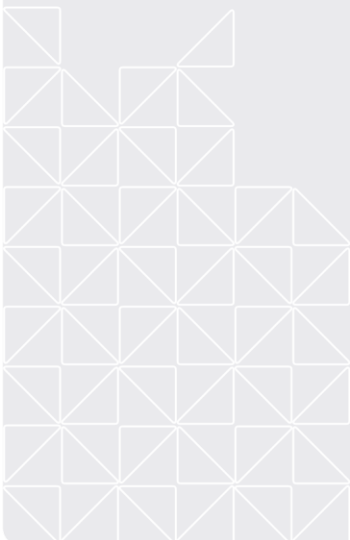


There's no place like home: Submission to the Residential Tenancies Act Review Options Discussion Paper

February 2017



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.

Approximately 60% of our work is tenancy and eviction prevention (including tenants in public, private and community housing). In the 2015–16 financial year, Homeless Law opened 445 casework files and prevented the eviction of 111 clients and their families through legal representation and intensive social work support.

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 *Residential Tenancies Act 1997* (Vic) (**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);
- 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.

Homeless Law also runs a specialist women's program, the Women's Homelessness Prevention Project (**WHPP**). In its first two years of operation, the WHPP has provided 102 women with 157 children in their care with a combination of legal representation and social work support. Of these 102 women at risk of homelessness, 90% had experienced family violence. Of the completed matters, 83% resulted in women maintaining safe and secure housing or resolving a tenancy legal issue (e.g. a housing debt) that was a barrier to accessing housing. The two year report on the WHPP, *Keeping Women and Children Housed: Two years, ten client stories and ten calls for change* (**WHPP Two Year Report**) is included at **Annexure 1**.

In the two years from August 2014, Homeless Law provided legal assistance to 228 prisoners through the Debt and Tenancy Legal Help for Prisoners Project. Through the provision of legal representation, Homeless Law has assisted 43 Victorian prisoners to avoid eviction. Through this work we have built a stronger 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

Homeless Law thanks our partner law firms and pro bono lawyers whose casework continues to generate positive outcomes for our clients and to directly inform our recommendations for a safer, fairer residential tenancies system. We also acknowledge our colleagues in the homelessness, social service and community legal sectors for consulting in relation to this submission and our clients for their resilience and insights.

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1. Executive summary and 13 key recommendations

Homeless Law welcomes the further opportunity to contribute to the Victorian Government's Residential Tenancies Act (RTA) Review and to respond to the *Heading for Home, Residential Tenancies Act Review Options Discussion Paper (Options Paper)*.¹ We commend the Government for its commitment to creating a balanced rental market in which the expectations and needs of tenants, landlords and property managers are met.

Through our work 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 Options Paper recognises, the rental market is no longer a stepping stone on the path to home ownership and accordingly, there is an increasing need to rebalance the market through additional protections for tenants. Victoria's current housing environment is too tough on tenants – affordable housing options are sparse, social housing waitlists are soaring, and homelessness services are overwhelmed with demand.

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

- A recent snapshot of private rental properties showed that less than 1% of rental properties in and around metropolitan Melbourne were affordable for single parents on low incomes.²
- There are currently over 33,000 people on the waiting list for public housing in Victoria.³
- 279,196 people sought assistance from specialist homelessness services in Victoria in 2015–16.⁴
- 17,378 applications for possession orders were made to VCAT in 2015–16.⁵
- A 2017 survey conducted jointly by consumer group Choice, National Shelter and the National Association of Tenant Organisations revealed that 83% of people surveyed were living with little to no long-term security, and tenants in Australia lack the power to demand standard property maintenance.⁶

It is in this context that Homeless Law provides legal representation and social work support to Victorians facing eviction into homelessness. Through this work, we see that it is currently too easy to evict vulnerable tenants into homelessness.

As Melburnians grapple with the challenge of growing numbers of people sleeping rough, it is vital that the Government recognises the clear links between hasty evictions of vulnerable people and homelessness.

We need a legal, policy and services framework that makes evictions a last resort.

Through the Options Paper, the Government is presenting two divergent paths:

1. Proposals for a legislative framework that will support a fairer, more balanced rental market where unnecessary evictions are avoided; or
2. Proposals that will create a significantly greater risk of avoidable evictions into homelessness for too many Victorians.

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. While the ability for landlords to

¹ This is the sixth submission Homeless Law has contributed to the RTA Review.

² Anglicare Australia, *Anglicare Australia Rental Affordability Snapshot* (2016) 80 available at: <http://www.anglicare.asn.au/docs/default-source/default-document-library/rental-affordability-snapshot-2016.pdf?sfvrsn=7> (based on a snapshot dated 2-3 April 2016).

³ Department of Health and Human Services, *Victorian Housing Register and transfers by local area September 2016* (Victorian Housing Register) available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research-data-and-statistics/public-housing-waiting-and-transfer-list>.

⁴ Australian Institute of Health and Welfare, *Specialist Homelessness Services 2015–2016: Victoria – fact sheet* (2016) (AIHW Report), available at: <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129558613>.

⁵ Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2015-2016* (8 November 2016) 45 (VCAT Annual Report).

⁶ Natasha Robinson and Rebecca Armitage, *Renters have little security, put up with a lot and fear eviction: survey* (17 February 2017), available at: <http://www.abc.net.au/news/2017-02-16/renters-have-little-security-and-fear-eviction-survey/8273670>.

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. As it stands, Victoria does not have a legal system or a culture geared towards homelessness prevention and this needs to change.

Informed by the evidence-base from providing legal representation to over 400 clients last year, including preventing the eviction of 111 clients and their families into homelessness, Homeless Law makes the following 13 recommendations for a fairer, safer and more sustainable rental sector in which evictions are a last resort.

13 RECOMMENDATIONS FOR A FAIRER, SAFER AND MORE SUSTAINABLE RENTAL SECTOR FOR VICTORIA

Supporting a fairer, more balanced rental market that avoids unnecessary evictions

1. Introduce 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.
- Development of a pre-eviction checklist for landlords to satisfy before applying to VCAT for a possession order.
- VCAT be given jurisdiction to consider the human rights compatibility of eviction decisions by social landlords under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Homeless Law supports the adoption of option 11.2, along with the complementary development of a pre-eviction checklist and the expansion of VCAT's jurisdiction to consider the human rights compatibility of eviction decisions by social landlords.

2. Improve the legal framework for victims of family violence to keep their housing

To support the right of victims to safely remain in rented premises following family violence, Homeless Law recommends:

- Sections 233A and 233B of the RTA should be amended to provide that VCAT members may make an order under section 233B of the RTA where either:
 - The applicant has obtained a final IVO that excludes the perpetrator from the premises; or
 - The Tribunal is otherwise satisfied that the tenancy is affected by family violence, and it is appropriate to make an order under section 233B, having regard to the circumstances.
- Section 233B of the RTA should also be amended to provide criteria for VCAT members to consider when determining applications in the absence of a final exclusionary IVO. The criteria should be developed in consultation with specialist family violence and legal services and could include:
 - Whether the applicant has previously applied for an IVO, and if so, whether an IVO was granted.
 - The conditions of any IVOs that were previously, or are currently, in force.
 - If no IVO was previously sought, or is no longer in force, the reasons why.
 - The opinion of any professionals or support workers from services assisting any parties to the application, including a statutory declaration or report from police, specialist family violence services, GP, psychologist/counsellor or maternal and child health care nurse/workers.

- The respective hardships of the parties to the application if an order under section 233B were to be made.

- The use and awareness of section 233A should be improved through providing specific family violence training for VCAT members, family violence sector workers and the police about the operation of section 233A, along with the implementation of a Magistrates' Court practice direction to ensure IVO applicants are made aware of section 233A in Magistrates' Court proceedings.
- VCAT should be required to hear family violence-related applications as soon as practicable (preferably within a maximum of three business days) to ensure the safety of victims. However, VCAT should be mindful of the need for parties to obtain necessary support (including legal advice and representation) and supporting documentation as part of these hearings and should have clear processes for considering appropriate adjournments.
- A parent or guardian of a child who is a victim of family violence should have access to family related protections under the RTA, where the parent or guardian lives in the same premises as the child.
- Section 64 of the RTA should also be amended to allow victims of family violence to make non-structural modifications to improve the security of a rented premises, without requiring landlord consent.

Homeless Law supports the adoption of: a hybrid of options 12.1B and 12.1C (the drafting of which should be informed by consultation with specialist family violence services and legal services); 12.2 (noting the importance of appropriate adjournments); 12.3; and 12.5B.

3. Prevent victims of family violence being evicted for perpetrator conduct

To support victims of family violence to maintain their housing and to avoid punishing victims for the actions of perpetrators, Homeless Law recommends that:

- Victims of family violence are able to challenge the validity of a notice to vacate through VCAT (at or before the hearing of an application for a possession order) if the relevant action or conduct was committed by a perpetrator of family violence.
- Landlords and real estate agents are provided with guidance to support them act early to avoid evictions for clients experiencing family violence. More specifically, we recommend that 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.

Homeless Law supports the adoption of option 12.9.

4. Abolish no reason notices to vacate and end of fixed term agreement notices to vacate

The notice to vacate for no specified reason should be removed from the RTA. Unjustified evictions are no longer an appropriate feature of the Victorian residential tenancy landscape, and sections 263, 288 and 314 of the RTA, along with related provisions, should be repealed.

The notice to vacate for the end of a fixed term agreement should also be removed from the RTA through the repeal of section 261 so that landlords are required to provide a clear and specific reason for terminating the tenancy.

Homeless Law supports the adoption of options 11.25A and 11.27D.

5. Improve safeguards against avoidable evictions of vulnerable tenants

In the current housing environment, balanced, legally rigorous processes that protect against arbitrary evictions are essential and a crucial component of Victoria's work to prevent and address homelessness. Homeless Law recommends:

- Notices to vacate for illegal use of the premises can only be issued when the tenant or resident has been convicted in relation to the relevant illegal conduct.

- The notice period for a notice to vacate for disruption (i.e. seriously interrupting peace and quiet enjoyment in a rooming house) should be extended from the same day to 14 days.
- Notices to vacate for successive breaches of duty should be abolished.
- 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.

Homeless Law supports the adoption of options 5.2C, 11.12, 11.19 and 11.22A.

6. Improve legal mechanisms for exiting leases in cases of severe hardship

To clarify the provisions regarding terminating leases early due to unforeseen changes in circumstances that present a risk of severe hardship and, in particular, to prevent victims of family violence being trapped in tenancy agreements that are unsafe, Homeless Law recommends:

- Where an order under section 234 is made in relation to a fixed term tenancy, a periodic tenancy will only subsequently come into effect at the premises if one or more previous co-tenants continue to reside there.
- The successful applicant under section 234 will not be a party to any periodic tenancy agreement that arises after the fixed term tenancy is deemed to terminate by VCAT.
- Where an order under section 234 is made and a previous tenant remains at the property under a new periodic tenancy agreement, the successful section 234 applicant maintains a right to apply for the return of any portion of the bond and to access the property to collect belongings.
- VCAT members hearing applications under section 234 in relation to fixed term tenancies are prohibited from ordering lease breaking costs against applicant tenants. Compensation should be capped at two weeks' rent, but guidance should be provided to VCAT members on the appropriateness of ordering no compensation in circumstances, and severe hardship should also be able to be considered in assessing compensation claims after a tenancy has ended.
- VCAT members can apportion liability between the parties, including in relation to damage or arrears and including a finding that one party is wholly liable for those costs.
- VCAT members can make an order preventing a landlord, agent and database operator from making an entry on a tenancy database.
- A party to a fixed term or periodic lease can apply to terminate the lease (recognising the appropriateness of the above provisions for people at risk of severe hardship even where the lease is month to month).
- Landlords or real estate agents should be required to provide a fact sheet on all options available to a tenant where a lease needs to be reduced and/or a tenant discloses family violence and the standard form tenancy agreement should be amended to include a section informing tenants of their rights under section 234.
- Landlords and agents who knowingly mislead a tenant about their right to make an application under section 234, in circumstances where the landlord is aware that the tenant has experienced family violence or other unforeseen circumstances, will commit an offence under the RTA.
- Victims of family violence can issue an immediate notice of intention to vacate (fixed or periodic leases) by providing evidence of family violence (including a family violence safety notice, interim or final IVO, statutory declaration or report from police, a GP, specialist family violence service, psychologist/counsellor or maternal and child health nurse/worker), which identifies that it is no longer safe to live at the property. The victim will not be liable to pay compensation for early termination or damage to the property caused by the perpetrator.

