proves they were entitled to serve a notice to vacate.

There is no overarching requirement in the RTA that a landlord's eviction of a tenant must be reasonable in the circumstances. In Homeless Law's view, this is an area where the legislation could be improved to give VCAT greater powers to prevent evictions where the Tribunal cannot be satisfied that the eviction is reasonable in the circumstances.

### The Scottish model: A commitment to homelessness prevention

As part of Scotland's commitment to homelessness prevention, the *Housing (Scotland) Act 2001* provides that, for certain types of tenancy agreements, the court must be satisfied that the landlord has a statutory ground for recovery of possession and that 'it is reasonable to make the order' for possession.

The reasonableness test incorporates consideration of:

- the nature, frequency and duration of action by the tenant leading to the application to evict
- the degree to which the tenant is responsible for the eviction proceedings
- the effect of the tenant's conduct on others
- whether the landlord has considered other possible courses of conduct.

As part of its commitment to homelessness prevention, Scotland also introduced a legislated 'pre-eviction checklist' of requirements for landlords to satisfy before proceeding with evictions, which was reported to have reduced evictions by 33% in its first year in operation.

A more detailed case study of Scotland's homelessness prevention model is set out in the **Annexure**.

Legislative amendments of a similar nature in a Victorian context would give an additional layer of discretion to VCAT members who are confronted with applications for possession that, while legally valid, are otherwise unreasonable and inappropriate given the circumstances and background of the matter:

- **Pre-eviction check lists.** Homeless Law suggests the development of a pre-eviction checklist for landlords to satisfy before applying to VCAT for a possession order. The guidelines or checklist for landlords before taking steps to evict could include requirements that the landlord has spoken to the tenant, or made attempts to speak with them, about the issue the eviction proceedings relate to, and attempted to understand the impact of eviction on the tenant, along with exploring alternatives to eviction and linking the tenant with advice or supports wherever possible.
- **Reasonableness requirement.** For vulnerable tenants, the inclusion of a reasonableness requirement in the RTA would provide an additional layer of legal protection that might give them an opportunity to stabilise their tenancy and avoid entering homelessness. Similar to the Scottish model, VCAT members could consider the nature, frequency and duration of action by the tenant leading to the application to evict; the degree to which the tenant is responsible for the eviction proceedings; the effect of the tenant's conduct on others; and whether the landlord has considered other possible courses of conduct.

Together, a set of pre-eviction criteria for landlords to satisfy and a reasonableness requirement in eviction proceedings, have significant potential to improve security of tenure for Victorian tenants while still maintaining the rights of landlords to manage their tenancies, regain possession and address breaches in a reasonable and proportionate way.<sup>84</sup>

<sup>84</sup> See, eg, *Housing (Scotland) Act 2001* (UK) s 16. See also Chris Povey, *Investigating Tenancy Sustainment Programs and Approaches in relation to Clients at Risk of Homelessness* (The Winston Churchill Memorial Trust of Australia) (September 2011) for a more detailed discussion of the Scottish model.

### Recommendation 11: Legislative and procedural safeguards to prevent unnecessary evictions into homelessness

To make sure that evictions from both social and private tenancies only ever occur as a last resort, Homeless Law recommends:

- The introduction of a ‘reasonableness’ requirement for all evictions under the RTA, to give VCAT members discretion to avoid eviction where they are not satisfied it is reasonable in the circumstances; and
- Development of a pre-eviction checklist for landlords to satisfy before applying to VCAT for a possession order.

## 8.2 Supporting human rights accountability for social landlords

In addition to their rights and responsibilities under the RTA, public and community landlords (together, social landlords) also need to comply with section 38 of the Charter when making decisions about evictions. Section 38 requires them to:

- Act in a way that is compatible with human rights; and
- When making a decision, give proper consideration to relevant Charter rights.<sup>85</sup>

The decision to take steps to evict the tenant (for example, by issuing a notice to vacate, applying to VCAT for a possession order or purchasing a warrant), potentially engages the following Charter rights:

- Section 13(a) – A person has the right ‘not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with’;
- Section 17(1) – ‘Families are the fundamental group unit of society and are entitled to be protected by society and the State’; and/or
- Section 17(2) – ‘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’.