Homeless Law supports the adoption of options 6.3, 6.4 (modified), 6.5 and a hybrid of options 12.4A and 12.4B, subject to further consultation with specialist family violence and legal

	<p>services, and stakeholders affected by the new model in NSW to better understand whether it is delivering the clear, safe mechanism intended. Most likely, both options will be needed i.e. immediate notice of intention to vacate for some tenants, and an effective VCAT process for others.</p> <p>7. Improve the apportionment of liability in the context of family violence</p> <p>To prevent victims of family violence bearing housing debts for damage or arrears attributable to family violence, Homeless Law recommends:</p> <ul style="list-style-type: none"> • In relation to co-tenancies: VCAT may take into account whether the damage and/or arrears which form the basis of a landlord's compensation claim are attributable to family violence, and if they are, VCAT can apportion liability between co-tenants as it sees fit (including determining that the perpetrator is fully liable for the landlord's loss or damage), having regard to family violence. The victim's share of the bond should be excluded from compensation to the landlord and should be quickly returned to support access to alternative housing. • Where the victim is a sole tenant: where the Tribunal is satisfied that some or all of the damage has arisen as a result of family violence, the tenant will not be held liable for any compensation that arises as a result of the damage. • A final or interim IVO should not be required as evidence of family violence for these mechanisms. Legislative guidance on what evidence will establish that a tenant or co-tenant was a victim of family violence should be informed by further consultation with specialist family violence and legal services, but could include a statutory declaration or report from police, specialist family violence services, GP, psychologist/counsellor or maternal and child health care nurse/workers. <p>Homeless Law supports the adoption of modified options 12.11 and 12.12.</p> <p>8. Remove unfair 'blacklistings' and improve tenancy database accessibility for vulnerable tenants</p> <p>Section 439 of the RTA should be amended to allow victims of family violence to prevent their personal details from being listed on tenancy databases and to remove existing listings where the relevant breach or damage occurred in the context of family violence.</p> <p>Database operators and landlords should be prohibited from charging a fee to a tenant in order to obtain a copy of that tenant's 'blacklisting'. Tenants should also be able to apply to VCAT to have a listing amended or removed, if VCAT is satisfied that the listing is unjust in the circumstances, with regard to the listing, the tenant's involvement and any adverse consequences.</p> <p>Homeless Law supports the adoption of options 4.4, 4.5, 12.6, 12.7 and 12.8.</p> <p>9. Introduce a re-hearing process for residential tenancies decisions</p> <p>With reference to the joint statement by the CEOs of Community Housing Federation of Victoria, Tenants Union of Victoria, Justice Connect, Real Estate Institute of Victoria, Law Institute of Victoria and Victoria Legal Aid (Annexure 2), Homeless Law recommends the introduction of a re-hearing process for residential tenancies cases at VCAT, to address sector-wide concerns about the lack of consistency and predictability of decision-making, the current inaccessible appeal rights and the lack of sufficient oversight of decision-making in the Residential Tenancies List.</p> <p>Homeless Law supports the adoption of option 10.4A.</p>
<p>Avoiding reforms that will push more Victorians into homelessness</p>	<p>10. Abandon the proposed termination order and improve effective communication strategies with tenants</p> <p>Termination orders present an unacceptable risk of turning VCAT into a rubber stamp for orders made against tenants who do not understand the case being put against them and who may not attend the hearing. They will hasten the eviction process, weaken procedural fairness, diminish VCAT's role in effectively adjudicating and lead to preventable evictions of vulnerable tenants. They should not be pursued.</p>

To improve tenant engagement and avoid tenants vacating on receipt of a notice to vacate, the misleading term 'notice to vacate' should be changed (for example to 'request to vacate' or 'notice of intention to end tenancy agreement'), 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.

Homeless Law strongly opposes the adoption of option 11.1 and the adoption of termination orders in relation to any eviction process.

11. Reduce preventable evictions for rental arrears, which are detrimental to landlords and tenants

The eviction process is costly for both landlords and tenants, and the needs of the landlord can often be appropriately met by the tenant receiving timely support to comply with their obligations (for example, by addressing unpaid arrears), rather than through termination of the tenancy.

To address rental arrears, Homeless Law recommends that section 246 and related provisions of the RTA should be amended to implement the following processes:

- Landlords are required to give tenants a 'rent arrears warning' within 14 days of rent arrears arising. This warning, which could be a Consumer Affairs Victoria form, should contain referral options for appropriate services, including financial counsellors and housing, family violence and legal services.
- If steps are not taken by the tenant to address the arrears in response to the 'rent arrears warning', a notice to vacate could be issued if the tenant owes at least 28 days rent to the landlord.
- Real estate agents should be better supported to understand alternatives to eviction, including through making early referrals to support services when they identify a tenant having difficulty complying with their obligations.

Section 281 of the RTA should be amended to make rooming house processes for rental arrears and late rental payments consistent with general tenancy provisions, reducing the significant risk of immediate homelessness faced by residents.

Homeless Law strongly opposes the adoption of options 11.15 and 11.17, and supports the adoption of option 11.18.

12. Avoid making it easier to evict tenants for minor breaches and 'antisocial behaviour' and ensure VCAT has discretion to consider alternatives

To avoid increasing the risk of vulnerable tenants being evicted for minor misconduct and conduct directly related to mental illness, fraught neighbourhood relationships, discrimination or special needs of tenants and their children, Homeless Law recommends:

- Do not broaden the potential to get a termination order for any three breaches in a 12 month period or convert the three strikes rule into a two strikes rule.
- Do not include a new termination provision with a broad definition of anti-social behaviour.
- Do not remove the ability of VCAT to consider that 'there will not be any further breach of duty'. Instead, section 332(1)(b)(ii) of the RTA should be maintained and section 332(1)(b) of the RTA should be amended, so that each of the subsections are alternative bases on which VCAT can refuse a possession order.

Homeless Law strongly opposes the adoption of options 5.2A, 5.2B, 11.20, 11.21 and 11.24.

13. Prevent and address the escalation of conduct through supports and strengthen safeguards to ensure evictions are a last resort

In addressing challenging conduct in tenancies and rooming houses, Homeless Law strongly recommends that every effort is made to prevent escalation of conduct, to address conduct through supports, and to make sure we have a legal, policy and services framework that means we resort to eviction only as an absolute last resort.

Homeless Law recommends that:

- No changes are made to make it easier to evict for damage or danger. Instead, the clear links between this conduct and mental illness, family violence, disability and fraught relationships within neighbourhoods and rooming houses must be acknowledged and addressed.
- Tenants and residents should be supported to sustain their housing and address their ongoing conflicts with their neighbours (including through case management support or, in some cases, transfer to an alternative property), particularly through information and referral pathways to appropriate social, financial and legal services.
- Community housing providers should be supported with resources, training, access to tenant support services (for example, the Social Housing Advocacy and Support Program, which is currently only available for public housing tenants) and a supply of stock available for transfer options where necessary. These mechanisms will support genuine contemplation of alternatives to eviction.

Homeless Law strongly opposes the adoption of options 11.3, 11.4, 11.5 and 11.6.

2. Supporting a fairer, more balanced rental market that avoids unnecessary evictions

We commend the Victorian Government for its commitment to developing a balanced rental market, seeking to meet the needs and expectations of tenants, landlords and property managers.

This part identifies the following key reform options canvassed in the Options Paper, which would support a fairer, more balanced rental market, improve safety for vulnerable Victorians and effectively reduce preventable evictions:

- Making sure that evictions are reasonable and a last resort;
- Improving the framework for victims of family violence to keep their housing;
- Avoiding evictions for actions by the perpetrator of family violence;
- Getting rid of unjustified evictions;
- Improving safeguards against avoidable evictions of vulnerable tenants;
- Improving legal mechanisms for exiting leases in cases of severe hardship;
- Creating a clearer mechanism for apportioning liability in the context of family violence;
- Removing unfair 'blacklistings' and improving tenancy database accessibility for tenants; and
- Introducing a mechanism for internal appeal of residential tenancies decisions.

2.1 Making sure evictions are reasonable and a last resort

Strengthen legal safeguards

Through over 15 years of eviction prevention work, Homeless Law has seen that existing legal frameworks make it too easy to evict vulnerable tenants into homelessness in Victoria.

Although 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),⁷ ordinarily VCAT members *must* make an order of possession if the landlord proves they were entitled to serve a notice to vacate.

In a system where evictions are relatively straightforward – 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.

We welcome the recognition in the Options Paper: 'It has been suggested that a further test be applied to terminations such that VCAT must not make a possession order unless it is reasonable and proportionate in the circumstances, taking into account hardship to the tenant. This is particularly important in light of the fact that in some cases, the end of a tenancy could result in homelessness for the tenant'.⁸

As the case study below highlights, landlords often do not have access to the referral pathways and supports they need to intervene early and to choose options other than eviction. There is no onus on landlords to take steps to engage the tenant or consider alternatives to eviction. In Homeless Law's experience, this leads to an over-reliance on VCAT – an already overburdened jurisdiction – and to evictions that could and should be avoided.

⁷ Residential Tenancies Act 1997 (Vic) s 331.

⁸ State Government of Victoria, *Heading for Home: Residential Tenancies Act Review – Options Discussion Paper* (January 2017), 173 (Options Paper).

Mother of two with mental health concerns facing eviction for arrears despite a workable payment plan

Sheena is a single mother of two children living in a private rental property. She has bipolar disorder and recently experienced family violence from her husband, which caused her to separate from him. When she was hospitalised for her mental health, she fell behind in her rent and VCAT made a possession order in her absence. When she approached Homeless Law, the locks were going to be changed.

Through Homeless Law, Sheena was assisted to lodge an urgent review application because she had not attended the first hearing, and this put a hold on the locks being changed. In the lead-up to the VCAT hearing, Homeless Law's social worker also managed to arrange financial brokerage totalling \$1500 from three separate support services. At the VCAT hearing, a feasible repayment plan for the arrears was offered, but the VCAT member found the arrears were excessive and confirmed the possession order meaning the eviction could go ahead.

Despite this, Homeless Law conducted further urgent negotiations with the landlord that led to an agreement being reached for the tenant to stay provided she could make regular arrears repayments. Sheena kept up with these payments and the possession order expired six months later.

In Sheena's case, the combination of access to legal representation that involved pre- and post-hearing negotiation, social work support, brokerage, and the landlord's openness to negotiation, meant that Sheena and her children narrowly avoided eviction into homelessness.

Homeless Law strongly encourages the Government to move toward a legal framework that supports tenancy sustainment. As Sheena's story shows, both tenants and landlords, and the community more generally, stand to benefit from avoiding unnecessary tenancy terminations.

Reasonableness requirement

Homeless Law recommends that the RTA should be amended to provide VCAT members with discretion to avoid granting a possession order where they are not satisfied that it is reasonable in the circumstances.

For vulnerable tenants in private and social housing, the inclusion of a reasonableness requirement in the RTA would provide an additional layer of legal protection that may 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.⁹

Pre-eviction checklist

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.¹⁰

Similarly, the development of a pre-eviction checklist for landlords to satisfy before applying to VCAT for a possession order has significant potential to improve security of tenure for Victorian tenants. The checklist provides an opportunity for the landlord and tenant to resolve issues with the tenancy as early as possible, including by: requiring the landlord to speak with the tenant (or make attempts to) about the issue the potential eviction proceedings relate to; attempt to understand the impact of eviction on the tenant; consider alternatives to eviction, and; link the tenant with advice or supports where possible.

This approach would strike the necessary balance with maintaining the rights of landlords to manage their tenancies and address breaches in a reasonable and proportionate way.¹¹

⁹ *Housing (Scotland) Act 2001* (UK) s 16. See also the annexure to *Justice Connect Homeless Law, There's no place like home: Submission on the Security of Tenure Issues Paper* (December 2015) 56-8.

¹⁰ 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) 8 (**The Churchill Report**).

¹¹ See, eg, *Housing (Scotland) Act 2001* (UK) s 16. See also The Churchill Report, above n 10 for a more detailed discussion of the Scottish model.

Together, a set of pre-eviction criteria for landlords to satisfy and a reasonableness requirement in eviction proceedings, will better ensure that evictions only occur as a last resort. This approach would contribute to shifting the tenancy system's focus to ensuring that the risks to the property, landlord and to the tenant are taken into account when making decisions in relation to termination and possession.

Ensuring that eviction decisions are compatible with human rights

In addition to the introduction of a reasonableness requirement and pre-eviction checklist, Homeless Law recommends law reform that would give VCAT jurisdiction to consider the human rights compatibility of eviction decisions by public and community landlords. Effective use of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) when making eviction decisions can play a significant role in balancing competing obligations for social landlords and ensuring consideration of alternatives to eviction.¹²

The current requirement to raise questions of human rights compliance in the Supreme Court of Victoria significantly limits the accessibility and impact of Victoria's human rights framework.

Recommendation 1: Introduce 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.
- Development of a pre-eviction checklist for landlords to satisfy before applying to VCAT for a possession order.
- VCAT be given jurisdiction to consider the human rights compatibility of eviction decisions by social landlords under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Homeless Law supports the adoption of option 11.2, along with the complementary development of a pre-eviction checklist and the expansion of VCAT's jurisdiction to consider the human rights compatibility of eviction decisions by social landlords.

2.2 Improving the framework for victims of family violence to keep their housing

Family violence is the most common cause of homelessness in Victoria, with 34% of people citing family violence as the main reason they need help from a specialist homeless service.¹³ In May 2015, 129 organisations from the housing, homelessness, family violence, health, local government and legal sectors made a joint submission to Victoria's Royal Commission into Family Violence (**Royal Commission**), which identified the links between family violence, housing and homelessness. The joint submission collectively highlighted that Victoria's shortage of affordable housing:

- Deters victims from leaving violent relationships.
- Pushes victims into homelessness.

¹² See Justice Connect Homeless Law, *There's no place like home: Submission on the Security of Tenure Issues Paper* (December 2015) 50-2 for a more detailed discussion of the human rights compatibility of eviction decisions by social landlords. See also Justice Connect Homeless Law, *Charting a Stronger Course: Submission to the Eight Year Charter Review* (2015) available at: <https://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/preventing-evictions-and-sustaining-tenancies/charting-stronger-course-homeless-law-submission-eight-year-charter-review> and Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2015), recommendation 27, which also stated: The amendment should be modelled on section 40C of the *Human Rights Act 2004* (ACT). The Tribunal's jurisdiction to determine whether a public authority has breached section 38 of the Charter should be similar to the jurisdiction in relation to unlawful discrimination under the *Equal Opportunity Act 2010* (Vic) available at: <https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>.

¹³ See Australian Institute of Health and Welfare, *Specialist Homelessness Services: 2015-2016* (2016) (**AIHW Report**), 'Supplementary table: VIC CLIENTS.14: Clients, by main reasons for seeking assistance, 2015-16, adjusted for non-response' available at <http://www.aihw.gov.au/homelessness/specialist-homelessness-services-2015-15/supplementary-tables/>.

- Can make perpetrators more isolated and increase the risk of repeated or escalated violence.¹⁴

Based on the lived experiences of our clients, particularly through the Women's Homelessness Prevention Project,¹⁵ Homeless Law sees that victims of family violence are inadequately protected regarding their tenancy rights, burdened with debts as a result of perpetrator damage or arrears and, consequently, at risk of homelessness.

We commend the Government's reform options in section 12 of the Options Paper, which seek to improve the legal framework for victims of family violence to keep their housing, including with reference to recommendation 116 of the Royal Commission into Family Violence. Implementation of the appropriate reforms will strengthen safeguards and reduce the current unacceptable links between family violence and homelessness in Victoria.

Improve access to family violence protections

Section 233A of the RTA is the legal mechanism intended to support victims to stay in their homes when they choose to and when it is safe to do so. It was introduced as part of the *Family Violence Protection Act 2008* (Vic), with the stated aim of reducing the risk of homelessness, poverty and social dislocation that often follows an incident of family violence.¹⁶

As the Options Paper discusses, section 233A of the RTA provides that where a tenant is excluded from the premises pursuant to a final intervention order, the protected person under that IVO can apply to VCAT for an order terminating the existing tenancy agreement with the protected person. Victims can make an application under section 233A if they are a co-tenant or if they are living at the premises but are not a party to the lease.

Unfortunately, despite its intention, in practice section 233A of the RTA is grossly underutilised. The Royal Commission into Family Violence report noted that in 2013–14, this provision was used just 22 times (with only 13 applications proceeding to a final hearing and determination). In the same period the Magistrates' Court made 24,947 final IVOs.¹⁷

As discussed in our joint submission with safe steps Family Violence Response Centre to the *Rights and Responsibilities of Landlords and Tenants Issues Paper (Homeless Law and safe steps Joint Submission)*,¹⁸ the requirement for a final Intervention Order (IVO) to invoke section 233A of the RTA creates difficulties for women experiencing family violence, particularly because:

- A final IVO can take considerable time to obtain, by which time the tenancy may have been terminated for other reasons – e.g. rent arrears attributable to a perpetrator as in the example above.
- There can be issues with serving an IVO after it has been made, with some orders remaining unserved for significant periods of time, which can significantly delay finalisation of an IVO.
- Police do not always apply for exclusion conditions in IVO applications where they would be warranted.
- The victim must apply under two jurisdictions (the Magistrates' Court of Victoria and VCAT) in order to use this provision;
- Many victims of family violence will simply not seek an IVO. This can happen for a range of reasons, including fear of further escalation of the violence, lack of police enforcement, a belief that the order won't change the perpetrator's behaviour, the inconvenience and time investment that can be involved in obtaining an IVO, or other competing personal priorities following an incident of family violence (i.e. children's needs).
- Many Magistrates and court officers working in the IVO jurisdiction are not aware of section 233A of the RTA and the requirement of a final order with an exclusion clause, and as a result, may not provide appropriate information or guidance about this provision to protected persons who might benefit from an application under section 233A.

Although ultimately successful, Agatha's case study below highlights the shortcomings of the current mechanism and the barriers to its accessibility.

¹⁴ See *Joint submission on family violence, housing and homelessness endorsed by 129 organisations* (May 2015) available at: <https://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/preventing-evictions-and-sustaining-tenancies/family-violence-homelessness-and-affordable-housing>.

¹⁵ Please see Annexure 1 – Justice Connect Homeless Law, *Keeping Women and Children Housed: Women's Homelessness Prevention Project – Two Years, ten client stories and ten calls for change* (December 2016) (**WHPP Two Year Report**).

¹⁶ Second Reading Speech for the Introduction of the *Family Violence Protection Act 2008* (Vic) Hansard 2649.

¹⁷ Victorian Civil and Administrative Tribunal, *Submission to the Royal Commission into Family Violence* (2015), 3, VCAT reports that only 13 section 233A applications were heard in the 2013-2014 period.

¹⁸ Justice Connect Homeless Law and safe steps Family Violence Response Centre, *Joint submission: Rights and Responsibilities of Landlords & Tenants* (May 2016) 39 (**Homeless Law and safe steps Joint Submission**).

Victim of family violence almost evicted for arrears before new tenancy could be created

Agatha was living as a co-tenant in public housing along with her two adult children when her daughter Jane's partner Sam moved in. Agatha was pressured into allowing Sam to become a co-tenant, and shortly afterwards he began using family violence against her, including verbal threats and economic abuse.

When the violence escalated, Agatha was forced to flee the premises. Despite telling the Office of Housing (OOH) she was not safe there, Agatha wasn't deemed eligible for a reduced rental payment because the OOH's previous temporary absence policy didn't accommodate absence due to family violence. This meant Agatha kept paying her rent to OOH while homeless. Sam was not paying his rent and as the arrears kept accruing, the OOH issued a notice to vacate and applied to VCAT to evict all the tenants.

Agatha applied for an IVO on her own, and obtained an interim order with limited conditions. She then contacted Homeless Law who helped her to negotiate with the OOH to put a hold on eviction proceedings until her IVO application could be finalised. This took over four months because Sam contested Agatha's application. When the IVO was eventually finalised with a clause excluding Sam, Homeless Law helped Agatha apply under section 233A to take over the lease as a sole tenant, and to have her temporary absence due to family violence retrospectively approved, which led to a reduction in the amount of outstanding arrears.

In our two year report on the WHPP, *Keeping Women and Children Housed: Two years, ten client stories and ten calls for change (Annexure 1)*, Homeless Law recommended that:

- Sections 233A and 233B of the RTA should be amended to provide that VCAT members may make an order under section 233B of the RTA where either:
 - The applicant has obtained a final IVO that excludes the perpetrator from the premises; or
 - The Tribunal is otherwise satisfied that the tenancy is affected by family violence, and it is appropriate to make an order under section 233B, having regard to the circumstances.
- Section 233B of the RTA should also be amended to provide non-exhaustive criteria for VCAT members to consider when determining applications in the absence of a final exclusionary IVO. The non-exhaustive criteria should include:
 - Whether the applicant has previously applied for an IVO, and if so, whether an IVO was granted.
 - The conditions of any IVOs that were previously, or are currently, in force.
 - If no IVO was previously sought, or is no longer in force, the reasons why.
 - The opinion of any support workers from services assisting any parties to the application.
 - The respective hardships of the parties to the application if an order under section 233B were to be made.

Homeless Law welcomes the clear reference in the South Australian model to 'other evidence of family violence', including a statutory declaration or report from police, specialist family violence services, GP, psychologist/counsellor or maternal and child health care nurse/workers. We also appreciate the need for VCAT to be able to consider a complex range of factors, for example, evidence that could prevent cross-applications being misused to bring about the termination of a tenancy.

As recommended in the Homeless Law and safe steps Joint Submission, in considering how best to amend sections 233A and 233B of the RTA, targeted consultation should be undertaken on the proposed drafting, including with specialist family violence and legal services, and more detailed enquiries should be made about the operation of the provisions in Queensland and South Australia (e.g. benefits and limitations in practice).¹⁹

Together with removing the legislative barriers, we recommend that the use and awareness of section 233A should be improved through providing specific family violence training for VCAT members, family violence sector workers and the police about the operation of section 233A, along with the implementation of a Magistrates' Court practice direction to ensure IVO applicants are made aware of section 233A in Magistrates' Court proceedings.