There is a built in mechanism for balancing competing priorities under section 7(2) of the Charter, which sets out factors to be taken into account to determine if any limitation on rights was reasonable and ‘demonstrably justified’ in the circumstances.<sup>86</sup>

### 8.2.1 Using the Charter in housing matters

For clients living in public or community housing, Homeless Law frequently engages in Charter-based negotiation with social landlords with a view to preventing the eviction of vulnerable tenants into homelessness. This is often on the basis that, in taking steps to evict the tenant, the landlord has not have given proper consideration to, or acted compatibly with, the tenant’s rights under the Charter.

The Charter provides a helpful framework for making difficult decisions. It encourages consideration of a tenant’s individual circumstances, including their family, any health problems and their risk of homelessness, and allows these considerations to be balanced against the competing obligations of social landlords (including, for example, the safety or comfort of other tenants). It encourages proper consideration of alternatives to eviction.

Prior to the Court of Appeal’s decision in *Director of Housing v Sudi* [2011] VSCA 266 (**Sudi**), VCAT members were considering whether or not a social landlord had complied with section 38 of the Charter when determining applications for possession. VCAT members were balancing human rights considerations against the competing obligations of social landlords in making their decisions about whether to make a possession order. In Homeless Law’s experience, this accountability (i.e. the knowledge that

<sup>85</sup> Charter of Human Rights and Responsibilities Act 2006 (Vic) s 38.

<sup>86</sup> Charter of Human Rights and Responsibilities Act 2006 (Vic) s 7(2).

VCAT would consider Charter compliance in eviction proceedings) provided a compelling incentive for social landlords to consider the client's circumstances and to contemplate reasonable alternatives to eviction.

In *Sudi*, however, the Court of Appeal held that VCAT does not have jurisdiction to consider whether a social landlord has complied with its obligations under section 38 of the Charter in proceeding with an eviction, and that any questions about Charter compliance in eviction matters must be considered by the Supreme Court.

Since *Sudi*, Homeless Law has witnessed less accountability for human rights compliance, which presents a greater risk of eviction for vulnerable tenants.

In our experience, social landlords are less motivated to try to comply with human rights obligations because there is little consequence of not doing so. Although social landlords still have an obligation under section 38 of the Charter to act compatibly with human rights and to give proper consideration to human rights in decision-making, it is unlikely that tenants have meaningful recourse in the event of non-compliance given the costs associated in challenging the decisions of social landlords in the Supreme Court.

## 8.2.2 Restrictive timeframes for Charter-based challenges

In addition to the impact of *Sudi*, the recent decision of the Supreme Court in *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 (**Burgess**) has further limited vulnerable tenants' options for seeking judicial review of the eviction decisions of social landlords. While *Burgess* is a powerful decision in terms of confirming the Director of Housing's obligation to consider the Charter when deciding whether to evict tenants, one unfortunate result of this decision is that tenants are now required to commence judicial review proceedings in relation to Charter unlawfulness:

- After the Director has made the decision to issue the notice to vacate but before VCAT has made a possession order; or
- After the Director has made a decision to purchase a warrant but before the locks are changed.

This further limits the accessibility of a mechanism for ensuring the human rights compliance of social housing providers in eviction proceedings. It is undesirable for low income tenants who may have a range of other vulnerabilities to have to make a decision to commence proceedings in the Supreme Court prior to exhausting the no cost, much less onerous avenue available to them in VCAT.

To overcome these barriers to meaningful consideration of human rights in the decision-making of social landlords, Homeless Law recommends legislative amendments which give VCAT jurisdiction to consider Charter compliance in eviction proceedings brought by social landlords.<sup>87</sup>

VCAT is a more accessible forum for both tenants and landlords and its ability to consider the human rights compatibility of evictions would play a significant role in promoting security of tenure and making sure evictions of vulnerable tenants into homelessness only ever occur as a last resort.

For social housing tenants, this amendment would be a genuine safeguard against preventable evictions.

### Recommendation 12: Improving accountability for human rights in eviction decisions

To make sure that evictions from social tenancies only ever occur as a last resort, Homeless Law recommends law reform to give VCAT jurisdiction to consider the human rights compatibility of eviction decisions by social landlords.

Social housing providers should also be supported with training and resources to adopt Charter-based policies and practices in managing tenancies and making eviction decisions.

<sup>87</sup> For more detailed submissions on the legislative amendments required to give effect to this recommendation, see Justice Connect Homeless Law, *Charting a Stronger Course: Submission to the Eight Year Charter Review* (June 2015). See also Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (1 September 2015), which recommends that VCAT 'be given original jurisdiction to hear and determine claims that a public authority has acted incompatibly with human rights protected under the Charter' (Recommendation 27).

## 8.3 Working effectively with the private sector

As discussed in part 3.3 above, and as both the Consultation Paper and the Issues Paper recognise, we are increasingly relying on the private rental market to provide housing to a significant and diverse population of Victorians, including people with low incomes and complex circumstances whose needs would be better met in social housing if not for the acute shortage of supply and prohibitively long waiting lists.

Accordingly, the private rental sector, including real estate agents, needs to be engaged and supported to foster a housing system focussed on sustaining tenancies. In some cases, for example HomeGround Real Estate, private landlords will actively contribute to the supply of appropriate, affordable, accessible housing. More commonly, real estate agents and private landlords should be supported and regulated to encourage tenancy management practices that minimise the risk of tenancies ending unnecessarily.

### 8.3.1 Voluntary code of conduct

Currently in Victoria, there is no code of conduct applying to landlords or real estate agents that covers circumstances where a tenant is having difficulty complying with their obligations under the RTA and is subject to hardship or exceptional circumstances. Although the Real Estate Institute of Victoria's (REIV) policy requires their members to act fairly and not harshly or unconscionably, the existing REIV Code of Conduct does not address specific instances of tenancy breach, or the ways in which agents might respond or otherwise advise a property owner in the event a tenant is experiencing hardship or exceptional circumstances. In Homeless Law's view, this is an area where significant cultural change could be led.

This kind of leadership within the private sector could first be rolled out in relation victims of family violence as part of the State's response to family violence and homelessness. This was a key recommendation of Homeless Law in our submission to the Royal Commission into Family Violence, *Home Safe*.<sup>88</sup>

The code of conduct could set out a range of factors that landlords and agents will consider prior to proceeding with eviction of a tenant who identifies that they are a victim of family violence. Signatories to such a code of conduct, particularly real estate agents, would be able to advertise their support for victims of family violence. They could also have knowledge of, and relationships with, local support services who they could link tenants with at the earliest possible point to try and sustain the tenancy. This collaborative initiative, led by the private sector, would have significant potential to reduce evictions of victims of family violence into homelessness. It would better equip private landlords and real estate agents to make decisions about family violence, including to make early and appropriate referrals to services that can provide support.

More broadly, the code of conduct could also address other types of hardship and exceptional circumstances that threaten a tenant's security of tenure with a view to guiding and supporting real estate agents to avoid unnecessary evictions.

### 8.3.2 Use of Centrepay by real estate agents

Centrelink's Centrepay system enables automatic deductions to be made from Centrelink recipients' fortnightly payments. The Centrepay system can be used by real estate agents to assist tenants who receive Centrelink to make rental payments. However, Homeless Law's experience suggests that few real estate agents have signed up for Centrepay. Chris's story, below, demonstrates how the availability of Centrepay payments had a significant impact on his ability to maintain his tenancy.

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<sup>88</sup> Justice Connect Homeless Law, *Home Safe: Submission to the Royal Commission into Family Violence* (2015), 18 (Recommendation 2).

## Access to Centrepay and security of tenure

Chris suffers from bipolar disorder, has undergone periods of incarceration and has great difficulty organising his finances.

In 2013, Homeless Law represented Chris at VCAT where his landlord sought possession of the property due to rental arrears. Through Homeless Law's advocacy, Chris entered into a payment plan with the real estate agent (REA) whereby he made his fortnightly payments automatically through Centrelink's Centrepay system.

Through the Centrepay system, Chris was up-to-date with rental payments for the remainder of 2013 and into 2014. In late 2014, a new REA took over the management of the property. The new REA did not accept Centrepay payments, so Chris was required to manually make fortnightly rental payments.