Homeless Law further recommends that:

- VCAT be required to list family violence-related applications within three days to support the safety of the victim and to give the best chance of sustaining the housing (e.g. before the victim has to flee or the existing tenancy is terminated for another reasons such as arrears).²⁰ However, VCAT should be mindful of the need for parties to obtain necessary support

¹⁹ Homeless Law and safe steps Joint Submission, above n 18, 37.

²⁰ Options Paper, above n 8, 222, option 12.2.

(including legal advice and representation) and supporting documentation as part of these hearings and should have clear processes for considering appropriate adjournments; and

- A parent or guardian of a child who is a victim of family violence should have access to family related protections under the RTA, where the parent or guardian lives in the same premises as the child.²¹ This would ensure that the protections under the RTA are available where family violence has occurred against a minor. For example, a parent or guardian of a child who is the victim of family violence would be able to make reasonable modifications to the rented premises, even though the child is not a party to the tenancy agreement.

Allow modification of rented premises to improve security

To make it a more realistic possibility that victims are safely able to stay in their homes after an experience of family violence, tenants should be empowered to modify the rented property to improve security if he or she is a victim of family violence.²²

Specifically, Homeless Law recommends amending section 64 of the RTA to allow victims of family violence to make certain security improvement modifications to a rented premises, without requiring the landlord's consent.²³ These 'non-structural modifications' should include security-related modifications except locks, including security cameras, alarm systems, security lighting and window coverings (noting as the Options Paper does that where a protected person has a family violence or personal safety IVO or a family violence safety notice, with an exclusion condition against a tenant or co-tenant, locks on external doors and windows are already permitted to be changed without the landlord's consent under section 70A of the RTA).²⁴

Homeless Law supports the development of a list of non-structural modifications that can be made without the landlord's consent in consultation with the family violence sector and victim survivors who will have the most informed understanding of what types of modifications are needed to improve victims' safety.

For modifications that fall outside this list, the tenant can seek the landlord's consent to make reasonable modifications, the landlord must respond within two business days and must not unreasonably withhold consent. If the landlord withholds consent, the tenant can apply to VCAT, which must schedule a hearing within two business days to:

- Confirm that the applicant was a victim of family violence;
- Establish whether the proposed modifications are reasonable; and
- Consider relevant matters raised by the landlords and any co-tenants.

We reiterate that the legislative guidance on what evidence will establish the existence of family violence and inform whether or not the modifications are reasonable should be developed in further consultation with the specialist family violence sector. As mentioned above, VCAT members will require specialist family violence training to support them to make well-informed decisions that protect the safety of victims and make it a possibility for victims to stay in their homes and communities.

²¹ Options Paper, above n 8, 222, option 12.3.

²² Homeless Law and safe steps Joint Submission, above n 18, 39.

²³ Options Paper, above n 8, 228, option 12.5B.

²⁴ Ibid 227. Note that section 70A of the RTA only applies where the perpetrator who is excluded from the property is a tenant or co-tenant. It does not apply, for example, where the perpetrator has a spare set of keys and presents a risk to the victim, but is not a tenant or co-tenant at the property.

Recommendation 2: Improve the legal framework for victims of family violence to keep their housing

To support the right of victims to safely remain in rented premises following family violence, Homeless Law recommends:

- Sections 233A and 233B of the RTA should be amended to provide that VCAT members may make an order under section 233B of the RTA where either:
 - The applicant has obtained a final IVO that excludes the perpetrator from the premises; or
 - The Tribunal is otherwise satisfied that the tenancy is affected by family violence, and it is appropriate to make an order under section 233B, having regard to the circumstances.
- Section 233B of the RTA should also be amended to provide criteria for VCAT members to consider when determining applications in the absence of a final exclusionary IVO. The criteria should be developed in consultation with specialist family violence and legal services and could include:
 - Whether the applicant has previously applied for an IVO, and if so, whether an IVO was granted.
 - The conditions of any IVOs that were previously, or are currently, in force.
 - If no IVO was previously sought, or is no longer in force, the reasons why.
 - The opinion of any professionals or support workers from services assisting any parties to the application, including a statutory declaration or report from police, specialist family violence services, GP, psychologist/counsellor or maternal and child health care nurse/workers.
 - The respective hardships of the parties to the application if an order under section 233B were to be made.
- The use and awareness of section 233A should be improved through providing specific family violence training for VCAT members, family violence sector workers and the police about the operation of section 233A, along with the implementation of a Magistrates' Court practice direction to ensure IVO applicants are made aware of section 233A in Magistrates' Court proceedings.
- VCAT should be required to hear family violence-related applications as soon as practicable (preferably within a maximum of three business days) to ensure the safety of victims. However, VCAT should be mindful of the need for parties to obtain necessary support (including legal advice and representation) and supporting documentation as part of these hearings and should have clear processes for considering appropriate adjournments.
- A parent or guardian of a child who is a victim of family violence should have access to family related protections under the RTA, where the parent or guardian lives in the same premises as the child.
- Section 64 of the RTA should also be amended to allow victims of family violence to make non-structural modifications to improve the security of a rented premises, without requiring landlord consent.

Homeless Law supports the adoption of: a hybrid of options 12.1B and 12.1C (the drafting of which should be informed by consultation with specialist family violence services and legal services); 12.2 (noting the importance of appropriate adjournments); 12.3; and 12.5B.

2.3 Avoiding evictions for actions by the perpetrator of family violence

Homeless Law strongly supports the strengthening of safeguards to avoid evictions of people experiencing family violence due to the conduct of perpetrators. Homeless Law recommends that victims of family violence be able to challenge the validity of a notice to vacate through VCAT if the relevant action or conduct was committed by a perpetrator of family violence.²⁵

In particular, provisions dealing with evictions on the basis of alleged malicious damage, danger, disruption, illegal use, breach of compliance orders and successive breaches (if this ground is not repealed, which we recommend it is), should provide that a family violence victim will not be evicted if the alleged action or conduct was committed by the perpetrator of family violence.²⁶

Each of these circumstances can arise in situations of control, coercion, abuse and physical violence. While clearly being very difficult to manage from a landlord's perspective, eviction of the victim is not the appropriate response. Early intervention and linking the tenant with appropriate supports to address the underlying violence and causes of the conduct must be the priority.

We reiterate our recommendation from the Homeless Law and safe steps Joint Submission, as well as Homeless Law's Two Year WHPP Report, regarding the need to provide guidance to landlords and real estate agents to support them act early to avoid evictions for clients experiencing family violence. More specifically, we recommended that 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.²⁷

Jacqueline's case study below highlights the importance of giving landlords and VCAT a framework for avoiding evictions of victims of family violence due to the violent conduct of perpetrators.

Victim of family violence facing imminent eviction because of conduct of perpetrator

Jacqueline is an Aboriginal woman who has a cognitive impairment and has been living in community housing and receiving a disability support pension for a number of years. She had previously obtained an intervention order against one of her children due to persistent family violence, but in a recent incident Jacqueline's child had attended her property and caused significant damage. Jacqueline had hidden in the bathroom and called police during the incident.

When Jacqueline's landlord learned about the damage, they issued her with an immediate notice to vacate for malicious damage and requested she immediately repay over \$4000 in damage that had been caused. Jacqueline hadn't vacated the property, and attended a VCAT hearing where a possession order was made against her. Several days before police were due to remove her from the property, Jacqueline contacted Homeless Law for assistance.

Jacqueline's lawyers entered urgent negotiations with her landlord in an attempt to prevent the eviction, which included providing detailed information about her history of family violence and cognitive impairment that the landlord had not previously been aware of. When Jacqueline's landlord refused to call off the eviction, the Homeless Law lawyers worked with pro bono counsel and lodged an urgent injunction application in the Supreme Court, arguing that the landlord had failed to give proper consideration to Jacqueline's human rights in reaching its decision to evict her.

Shortly after these proceedings were commenced, Jacqueline's landlord agreed to cancel the eviction, and instead offered Jacqueline alternative housing in a new location, with no liability for the damage caused by her child.

She has relocated to a different social housing property which has better security that improves her safety.

For Victoria to be a State that genuinely supports victims of family violence to keep their housing and is truly committed to making sure victims are not punished for the conduct of their violent partners, the RTA needs to clearly recognise that victims cannot be liable for the chaotic, coercive, violent conduct of perpetrators of violence. Unless this is made clear in legislation, women like Jacqueline will continue to find themselves homeless, isolated and more open to further abuse.

²⁵ Ibid 231, option 12.9.

²⁶ Victims of family violence should be able to challenge evictions under the following provisions where the alleged conduct was committed or caused by the perpetrator of family violence: sections 243, 244, 248, 249, 250 and 250A (tenancies); 278, 279, 280, 282, 283 and 284 (rooming houses); and 302, 303, 304, 307, 308 and 309 (caravan parks).

²⁷ See Homeless Law and safe steps Joint Submission, above n 18, recommendation 4; WHPP Two Year Report, above n 15, call for change 9, 24–5.

Recommendation 3: Prevent victims of family violence being evicted for perpetrator conduct

To support victims of family violence to maintain their housing and to avoid punishing victims for the actions of perpetrators, Homeless Law recommends that:

- Victims of family violence are able to challenge the validity of a notice to vacate through VCAT (at or before the hearing of an application for a possession order) if the relevant action or conduct was committed by a perpetrator of family violence.
- Landlords and real estate agents are provided with guidance to support them act early to avoid evictions for clients experiencing family violence. More specifically, we recommend that 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.

Homeless Law supports the adoption of option 12.9.

2.4 Getting rid of unjustified evictions

Abolishing no reason notices to vacate

As the Options Paper recognises, the no reason notice to vacate, 'does not adequately protect tenants against unfair termination of their tenancies, and may compromise their ability to access other protections in the RTA during a tenancy for fear of retaliatory termination'.²⁸

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.²⁹ 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'.³⁰

The rationale for the no reason notice is to provide flexibility to private landlords in managing their properties. The four month notice period acknowledges that tenants should be given a reasonable notice period when being evicted without a clear or articulated reason. However, as has been made clear throughout this submission and previous submissions by Homeless Law, 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.³¹

Homeless Law recommends that the notice to vacate for no specified reason should be removed from the RTA.³² We particularly recommend that sections 263, 288 and 314 of the RTA, along with the related provisions, should be repealed, as these provisions are no longer an appropriate or justifiable feature of the Victorian residential tenancy landscape. In the event that this option is not adopted, Homeless Law will support extending the notice period for a notice to vacate during a periodic tenancy agreement to 26 weeks or 182 days.³³

²⁸ Options Paper, above n 8, 200.

²⁹ See *Residential Tenancies Act 1997* (Vic) ss 263, 288 and 314 for tenancies, rooming houses and caravans respectively.

³⁰ John Billings, Jacquelyn Kefford, Alan Vassie, *VCAT Annotated Residential Tenancies Act* (2015) [263.01] (**Annotated RTA**).

³¹ For a more detailed discussion of this issue, please see Justice Connect Homeless Law, *There's no place like home: Submission on the Security of Tenure Issues Paper* (December 2015) 21-26 (**Security of Tenure Submission**).

³² Options Paper, above n 8, 202, option 11.27D.

³³ Options Paper, above n 8, 202, option 11.27A.

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'.³⁴ 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.³⁵ 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.³⁶ 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 and in the Options Paper, 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.³⁷ As discussed throughout this submission, 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

³⁴ Victorian Equal Opportunity and Human Rights Commission, *Locked out: Discrimination in Victoria's private rental market* (August 2012).

³⁵ 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.