Chris struggled to make manual payments and quickly accrued rental arrears. The new REA applied for a possession order, but agreed to enter into a new payment plan with an upfront lump-sum payment. However, Chris soon missed another payment and was subsequently evicted from the property.

Had the new REA accepted Centrepay payments, it is very likely Chris would have continued to regularly make his rental repayments. Instead, the landlord now has the time and expense of finding a new tenant and Chris has re-entered homelessness and is experiencing the detriment to his mental health and wellbeing that homelessness brings with it.

## Recommendation 13: Working with the private sector to support eviction prevention

To support real estate agents and private landlords to sustain tenancies, Homeless Law recommends:

- That the private sector, including real estate agents are given guidance and support to act early to avoid evictions for clients experiencing hardship. More specifically, a voluntary 'Code of Conduct for Private Landlords and Real Estate Agents who Support Victims of Family Violence' should be introduced to equip signatories to avoid eviction of victims of family violence into homelessness wherever possible.
- Real estate agents should be educated about the benefits of regular and reliable payments through Centrepay and encouraged to make this payment method available for tenants.

## 8.4 The role of support, advocacy and brokerage in sustaining tenancies

In addition to legislative and regulatory reforms, to effectively improve security of tenure and balance the needs of landlords and tenants, we require an investment in the services and programs that are proven to be highly successful at maintaining tenancies and resolving issues to the mutual benefit of tenants and landlords.

The case studies in part 4.2 ('Hoarding, mental health and imminent eviction for breach of compliance order') and part 3.2 ('Single mother falls behind in rent, but gets support to catch up. Landlord benefits') highlight the critical role legal representation, non-legal support and brokerage can play in supporting tenants to meet their obligations, avoiding evictions into homelessness and preventing landlords from incurring the expense and inconvenience of eviction:

- Hoarding, mental health and imminent eviction for breach of compliance order – through advocacy based on the *Charter of Human Rights and Responsibilities Act 2006* (Vic), an agreement was reached that allowed Jessica to work with her support worker to address the hoarding and clutter, rather than being evicted into homelessness. This outcome allowed Jessica to maintain her housing, but also addressed the landlord's concerns regarding the clutter.
- Single mother falls behind in rent, but gets support to catch up. Landlord benefits – through legal representation, social work support and access to brokerage, Bianca was able to repay the arrears owing to her landlord and maintain housing

for her and her two children in the aftermath of family violence. The landlord was paid the money owing and avoided the cost and inconvenience of terminating Bianca's tenancy.

The importance of early intervention and referrals to services for struggling tenants is not limited to the social housing sector, but many real estate agents and private landlords lack of knowledge of, or access to, services and supports that could help address concerns with a tenancy (for example, arrears or compliance) before the issues escalate.

Homeless Law's Women's Homelessness Prevention Project has proven to be a highly successful model for addressing tenants' legal and non-legal needs and avoiding evictions, frequently through negotiated outcomes that also meet the needs of landlords.

### Effective models for sustaining tenancies: Women's Homelessness Prevention Project

Key aspects of the Women's Homelessness Prevention Project (WHPP) are:

- **Holistic, integrated service:** women who are at risk of eviction or experiencing another barrier to accessing safe and stable housing are provided with both legal representation and intensive social work support from an in-house social worker.
- **Preventative focus:** through our relationships with family violence services, the courts and VCAT, Homeless Law aims to attract early referrals, before legal issues have escalated to crisis point.

Some key statistics from the WHPP's first 12 months of operation are:

- 62 women with 102 children in their care – 95% of whom have experienced family violence – have been provided with a combination of legal representation and social work support.
- **Of finalised matters, 81% of women with a total of 68 children in their care have either maintained safe and stable housing, or resolved a debt or compensation claim that was a barrier to their accessing to housing.**
- 68% of all WHPP clients were facing eviction for rent arrears, with the average amount of \$2177 owing, and to date 82% of these women have avoided homelessness.
- One-third of women who avoided eviction for arrears were assisted with financial brokerage, and the average amount provided was \$560.
- The WHPP social worker has made 78 referrals to non-legal professionals and support services, including:
  - 23 referrals to initial assessment and planning homelessness access points for assistance with accessing crisis accommodation, transitional housing and financial assistance to help sustain existing tenancies and transition into new housing.
  - 15 referrals to mental health care professionals including psychological services through mental health care plans, youth counselling, and assisting women to re-engage with previous mental health supports.
  - 15 referrals to other professionals including physiotherapists, chiropractors, support services for clients' children, and family violence specific counsellors.
  - 12 referrals to a general practitioner for a range of issues including medication review, referrals to specialists, medical support letters, activation of a mental health care plan and advice in relation to children's health and behaviour.
  - 11 referrals to financial counsellors to assist women with setting up automatic bill paying systems and making a budget to manage household income.
  - Two referrals to alcohol and other drug counsellors.

In addition to the benefits of legal representation and social work support, access to brokerage has been critical to Homeless Law's ability to address the concerns of landlords and sustain tenancies at risk because of rental arrears. As noted above,



brokerage was used to prevent homelessness for one-third of WHPP clients at risk of eviction for rent arrears. As identified in part 2.2 above, each person who enters homelessness represents an annual cost to government \$29,450 higher than for the rest of the Australian population.<sup>89</sup> Given that the average amount of brokerage provided to WHPP clients was \$560, and the high rate of effectiveness in preventing evictions, access to financial brokerage makes clear financial sense.<sup>90</sup> While one-off payments can be highly valuable, any brokerage program should also be flexible and should allow for ongoing supplements to support tenants to find their feet financially.<sup>91</sup>

Early access to advocacy services such as the Social Housing Advocacy and Support Program (SHASP) has also proven to be highly effective at preventing evictions into homelessness. A 2014 report found that 78% of public housing tenants supported by SHASP avoided eviction and 73% engaged in repaying rent debts.<sup>92</sup> In 2012 SHASP's funding was reduced by approximately \$3 million. It is a vital service in preventing evictions and sustaining tenancies and restoration of its funding would allow an additional 1500 case management episodes per year.

Key messages to come out of the WHPP – and similar services focussed on prevention and integration – are:

- It is currently too easy to evict vulnerable people into homelessness in Victoria.
- With timely, effective support, the majority of evictions are preventable.
- We need more effective legal protections and strengthened services to avoid unnecessary evictions into homelessness.

#### **Recommendation 14: Investing in services and programs proven to be highly successful at sustaining tenancies**

With timely, effective support, the majority of evictions are preventable. We need an investment in services and programs, including integrated legal representation, SHASP and rental brokerage, that are proven to be highly effective at avoiding unnecessary evictions to the benefit of both landlords and tenants.

<sup>89</sup> Kaylene Zaretsky et al, *The cost of homelessness and the net benefit of homelessness programs: a national study*, AHURI Final Report No 205 (2013) 4.

<sup>90</sup> Justice Connect, *Women's Homelessness Prevention Project – Executive Summary*  
<https://www.justiceconnect.org.au/sites/default/files/WHPP%20executive%20summary%20only.pdf>

<sup>91</sup> See, eg, Council to Homeless Persons, *Submission to the Family Violence Royal Commission* (May 2015), which refers to these payments as medium term rental subsidies (available at: <http://chp.org.au/wp-content/uploads/2015/06/150418-FV-RC-submission-FINAL.pdf>).

<sup>92</sup> See SHASP Managers Network (Victoria), *Social Housing Advocacy & Support Program (SHASP): Support that works* (September 2014).

# Annexure: A case study of the Scottish model of homelessness prevention

Scotland is an example of a jurisdiction with a demonstrated commitment to preventing homelessness, including through its residential tenancy laws.<sup>93</sup>

Scotland has different legislation in respect of private and public tenancies:<sup>94</sup>

- Private tenancies are covered by the *Housing (Scotland) Act 1988*, which establishes 'Assured Tenancies' and 'Short Assured Tenancies'.<sup>95</sup>
- Social tenancies are covered by the *Housing (Scotland) Act 2001*, which establishes 'Scottish Secure Tenancies' and 'Short Scottish Secure Tenancies'.<sup>96</sup>

## Scottish model: Protection for private tenants

During the agreed term of the lease, a private tenant with a 'Short Assured Tenancy' cannot be evicted, provided that the tenant does not breach the conditions of the lease. However, at the end of the agreed term, the landlord has the right to make a no reason application for possession. The tenant can remain on the property until the court grants the landlord an order for possession.<sup>97</sup>