³⁶ 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'.

³⁷ 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].

resolving disputes or concerns. In short, these notices close the door to any potential for negotiation; they don't contemplate alternatives to eviction; they make eviction inevitable and risk turning VCAT into a rubber stamp.³⁸

As Sandra's case study demonstrates, the consequences of eviction for no reason for tenants are increasingly harsh in a competitive and unaffordable rental market.

Single mother and her daughter left without options and evicted from their private rental 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.'

The tenancy termination was financially disruptive as Sandra 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 relocation.

No reason evictions from community housing

As the Options Paper recognises, community housing providers also use no reason notices to vacate to deal with fraught tenancies or rooming house residencies where the housing provider is reluctant to use the compliance-based mechanisms under the RTA.³⁹

Homeless Law appreciates the challenging role of social housing providers in managing complex tenancies and rooming houses with limited resources, but we reiterate that these situations are where accountability is essential. Community housing is the end of the line for its tenants and residents and eviction will almost inevitably cause them to become homeless. Evictions should only ever occur as a last resort and there is no way of ensuring this is the case when no reason notices to vacate are employed.

³⁸ See Security of Tenure Submission, above n 31, 26 for a more detailed discussion of the use of no reason notices to vacate by community housing providers.

³⁹ Options Paper, above n 8, 200.

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.

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.

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, where necessary, the cause-based eviction provisions (such as danger, illegal use 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.

Importantly, broad and opaque powers to evict must not be the mechanism we rely on to manage challenging tenants and residents in Victoria. Community housing providers should be able to refer tenants and residents to the Social Housing Advocacy and Support Program (currently limited to public housing tenants) and should have a supply of stock that allows them to transfer tenants or residents where the tenancy is no longer viable, but homelessness should be avoided. Making these alternatives to eviction available to community housing providers would support their ability to effectively manage their properties and competing obligations without resorting to evicting Victoria's most vulnerable tenants into homelessness.

In the current environment, it is difficult to justify retaining an ability to evict without a clear and transparent reason for doing so and these notices have no place in a fairer, more equal Victorian rental market.⁴⁰

Abolishing notices to vacate at the end of fixed term agreements

In a similar way to the way no reasons notices can be used, notices to vacate for end of fixed term tenancy agreements can be used to evict for discriminatory or retaliatory reasons. They diminish the certainty, confidence and stability of tenants and provide landlords with a mechanism that they can rely on for a range of reasons that may not otherwise be permitted under the RTA.

They do not adequately recognise the changed environment in which tenants may be seeking stability in their homes and communities and they exacerbate the power imbalance between tenants and landlords.

⁴⁰ See Security of Tenure Submission, above n 31, 26 for a more detailed discussion, including of other jurisdictions which do not allow a no reason notice to vacate; the use of no reason notices to manage conduct or transitional housing properties in the community housing sector; and the relevance of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Homeless Law supports the removal of the notice to vacate for the end of a fixed term agreement from the RTA through the repeal of section 261.⁴¹

Landlords would still be able to regain possession of their properties, but would need a clear and specific reason for doing so.

Recommendation 4: Abolish no reason notices to vacate and end of fixed term agreement notices to vacate

The notice to vacate for no specified reason should be removed from the RTA. Unjustified evictions are no longer an appropriate feature of the Victorian residential tenancy landscape, and sections 263, 288 and 314 of the RTA, along with related provisions, should be repealed.

The notice to vacate for the end of a fixed term agreement should also be removed from the RTA through the repeal of section 261 so that landlords are required to provide a clear and specific reason for terminating the tenancy.

Homeless Law supports the adoption of options 11.25A and 11.27D.

2.5 Improving safeguards against avoidable evictions of vulnerable tenants

Homeless Law commends the Victorian Government for putting forward a number of options in the Options Paper that provide sensible safeguards against unnecessary evictions of vulnerable tenants. In the current housing environment, balanced, legally rigorous processes that protect against arbitrary evictions are essential and a crucial component of Victoria's work to prevent and address homelessness.

Use of premises for illegal purpose

While illegal use of rental premises (for example, using the premises for drug trafficking activity) undeniably presents a concern for private, public and community landlords, evictions on this basis should not be rushed into without adequate evidence, procedural fairness or proper consideration of alternatives to eviction.

Greg's case below illustrates how easily a tenant can face eviction unfairly for alleged illegal behaviour under the current legislative framework.

Man nearly evicted from public housing despite charges being withdrawn

Greg contacted Homeless Law after he received a letter from the Office of Housing (OOH) saying that eviction proceedings would be initiated for illegal use of his premises relating to drug offending. At the time he received the letter, Greg was in custody serving a short term of imprisonment.

Homeless Law lawyers attempted to negotiate with the OOH to propose an alternative to eviction, whereby Greg would undertake to engage with drug counsellors upon his release from prison and meet other strict conditions to avoid further criminal charges for drug use at the rented premises. The OOH rejected this proposal and subsequently issued Greg with two notices to vacate (NTV). The NTVs alleged that Greg had been charged and convicted of trafficking cannabis. In fact, although Greg had been charged with trafficking cannabis (among other charges), the trafficking charge was ultimately withdrawn by the Police. This would have been readily apparent from the court record had the OOH requested it.

When Homeless Law brought the withdrawal of the trafficking charge to the attention of the OOH, they proceeded to withdraw their applications for possession orders, withdrew the notices to vacate and signed an agreement with Greg.

⁴¹ Options Paper, above n 8, 198, option 11.25A.

Greg is a vulnerable tenant who had experienced significant hardship. If he had not accessed legal representation, it is highly likely that he would have been evicted into homelessness on the basis of criminal charges that were ultimately withdrawn by the Police.

The RTA should be amended to ensure that a landlord can only give a notice to vacate and make an application for possession if a person is convicted or found guilty of the conduct constituting illegal use of the premises. An unproven charge should not be a sufficient basis for eviction.

The interplay between criminal charges (which must be proven beyond reasonable doubt) and grounds for eviction under the RTA (which must only be established on the balance of probabilities) is fraught. The basis of our criminal justice system relies upon a presumption of innocence, the protection of an accused person's fundamental rights and a requirement for charges to be proven on the basis of relevant and admissible evidence. The current legislative framework undermines these fundamental rights by allowing a person to be evicted from their home on the basis of pending charges in respect of which they are ultimately acquitted.

The Supreme Court of Victoria in *Burgess v Director of Housing* [2014] VSC 648 provided a further judicial reminder of the need to avoid evictions of vulnerable tenants into homelessness without affording procedural fairness or properly considering the impact of eviction or the alternatives to eviction.

Disruption – seriously interrupting quiet and peaceful enjoyment

Under section 280 of the RTA, disruption involves a rooming house resident seriously interrupting the quiet and peaceful enjoyment of the rooming house by other residents.

As the Options Paper recognises, disruption is less likely to cause harm to other residents, making immediate termination for disruption disproportionate.

The current provision fails to recognise the reality of rooming house environments, where groups of people, sometimes with complex lives, live closely together often with limited supports. In these environments, serious interruptions of residents' quiet and peaceful enjoyment occur relatively easily. They can also easily be alleged against residents who have developed troubled relationships with other residents or rooming house staff.

While the quiet and peaceful enjoyment of residents must be protected and balanced, a swift blunt tool for eviction is not the appropriate mechanism for doing this. People evicted on this basis are highly likely to end up sleeping rough, as the alternative housing options are extremely limited.

Homeless Law recommends that the notice period for termination for disruption should be extended from the same day to 14 days.⁴² Section 332(2) should be retained but modified so that VCAT must not make a possession order where the Tribunal is satisfied that the interruption to quiet and peaceful enjoyment of the rooming house has ceased or the disturbance is not a recurrence and will not be repeated.⁴³

Abolishing notices to vacate for successive breaches of duty

Through our work, Homeless Law has witnessed relatively minor breaches of duty by a tenant resulting in the person facing eviction into homelessness.

The 'three strikes rule' is a punitive approach to tenancy management that makes it too easy for vulnerable people to be evicted. Importantly, it is common for the breaches alleged (e.g. causing nuisance or failing to keep the premises reasonably clean) to be directly linked to a tenant's vulnerability. Examples Homeless Law has seen include alleged noise or nuisance stemming from the disability of the tenant's children or the tenant's mental illness, failures to keep the property reasonably clean because of the tenant's disability or mental illness and repeated allegations of noise or nuisance from neighbours who dislike the tenant (including because of judgments based on race, religion, gender identity, or status as a public housing tenant).

Homeless Law supports the proposal for notices of termination for successive breaches of duty should be abolished through the removal of section 249 of the RTA.⁴⁴ Under this approach, each instance of breach would require the landlord to issue a breach of duty notice and, if the notice is not complied with within the required time, the landlord could apply for a compliance order or compensation order from VCAT. Together with the amendments to the compliance order regime, this is an appropriate mechanism, which has a greater likelihood of addressing the concerning conduct, particularly if used together with referrals to appropriate support services.

⁴² Options Paper, above n 8, 181, option 11.12.

⁴³ See also recommendation 12 and related discussion below.

⁴⁴ Options Paper, above n 8, 51, option 5.2C.

Reducing the perpetual risk of eviction presented by broad, indefinite compliance orders

In an environment where eviction of vulnerable people carries a significant risk of homelessness, Homeless Law recommends that the compliance order regime under the RTA should be revisited to minimise the risk of arbitrary, unreasonable or avoidable evictions. Compliance orders which are broad and often indefinite in length can place tenants at perpetual risk of eviction.⁴⁵ In their current form, 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.

Homeless Law supports the inclusion of specific expiry dates on compliance orders, after which date the order will no longer apply.⁴⁶ More specifically, Homeless Law recommends that compliance orders should be worded as precisely 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.

Recommendation 5: Improve safeguards against avoidable evictions of vulnerable tenants

In the current housing environment, balanced, legally rigorous processes that protect against arbitrary evictions are essential and a crucial component of Victoria's work to prevent and address homelessness. Homeless Law recommends:

- Notices to vacate for illegal use of the premises can only be issued when the tenant or resident has been convicted in relation to the relevant illegal conduct.
- The notice period for a notice to vacate for disruption (i.e. seriously interrupting peace and quiet enjoyment in a rooming house) should be extended from the same day to 14 days.
- Notices to vacate for successive breaches of duty should be abolished.
- 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.

Homeless Law supports the adoption of options 5.2C, 11.12, 11.19 and 11.22A.

2.6 Improving legal mechanisms for exiting leases in cases of severe hardship

Section 234 of the RTA is the mechanism intended to recognise that there are circumstances in which people will need to leave a property earlier than expected. It provides a general mechanism for parties to fixed term leases to apply for the term of their lease to be reduced, where they can show that due to an unforeseen change in circumstances, they would suffer hardship if the term of the lease was not reduced, and this hardship outweighs the hardship of other relevant parties.

Section 234 expressly provides that the existence of a family violence IVO may constitute an unforeseen change in circumstances occasioning severe hardship for the purposes of this provision, but does not make this a requirement for lodging the application.

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]

⁴⁵ Justice Connect Homeless Law, *There's No Place Like Home: Submission to the Residential Tenancies Act Review* (August 2015) 21; Security of Tenure, above n 31, 27; Homeless Law and safe steps Joint Submission, above n 18, 18; Justice Connect Homeless Law, *There's No Place Like Home: Submission to the Dispute Resolution Issues Paper* (July 2016), 9.

⁴⁶ Options Paper, above n 8, 189, option 11.19.