An 'Assured Tenancy' can be terminated by the landlord on the basis of 17 specified grounds. The grounds are set out in Schedule 5 to the *Housing (Scotland) Act 2001*.<sup>98</sup> All grounds require a sheriff's court order. There is no provision for a no reason application for possession. Grounds 1 to 8 are mandatory, where the legislation provides that the sheriff 'must' grant the landlord an order for possession if satisfied that the ground is established. Grounds 9 to 17 are discretionary, where the legislation provides that the sheriff 'may' grant the landlord an order for possession if satisfied that the ground is established. For these discretionary grounds, the sheriff will only make the order for possession if it is considered to be 'reasonable' in the circumstances.<sup>99</sup>

The Scottish private tenancy system is currently undergoing a review by the Scottish Government. This review has involved two recent rounds of public consultation, which have generated extensive discourse and commentary with regard to the current system and the ways in which it can be improved. Among other things, these proposed reforms aimed to modernise and simplify the grounds on which a landlord can obtain an order for possession. The initial reform proposal was to reduce the 17 grounds of possession to 8, all of which would be mandatory rather than discretionary. The proposed new grounds for possession are:

- Ground 1: The landlord wants to sell;
- Ground 2: A mortgage lender wants to sell because the landlord has breached the conditions of the loan;
- Ground 3: The landlord or a family member wants to live in the property;
- Ground 4: Refurbishment;
- Ground 5: Change of use;
- Ground 6: The tenant has failed to pay full rent over three months;
- Ground 7: The tenant has displayed antisocial behaviour; or
- Ground 8: The tenant has otherwise breached the tenancy agreement.<sup>100</sup>

In light of public feedback, the Government's second consultation paper contained a revised proposal, whereby grounds 6, 7 and 8 would contain a discretionary element in cases of rent arrears comprising less than one month's rent or arising due to housing benefit delay, less serious forms of antisocial behaviour, and the tenant otherwise breaching a non-mandatory tenancy agreement

<sup>93</sup> See, eg. Povey, above n 84, 30–4; Scottish Government and the Convention of Scottish Local Authorities, *Prevention of Homelessness Guidance* (June 2009).

<sup>94</sup> Australian Housing and Urban Research Institute, *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives* (July 2011) 106.

<sup>95</sup> The Private Housing (Tenancies) (Scotland) Bill is currently before the Scottish Parliament. The Bill seeks to introduce a new type of tenancy which would supersede 'Assured Tenancies' and 'Short Assured Tenancies'; *Housing (Scotland) Act 1988* Schedule 4.11.

<sup>96</sup> *Housing (Scotland) Act 2001* ss 11, 14, 16.

<sup>97</sup> Scottish Government, *Consultation on a New Tenancy for the Private Sector* (October 2014) 15 (**Scottish Private Tenancy Consultation**).

<sup>98</sup> *Housing (Scotland) Act 1988* Schedule 5.

<sup>99</sup> *Housing (Scotland) Act 1988* s18; Scottish Private Tenancy Consultation, above n 97, 17.

<sup>100</sup> *Ibid* 21.

condition.<sup>101</sup> In August 2015 the Government released their report on the second round of consultations and on 7 October 2015 introduced the Private Housing (Tenancies) (Scotland) Bill to Parliament.

## Private Housing (Tenancies) (Scotland) Bill

The Bill seeks to create a new type of tenancy to replace 'Assured Tenancies' and 'Short Assured Tenancies'. One feature of this new type of tenancy that is particularly relevant to security of tenure is the limit on increases in rent. Under the proposal, rent increases:

- Can only take place once in any 12 month period;
- Require 12 weeks' notice to tenants; and
- Are reviewable by a Rent Officer at Rent Service Scotland where a tenant considers the rent to be more than rent charged for comparable local properties.<sup>102</sup>