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.⁴⁷

As the Options Paper recognises, there are deficiencies with the general operation of section 234 and its operation in relation to victims of family violence.⁴⁸ These include:

- **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.⁴⁹ 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. We support compensation being capped at two weeks' rent when a term is reduced on the application of the tenant (option 6.4), but also recommend that VCAT members are given guidance about the possibility of limited or no compensation being awarded in these circumstances. We further support the option that VCAT can consider severe hardship after the tenancy has ended (e.g. if the tenant has fled without making an application), when awarding compensation (option 6.3).
- **Apportioning liability** – Section 234 does not allow VCAT members to make orders about the liabilities of co-tenants when making an order for reduction of the tenancy e.g. a victim of family violence who succeeds in their section 234 application to end the tenancy cannot obtain an order that the other co-tenant and perpetrator of violence is individually liable for property damage caused in the context of family violence.
- **Uncertainty regarding creation of a 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. It is 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. There is also a lack of clarity where, for example, a victim of violence successfully applies under section 234 and a perpetrator continues to reside at the property after the order is made.
- **Lack of awareness** – Many tenants are unaware of their right to make an application under section 234, and when they ask landlords or real estate agents whether they can end a lease early – including on the basis of family violence – are often incorrectly advised that the only option is to break the lease and pay the relevant fees.
- **Lack of options for periodic tenancies** – For tenants and co-tenants who are parties to periodic (e.g. month-to-month) leases, there is no legal mechanism to remove your name without the consent of the other parties, including in situations of family violence. This is the case even where a victim has obtained an IVO against a co-tenant or occupant who is a perpetrator of violence, including where the IVO excludes them from entering the property. Even in situations of urgency, such as family violence, tenants must provide 28 days notice of their intention to vacate and will be liable for rent during this period.

⁴⁷ *Residential Tenancies Act 1997* (Vic) s 234(2).

⁴⁸ For detailed discussion of the operation of section 234 of the RTA specifically in relation to victims of family violence, see WHPP Two Year Report, above n 15, 14–15.

⁴⁹ See section 234(2) of the *Residential Tenancies Act* which provides VCAT may also order compensation when making an order for reduction of a fixed term lease. Generally, lease-break costs under the *Residential Tenancies Act* include reasonable re-advertising costs, a re-letting fee, and rent until a suitable tenant moves into the property.

These deficiencies cause Victorians experiencing severe hardship, including victims of family violence, to find themselves forced to pay rent and other debts at properties that they are unable to live in, or to stay in unsafe properties because of the fear of unmanageable costs and debts if they leave.

While the Options Paper contemplates the amendments to section 234 of the RTA separately for victims of family violence, a number of the recommendations proposed would also be appropriate for other tenants who could encounter severe hardship as a result of an unforeseen change in their circumstances if the term of the tenancy was not reduced.

Specifically in relation to victims of family violence, Homeless Law notes the increased urgency and the significant benefits of avoiding the delay and complexity of Tribunal proceedings. We also note the amendments in NSW which will enable victims of family violence to issue an immediate notice of intention to vacate by providing evidence of family violence (including an interim IVO).⁵⁰ We further note, however, the benefits of having VCAT make a final order, apportion liability, release bond and determine any compensation claimed by the landlord at the hearing, meaning that the victim has certainty about her legal and financial position. We therefore recommend that the mechanism by which victims can quickly end tenancies affected by violence would benefit from further consultation, including with family violence experts and parties affected by the NSW reforms to ascertain the benefits and risks of this approach.

In our view it is likely that both options will be needed i.e. immediate notice of intention to vacate for some tenants, and an effective VCAT process for others.

⁵⁰ Options Paper, above n 8, 225, option 12.4B.

Recommendation 6: Improve legal mechanisms for exiting leases in cases of severe hardship

To clarify the provisions regarding terminating leases early due to unforeseen changes in circumstances that present a risk of severe hardship and, in particular, to prevent victims of family violence being trapped in tenancy agreements that are unsafe, Homeless Law recommends:

- Where an order under section 234 is made in relation to a fixed term tenancy, a periodic tenancy will only subsequently come into effect at the premises if one or more previous co-tenants continue to reside there.
- The successful applicant under section 234 will not be a party to any periodic tenancy agreement that arises after the fixed term tenancy is deemed to terminate by VCAT.
- Where an order under section 234 is made and a previous tenant remains at the property under a new periodic tenancy agreement, the successful section 234 applicant maintains a right to apply for the return of any portion of the bond and to access the property to collect belongings.
- VCAT members hearing applications under section 234 in relation to fixed term tenancies are prohibited from ordering lease breaking costs against applicant tenants. Compensation should be capped at two weeks' rent, but guidance should be provided to VCAT members on the appropriateness of ordering no compensation in circumstances, and severe hardship should also be able to be considered in assessing compensation claims after a tenancy has ended.
- VCAT members can apportion liability between the parties, including in relation to damage or arrears and including a finding that one party is wholly liable for those costs.
- VCAT members can make an order preventing a landlord, agent and database operator from making an entry on a tenancy database.
- A party to a fixed term or periodic lease can apply to terminate the lease (recognising the appropriateness of the above provisions for people at risk of severe hardship even where the lease is month to month).
- Landlords or real estate agents should be required to provide a fact sheet on all options available to a tenant where a lease needs to be reduced and/or a tenant discloses family violence and the standard form tenancy agreement should be amended to include a section informing tenants of their rights under section 234.
- Landlords and agents who knowingly mislead a tenant about their right to make an application under section 234, in circumstances where the landlord is aware that the tenant has experienced family violence or other unforeseen circumstances, will commit an offence under the RTA.
- Victims of family violence can issue an immediate notice of intention to vacate (fixed or periodic leases) by providing evidence of family violence (including a family violence safety notice, interim or final IVO, statutory declaration or report from police, a GP, specialist family violence service, psychologist/counsellor or maternal and child health nurse/worker), which identifies that it is no longer safe to live at the property. The victim will not be liable to pay compensation for early termination or damage to the property caused by the perpetrator.

Homeless Law supports the adoption of options 6.3, 6.4 (modified), 6.5 and a hybrid of options 12.4A and 12.4B, subject to further consultation with specialist family violence and legal services, and stakeholders affected by the new model in NSW to better understand whether it is delivering the clear, safe mechanism intended. Most likely, both options will be needed i.e. immediate notice of intention to vacate for some tenants, and an effective VCAT

2.7 Creating a clearer mechanism for apportioning liability

Victims of family violence and other vulnerable tenants are often burdened with compensation claims and tenancy-related debts that create barriers to obtaining safe alternative housing. These compensation claims or debts can prevent people being allocated a public housing property⁵¹ and block people from obtaining a private rental property because their name appears on a tenancy database or 'blacklist'.

These debts, or the fear of them, may also impact on the decision-making of people experiencing family violence, including in deciding whether to leave their violent partner and try to seek safe housing. The difficulty in apportioning liability under the RTA is one of the key ways that victims of family violence are penalised for damage or debts caused by perpetrators.

The default position under the RTA is based on the principle of joint and several liability, and provides that a landlord seeking an award of compensation can make their claim against any or all of the co-tenants to the lease agreement.

This default position is altered to some extent by sections 24AF and 24AH of the *Wrongs Act 1958* (Vic) (**Wrongs Act**), which provide scope for apportionment of claims between concurrent wrongdoers where the claim relates to economic loss or damage to property arising from a failure to take reasonable care. However, there are limitations and issues with applying the Wrongs Act provisions to assist in the context of tenancy matters and family violence, including:

- Only liability for damage can be apportioned, not rental arrears;
- Co-tenants are dealt with as 'concurrent wrongdoers' and the mechanism does not contemplate one entirely innocent party;
- In Homeless Law's experience, many landlords and real estate agents are unfamiliar with the operation of the Wrongs Act and therefore unlikely to settle disputes outside of VCAT where arguments of apportionment are put by a tenant or their advocate.⁵²

The case study below highlights the uncertainty and inaccessibility of the current process and the impact this has on the decision-making of victims of family violence, their financial and personal safety and their ability to access alternative housing.

⁵¹ See, eg, Department of Health and Human Services, *Allocations Manual*, 'Introduction and conditions of public housing offers' (**DHHS Allocations Manual**), which provides that (1) for applicants in the 'special housing needs' category, '[o]utstanding charges of up to \$200 must be made in full [and] [o]utstanding charges of over \$200 require a lump sum payment of \$200, and a repayment agreement made and maintained for a minimum of three months prior to offer. The minimum repayment agreement amount is \$5.00 per week or \$10 per fortnight'; and (2) for people in the 'priority transfer' category for 'safety issues', '[a] repayment agreement must be made and maintained' prior to allocation (although there is no minimum repayment period prior to an offer of housing being made) available online at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies-guidelines-and-legislation/allocations-manual>.

⁵² See WHPP Two Year Report, above n 15, 16–17 for a more detailed discussion.

Reduction of compensation claim due to family violence allows young mother to prioritise safe housing

Elaine is a 21 year old woman, who is a single mother with an 11 month old baby. In late 2013 she entered a 12 month fixed term lease with her ex-partner who is the father of her child. Elaine suffered family violence from her ex-partner, which escalated when he became addicted to ice and his behaviour became increasingly erratic. After six months at the property, a serious incident took place, which forced Elaine and her child to flee.

Elaine's ex-partner remained at the property but was not contributing any rent. For two months, Elaine paid all of the rent at the property to prevent him being evicted. Eventually, Elaine obtained an IVO against her ex-partner as he continued to harass her. When Elaine couldn't afford to pay the rent anymore, the landlord applied to VCAT for a possession order and compensation of \$8000 for damage caused at the property and for rent arrears. The claim was made against both Elaine and her ex-partner as co-tenants.

Elaine connected with Homeless Law when she learned of the \$8000 compensation claim. Homeless Law tendered written submissions at the VCAT hearing, arguing that VCAT could apportion liability based on Part IVA of the *Wrongs Act 1958* (Vic) (**Wrongs Act**). Given the lack of mechanisms provided by the RTA and the wording of the Wrongs Act, there was uncertainty about whether the VCAT member would agree to apportion the arrears that had accrued after Elaine escaped the property.

After reviewing the written submissions, the VCAT member advised that they would prefer to resolve the matter by consent if possible, and urged the landlord to consent to an apportionment of liability so that Elaine was not liable for any aspect of the claim arising after she had fled the premises. The landlord consented to this arrangement, and the original claim of \$8000 was reduced to \$4500, with only \$900 payable by Elaine, allowing her to prioritise seeking a safe, alternative rental property.

Elaine's case illustrates how important it is that Victoria has legislative clarity that victims will not be liable for damage done or rental arrears accrued by a perpetrator of violence.

Recommendation 7: Improve the apportionment of liability in the context of family violence

To prevent victims of family violence bearing housing debts for damage or arrears attributable to family violence, Homeless Law recommends:

- In relation to co-tenancies: VCAT may take into account whether the damage and/or arrears which form the basis of a landlord's compensation claim are attributable to family violence, and if they are, VCAT can apportion liability between co-tenants as it sees fit (including determining that the perpetrator is fully liable for the landlord's loss or damage), having regard to family violence. The victim's share of the bond should be excluded from compensation to the landlord and should be quickly returned to support access to alternative housing.
- Where the victim is a sole tenant: where the Tribunal is satisfied that some or all of the damage has arisen as a result of family violence, the tenant will not be held liable for any compensation that arises as a result of the damage.
- A final or interim IVO should not be required as evidence of family violence for these mechanisms. Legislative guidance on what evidence will establish that a tenant or co-tenant was a victim of family violence should be informed by further consultation with specialist family violence and legal services, but could include a statutory declaration or report from police, specialist family violence services, GP, psychologist/counsellor or maternal and child health care nurse/workers.

Homeless Law supports the adoption of modified options 12.11 and 12.12.

Homeless Law also acknowledges that there are situations other than those involving family violence where increased clarity regarding apportionment of liability would lead to fairer outcomes for blameless co-tenants. For example, individuals who are forced to flee a rented premises due to the criminal actions of a co-tenant (e.g. assaults or other threatening behaviour) or individuals who are not home or not involved when accidental damage is caused to the property (e.g. through a fire), would also be disadvantaged if they were forced to rely on the existing legal framework to avoid liability for damage and loss attributable to a co-tenant who is at fault.

Homeless Law recommends that further consideration be given to the appropriate framework for apportionment between co-tenants outside the family violence context.

2.8 Removing unfair 'blacklistings' and improving tenancy database accessibility for vulnerable tenants

Preventing victims of family violence being 'blacklisted' for actions of perpetrators

As both the Royal Commission into Family Violence and the Options Paper have recognised, listing on tenancy databases ('blacklisting') as a result of actions of the perpetrator is a barrier to obtaining private rental accommodation for people who have experienced family violence. This can result in women and children being forced into homelessness or having to remain in crisis accommodation for extended periods, exacerbating their existing circumstances of uncertainty and hardship.

The current legislative framework allows a tenant to apply to VCAT to have the listing removed or amended if the information is inaccurate, incomplete or ambiguous. However in practice, a victim of family violence seeking to show that a listing is inaccurate, ambiguous or incomplete may encounter significant difficulties, particularly where there is a VCAT order for compensation or possession that lists the tenant's name along with information about the breach and/or amount owed. As discussed above and as the Options Paper recognises, the current mechanisms for apportioning liability for compensation are limited and unclear, which further results in victims of family violence being inadequately protected by the existing legislative framework regulating tenancy databases.

This issue was explored by the Royal Commission, which recommended that there should be a mechanism within the RTA to prevent victims being listed in a tenancy database for breaches of tenancy agreements due to the perpetrator's actions, and to have their name removed.

Homeless Law recommends that the RTA be amended to allow victims of family violence to prevent their personal details from being listed on tenancy databases and to remove existing listings where the relevant breach or damage occurred in the context of family violence. Specifically, we recommend amending the RTA as follows:

- Inserting into section 439F a stand-alone basis for a tenant to object to their personal information being listed where the relevant RTA breach occurred in the context of family violence and can be attributed to the perpetrator of that violence;⁵³
- Inserting into section 439L a stand-alone basis for a tenant to apply to VCAT for the removal of their personal information from a database where it can be shown that the relevant RTA breach occurred in the context of family violence and is attributable to the perpetrator of that violence;⁵⁴ and
- Inserting into section 439M a stand-alone power for VCAT to remove and amend listings where it is satisfied that the relevant breach is attributable to a perpetrator of family violence.⁵⁵

These improved protections against 'blacklisting' will reduce the risk of victims being prevented from accessing safe, stable private rental housing and moving forward with their lives.

Free access to listings for tenants

Database operators and landlords who list personal information about a tenant should not be able to charge tenants a fee to find out if they are listed on a database and to access their information. Homeless Law recommends prohibiting the charging of a fee to the tenant in order to obtain a copy of the tenant's listing.⁵⁶ This information should be free to the tenant and the cost should be borne by the parties who benefit from the databases.

⁵³ Options Paper, above n 8, 230, option 12.6.

⁵⁴ Options Paper, above n 8, 230, option 12.7.

⁵⁵ Options Paper, above n 8, 230, option 12.8.

⁵⁶ Options Paper, above n 8, 39, option 4.4

Giving VCAT power to decide if a database listing is unjust

We recommend that a tenant be able to apply to VCAT to have a listing amended or removed, if VCAT is satisfied that the listing is unjust in the circumstances with regard to the listing, the tenant's involvement and any adverse consequences.⁵⁷ This approach would be consistent with equivalent provisions in New South Wales, Queensland, Western Australia, Tasmania and the Australian Capital Territory.

Recommendation 8: Remove unfair 'blacklistings' and improve tenancy database accessibility for vulnerable tenants

Section 439 of the RTA should be amended to allow victims of family violence to prevent their personal details from being listed on tenancy databases and to remove existing listings where the relevant breach or damage occurred in the context of family violence.

Database operators and landlords should be prohibited from charging a fee to a tenant in order to obtain a copy of that tenant's 'blacklisting'. Tenants should also be able to apply to VCAT to have a listing amended or removed, if VCAT is satisfied that the listing is unjust in the circumstances, with regard to the listing, the tenant's involvement and any adverse consequences.

Homeless Law supports the adoption of options 4.4, 4.5, 12.6, 12.7 and 12.8.

2.9 Introducing a re-hearing process for residential tenancies cases at VCAT

The Options Paper proposes amending the RTA to introduce a re-hearing process to allow for internal appeal of decisions made in the Residential Tenancies List.⁵⁸

We refer to the joint letter to the Review and the Minister for Consumer Affairs dated 24 February 2017 signed by the CEOs of Community Housing Federation of Victoria, Tenants Union of Victoria, Justice Connect, Real Estate Institute of Victoria, Law Institute of Victoria and Victoria Legal Aid (**Annexure 2**).

The signatories to the joint letter represent the vast majority of users of the Residential Tenancies List, both landlords and tenants, and this group of unconventional allies states:

Together we urge the Victorian Government to adopt the re-hearing option to address sector-wide concerns about the lack of consistency and predictability of RT List decision-making, the current inaccessible appeal rights and the lack of sufficient oversight of decision-making.

... Based on the experience of our members and clients, it is our view that a re-hearings process for the RT List would be the most effective way to address our concerns about the quality and accountability of decision-making in the List.

A re-hearings process for the RT List would uphold VCAT's purpose of resolving disputes quickly, effectively and finally. It would promote public confidence in the RT List and would enhance VCAT's accessibility.

As this case study illustrates, even where an appeal to the Supreme Court has reasonable prospects of success, it is a daunting jurisdiction for clients, which carries a risk of adverse costs and protracted proceedings. For many tenants (and landlords), it is simply not an option to pursue their appeal in this forum.

⁵⁷ Options Paper, above n 8, 196, option 4.5.

⁵⁸ Options paper, above n 8, 165-6, option 10.4A.

Client unable to appeal potentially flawed VCAT decision because too disheartened by the result at VCAT

Mabel is a public housing tenant who received a number of breach of duty notices over the past few years. More recently, she had been issued a breach notice for causing a nuisance to her neighbours.

Mabel sought Homeless Law's assistance after learning that, in her absence, the Office of Housing had obtained a compliance order from VCAT, based on allegations she had caused a further nuisance after receiving the recent breach notice. Mabel hadn't known about the VCAT hearing due to issues with receiving her mail. Homeless Law helped Mabel to apply for a review, and obtained a copy of the Office of Housing's application to VCAT, which had included only a copy of the recent breach notice Mabel had been given.

At the VCAT review hearing, however, the Office of Housing sought to lead evidence about all the previous breach notices Mabel had been given over the years. When Homeless Law's lawyers objected to this on the basis that it was procedurally unfair because the application to VCAT had not referred to any of this historical evidence, the VCAT member disagreed and allowed this evidence to be led. Ultimately, the VCAT member confirmed the previous compliance order. When the Homeless Law lawyers requested written reasons for the member's decision, this request was denied.

Mabel was disappointed with the VCAT member's decision, and Homeless Law obtained an opinion from a barrister who confirmed it was likely that the decision could be successfully appealed to the Supreme Court as a number of errors of law could be identified. Homeless Law offered to assist Mabel with an appeal, but she was so discouraged by what had occurred that she became disengaged and did not return calls before the 28 day period to lodge an appeal had expired.

For Mabel, the availability of an easily accessible review mechanism within VCAT might have provided her with a more appropriate forum for clarifying the VCAT member's decision, without placing additional strain and pressures on an already struggling tenant.

A process for internal re-hearing would ensure that parties had an affordable and accessible right of appeal and that the quality of VCAT decision-making is monitored and maintained. Given the magnitude of the consequences for tenants of decisions made in the Residential Tenancies List, such an avenue for appeal has significant potential to reduce arbitrary evictions and to build trust and confidence in the decisions of the Tribunal. Creating an internal re-hearing mechanism at VCAT would also bring Victoria in line with most other Australian jurisdictions, where civil tribunals have built in internal appeals. Models that provide guidance include:

- **Queensland:** the Queensland Civil and Administrative Tribunal (**QCAT**), which hears a range of disputes, including residential tenancy disputes brought under the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld), has an internal appeals process, including for tenancy disputes. If the original QCAT decision was made by a non-judicial member (a senior member or ordinary member who is not a judge, or an adjudicator),⁵⁹ a party wishing to appeal the decision may appeal to QCAT's Internal Appeal Tribunal.⁶⁰ Parties do not require leave to appeal a question of law.⁶¹ Leave of the Internal Appeal Tribunal is required to appeal a decision of fact, or a decision of mixed law and fact.⁶² A hearing by the Internal Appeal Tribunal involves a reconsideration of the original evidence. If a party is dissatisfied with a decision made by the Internal Appeal Tribunal, the party can apply for leave to appeal to the Court of Appeal on a question of law.⁶³
- **New South Wales:** the *Civil and Administrative Tribunal Act 2013* (NSW) (**C&A Act**) provides a limited 'internal appeal' right for certain decisions made by NCAT in certain circumstances.⁶⁴ Parties generally have a right to appeal a question of law without needing to seek leave. Parties can seek leave to bring an internal appeal on 'any other grounds' (other than a question of law) to the Appeal Panel.⁶⁵ The Appeal Panel may 'permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance', to be given in the new hearing as it considers appropriate in the circumstances.⁶⁶ Parties need to seek and obtain leave before bringing fresh evidence before NCAT in an internal appeal.

⁵⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) Schedule 3.

⁶⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) Part 8 Division 1.

⁶¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(1).

⁶² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 142(1), (3)(b).

⁶³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 150.

⁶⁴ *Civil and Administrative Tribunal Act 2013* (NSW) s 32.

⁶⁵ *Civil and Administrative Tribunal Act 2013* (NSW) s 80(2)(b).

⁶⁶ *Civil and Administrative Tribunal Act 2013* (NSW) s 80(3)(b).

- **ACT:** a decision made by ACAT may be appealed on a question of either fact or law.⁶⁷ For an appeal to be heard, an application must be made to ACAT demonstrating that an error was made in the original decision in fact or in law, as leave from the ACAT Appeal President is required in order for an appeal to be heard. The ACAT Appeal President may decide that the appeal be dealt with either as a new application or as a review of all or part of the original decision.⁶⁸ The appeal tribunal can confirm, amend or set aside an order or make any other order that it considers appropriate in the circumstances.
- **South Australia:** the *South Australian Civil and Administrative Tribunal Act 2013* (SA) provides for internal merits review of a decision at first instance of a Member or (with leave of a Presidential Member) a Registrar of the Tribunal. The Tribunal may determine applications for review.⁶⁹ The Tribunal is to reach the 'correct or preferable decision but in doing so must have regard to, and give appropriate weight to, the decision of the Tribunal at first instance'. Upon review, the Tribunal will consider the material put before it at first instance, but it has the discretion to admit further evidence.