## Scottish model: Protection for social housing tenants

Security of tenure under 'Scottish Secure Tenancies' for social housing is similar to security of tenure under 'Assured Tenancies' for private rentals. Schedule 2 to the *Housing (Scotland) Act 2001*, which applies only to social landlords, specifies 15 grounds on which the landlord can recover possession. There is no provision for a no reason application for possession. For grounds 8 to 14, the court will only make the order if other suitable accommodation will be available for the tenant when the order takes effect. Grounds 1 to 7 and 15 are discretionary, and the court will only make the order for possession if it is considered to be 'reasonable' in the circumstances.<sup>103</sup> In considering 'reasonableness' in this context, the court has regard, in particular, to:

- the nature, frequency and duration of the conduct giving rise to the ground for recovery of possession;
- the extent to which that conduct is or was conduct of, or a consequence of acts or omissions of, persons other than the tenant;
- the effect which that conduct has had, is having or is likely to have on any person other than the tenant; and
- any action taken by the landlord, before raising the proceedings, with a view to securing the cessation of that conduct.<sup>104</sup>

In 2009, the Scottish Government established a 'Repossessions Group' to consider ways to improve eviction processes. One consideration was whether there should be a pre-action protocol specifying certain steps that a landlord must take before proceeding to eviction for arrears. One perceived benefit of the proposal was that it would be 'a robust safeguard for children, young people and families who are facing problems with their tenancy'.<sup>105</sup>

In 2010 the Scottish Government amended the *Housing (Scotland) Act 2001* to insert a new section containing a list of 'pre-action requirements for rental arrears'.<sup>106</sup> These requirements only apply to the public 'Scottish Secure Tenancy'. The pre-action requirements do not apply where the landlord seeks possession only for reasons other than rent arrears. However, if there are multiple grounds, including rent arrears, then the pre-action requirements apply.<sup>107</sup>

Before a landlord serves a tenant in social housing with a notice that the landlord is considering court action to recover possession where the tenant is in arrears, a landlord must comply with the following pre-action requirements:

- give clear information about the tenancy agreement and the unpaid rent or other financial obligations;
- make reasonable efforts to give help and advice on eligibility for housing benefits and other types of financial assistance;
- give information about sources of help and advice with the management of debt;
- make reasonable efforts to agree with the tenant a reasonable plan for future payments;
- consider the likely result of any application for housing benefits that has not yet been decided;
- consider other steps the tenant is taking which are likely to result in payment within a reasonable time;
- consider whether the tenant is complying with the terms of an agreed plan for future payments; and

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<sup>101</sup> *Scottish Private Tenancy Second Consultation*, above n 97, 22. Three additional mandatory grounds were also proposed.

<sup>102</sup> The Scottish Parliament, *SPiCe Briefing: Private Rents* (16 October 2015) (available at: [http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB\\_15-66\\_Private\\_Rents.pdf](http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-66_Private_Rents.pdf)).

<sup>103</sup> *Housing (Scotland) Act 2001* s 16(1), (2).

<sup>104</sup> *Ibid* s 16(3).

<sup>105</sup> *Ibid*.

<sup>106</sup> *Housing (Scotland) Act 2001* s 14A.

<sup>107</sup> Scottish Government, *Housing (Scotland) Act 2001 and 2010: Guidance for Social Landlords on Pre-Action Requirements and Seeking Repossession of Social Housing* (June 2012) 3 (**Guidance on Pre-Action Requirements**).

- encourage the tenant to contact their local authority (where the local authority is not the landlord).<sup>108</sup>

On a practical level, these pre-action requirements are reflected in a 'checklist' that the landlord must provide to the tenant.<sup>109</sup> When proceedings are commenced, the landlord must confirm to the court that the pre-action requirements have been met. The pre-action requirements do not replace the court's consideration of whether it is 'reasonable' to make an order for possession.<sup>110</sup>

According to a report on evictions by social landlords in Scotland, in 2010, following the implementation of the pre-action requirements for rental arrears matters, evictions had fallen by 33% and court orders for possession had fallen by 20%.<sup>111</sup>

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<sup>108</sup> *Housing (Scotland) Act 2001* s 14A; *Guidance on Pre-Action Requirements*, above n 107, 2.

<sup>109</sup> *Guidance on Pre-Action Requirements*, above n 107, 19, Annex C.

<sup>110</sup> *Ibid* 22.

<sup>111</sup> Povey, above n 84, 34, citing Shelter, *Research Report: Evictions by Social Landlords in Scotland 2009–10* (December 2010) 8.