In civil and administrative tribunals in other jurisdictions in Australia, internal appeals constituted between 0.9% and 2% of overall caseloads in 2014-2015, with a clearance rate of between 85.9% and 100%.⁷⁰ By requiring applicants to seek leave to appeal, and setting thresholds for time to lodge applications and what kinds of errors may be appealed, other jurisdictions have created an appeal system that has a minimal impact on overall caseload with a high clearance rate and an improvement of the tribunal's function through a quick, effective and accessible process. By way of example, the Queensland Civil and Administrative Tribunal had 395 tenancy appeals lodged in the 2014-2015 financial year with a 100% clearance rate in the same year.⁷¹

Homeless Law proposes that the internal re-hearing system considers the following characteristics:

- A party to the original order, or any person directly affected by it, may file a written request to review the order or decision.
- The written request must be filed within 28 days of the date on which the original order or decision was made, although VCAT should allow an extension where just and reasonable.
- Internal appeal should be automatically available on questions of law, however parties should obtain leave to appeal on errors of fact or errors of fact and law.
- The threshold requirements for obtaining leave on errors of fact or errors of fact and law should be clear and unambiguous.⁷²
- The appeal must be heard by a legal member of VCAT who is not the same Member who made the original order or decision.
- VCAT may permit fresh evidence, although applicants must seek and obtain leave before bringing fresh evidence.
- Any refusal of leave for an internal review should be appealable to the Supreme Court of Victoria.
- An internal review should be exhausted prior to any application to the Supreme Court of Victoria.⁷³

Recommendation 9: Introduce a re-hearing process for residential tenancies decisions

With reference to the joint statement by the CEOs of Community Housing Federation of Victoria, Tenants Union of Victoria, Justice Connect, Real Estate Institute of Victoria, Law Institute of Victoria and Victoria Legal Aid (**Annexure 2**), Homeless Law recommends the introduction of a re-hearing process for residential tenancies cases at VCAT, to address sector-wide concerns about the lack of consistency and predictability of decision-making, the current inaccessible appeal rights and the lack of sufficient oversight of decision-making in the Residential Tenancies List.

Homeless Law supports the adoption of option 10.4A.

⁶⁷ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 79(3).

⁶⁸ *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 82.

⁶⁹ *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 70.

⁷⁰ Queensland Civil and Administrative Tribunal, *Annual Report 2014-2015* (2015), 5; South Australia Civil and Administrative Tribunal, *Annual Report 2014/15* (2015), 22-23; New South Wales Civil and Administrative Tribunal, *Annual Report 2014-2015*, 7, 27; ACT Civil and Administrative Tribunal, *Annual Report 2014-2015*, 9-11.

⁷¹ Queensland Civil and Administrative Tribunal, *Annual Report 2014-2015* (2015), 41.

⁷² We note that NSW provides that the applicant must demonstrate that there was a 'substantial miscarriage of justice', which we believe is too high a bar and too ambiguous.

⁷³ If the Victorian Government adopts a re-hearing process, Homeless Law would welcome the opportunity to be involved in consultation regarding the procedural and technical elements of the model.

3. Avoiding reforms that will push more Victorians into homelessness

In Victoria there are currently 22,000 people experiencing homelessness and 33,000 people on the waiting list for public housing.⁷⁴ There has been a 74% increase in Melbourne's rough sleeping population since 2014, with 247 people sleeping on Melbourne's streets in 2016,⁷⁵ which has led to proposed changes to the City of Melbourne's local law that would effectively criminalise homelessness.⁷⁶ In this escalating context of an acute affordable housing shortage and rising levels of homelessness, it is more important than ever before for eviction to be an option of last resort for vulnerable Victorians.

This part identifies the reform options canvassed in the Options Paper, which if adopted would increase the risk of preventable evictions of highly vulnerable Victorians into homelessness.

This part identifies proposed changes in the Options Paper that should be reconsidered and avoided:

- Improving engagement, attendance and outcomes at VCAT – abandoning the proposed termination order;
- Minimising the risk of unnecessary evictions for breaches and 'anti-social behaviour'; and
- Avoiding resorting to easier evictions of highly vulnerable people.

3.1 Improving engagement, attendance and outcomes at VCAT – abandoning the proposed termination order

The Options Paper proposes that termination orders would replace the notice to vacate for 'at fault' evictions. Under option 11.1 and throughout a number of the proposals dealing with 'at fault' evictions, the Options Paper suggests that the tenant would be afforded a higher degree of protection because a level of scrutiny would be applied to the application and the tenant would have the same opportunities to challenge the application for a termination order as they do for a possession order application.⁷⁷ The Options Paper indicates that this proposal is aimed at overcoming the situation where tenants receive a notice to vacate and leave the property without presenting their case to VCAT. The Options Paper later suggests that a termination order would combine the steps of giving a notice to vacate and obtaining a possession order, meaning that the eviction process could be 'undertaken in a single step'.⁷⁸

Contrary to the stated intention of increased scrutiny, termination orders present an unacceptable risk of turning VCAT into a rubber stamp for orders made against tenants who do not understand the case being put against them and who may not attend the hearing.

A more straightforward and effective reform for improving tenant engagement with VCAT hearings is more effective communication with tenants, including no longer calling the documents a 'notice to vacate', which unsurprisingly causes confusion and anxiety, including prompting tenants to leave without responding to any allegations made against them.

Homeless Law recommends that the proposed termination order be abandoned, particularly due to the associated risks, including the extremely low levels of tenant attendance at VCAT and the challenges VCAT faces in making well informed decisions in this context. Given these risks, it is difficult to see how this proposal would achieve any further protections for tenants, and directly places highly marginalised people at more immediate risk of homelessness.

⁷⁴ See Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness* (November 2012) 19 (available at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/2049.0>); and Victorian State Government, *Public housing waiting and transfer list* (September 2016) (available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/research,-data-and-statistics/public-housing-waiting-and-transfer-list>).

⁷⁵ See City of Melbourne, *StreetCount highlights number of people sleeping rough* (9 June 2016) (available at: <http://www.melbourne.vic.gov.au/news-and-media/Pages/streetcount-highlights-number-of-people-sleeping-rough.aspx>).

⁷⁶ See for further discussion, Justice Connect Homeless Law, 'Melbourne, don't criminalise homelessness' (February 2017), available at: <http://www.justiceconnect.org.au/dontcriminalisehomelessness>.

⁷⁷ Options Paper, above n 8, 172, option 11.1.

⁷⁸ Options Paper, above n 8, 175, option 11.4.

Risks associated with termination orders

Homeless Law frequently assists tenants who have had a VCAT possession order made against them in their absence. In many instances, our 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 (e.g. illness, consequences of family violence, incarceration or caring obligations).⁷⁹

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. Currently, however, rates of tenant engagement with, and attendance at, VCAT hearings are unacceptably low, resulting in tenants' rights not being exercised and protections not being realised.⁸⁰ 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. Stephanie's case study highlights the potential consequences for tenants and their families if they miss the opportunity to explain their position and circumstances to VCAT.

Young family avoids imminent eviction for child's disability after accessing legal representation and VCAT

Stephanie is a mother to two young boys and an adult daughter with a baby on the way. Stephanie's 11 year old son Noah has been diagnosed with ADHD and a mild intellectual disability. A neighbour at Stephanie's public housing property had made continual complaints to the Office of Housing about Noah and had sought an intervention order against him. Office of Housing then obtained a compliance order against Stephanie ordering her to control Noah's behaviour. Stephanie had asked Office of Housing to transfer her to another property but this had not happened.

Stephanie contacted Homeless Law on a Monday afternoon, having been visited by police who told her they would be back on Friday to evict her and her family. Stephanie told Homeless Law intake staff that she didn't know how this had happened. She knew she had missed one possession hearing, not knowing what it was about at the time, then had applied for a review hearing but had not attended because Office of Housing staff called her on the way there to tell her she didn't need to go. She wasn't aware the order had been made until the police came knocking.

With leave for a second review needing to be made in person at VCAT, no clinic appointments free and Stephanie an hour away from Melbourne, Homeless Law staff made special arrangements for pro bono lawyers to meet Stephanie at our office on the Wednesday. After a long public transport trip, Stephanie and her daughter met with the lawyers, then all went to VCAT together to request leave for the second review, which was granted, putting the warrant for possession on hold.

Over the next week, the Homeless Law lawyers gathered supporting letters from Noah's paediatrician and school social worker highlighting how important safe and secure housing was to Noah's mental health and continued progress. They negotiated with Office of Housing, asking them to consider if their policies had been followed and their responsibilities under the Charter of Human Rights and Responsibilities Act complied with.

At the VCAT hearing, an adjournment was made by consent, agreeing that Stephanie and her family would vacate their property and Office of Housing would provide them a new property in a new neighbourhood. This was arranged and, instead of being evicted into homelessness, which was imminent when Stephanie contacted Homeless Law, Stephanie and her children were able to set up a new home with a fresh start.

⁷⁹ See, eg, Justice Connect Homeless Law submission to the Review of the Residential Tenancies Act, Security of Tenure Issues Paper (available at: <http://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/preventing-evictions-and-sustaining-tenancies/there%E2%80%99s-no-place-home-submission-residential-tenancies-act-review>).

⁸⁰ See, eg, The Hon Justice Iain Ross, Transforming VCAT (Discussion Paper, VCAT 2010) 9, which indicates that up to 80% of VCAT hearings were unattended by tenants in 2010 (**Transforming VCAT**). See also Victorian Civil and Administrative Tribunal, VCAT *Annual Report 2015-2016* (8 November 2016) 49 (**VCAT Annual Report**). Within VCAT's nine lists, the Residential Tenancies List is busiest, accounting for almost 65% of VCAT's entire case load in 2015-16. Available data from VCAT's 2015-16 annual report confirms that landlords use VCAT far more than tenants. More than 91% of the 56,412 applications received by the Residential Tenancies List in 2015-16 were initiated by landlords, and only 7% by tenants

Stephanie's case highlights the difficulty VCAT faces in making decisions in a tenant's absence. Under the proposed termination order, it is highly likely that Stephanie and her children would have been evicted. They would not have attended VCAT, the order would have been made in one, quick step and the locks would have been changed before they could engage, seek representation or present their case to the landlord.

Outcomes like that – where vulnerable people and families are evicted into homelessness more quickly – must be avoided at all costs in Victoria's reformed tenancy framework.

Alternatives to termination orders: Effective communication to reduce unnecessary evictions

If the intention of the Government is genuinely to improve scrutiny and avoid tenants leaving in response to receiving a 'notice to vacate', rather than introducing the proposed termination order process, Homeless Law recommends the following measures to better engage with tenants and encourage their attendance at VCAT:

- Changing the name and content of the current notice to vacate;
- Changing the form and content of VCAT's notices of hearing for residential tenancies matters; and
- Ensuring tenants can access appropriate legal advice and assistance as early as possible.

Changing the notice to vacate

The current notices to vacate weaken security of tenure for tenants by discouraging them from understanding or exercising their rights. In a housing market that is imbalanced against tenants, it is critical that the documents and processes regarding VCAT proceedings aim to facilitate tenant engagement.

In Homeless Law's view, the following proposed measures would make it more likely tenants would understand their rights and seek to assert them through the VCAT process.

- **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.⁸¹ 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 or Tenants Union of Victoria) are instead included on these notices.

⁸¹ Residential Tenancies Regulations sch 1 sets out the form of the notice to vacate.

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, which would not be facilitated by the proposed termination orders. This has significant potential to increase the number of negotiated outcomes and potentially avoid the need for VCAT proceedings.

Changing the 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.⁸² We understand that VCAT is updating the content of the notice of hearing, but the form of the notice for matters in the Residential Tenancies List (both initial hearings and hearings to determine an application for review under section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**)) continues to be an inaccessible double-sided folded and sealed document. Nicola's case study below highlights the barriers tenants can face to engaging with VCAT and the potential consequences for tenants and their families if they miss the opportunity to explain their position and circumstances to VCAT.

Single mother of five and victim of family violence facing eviction into homelessness after missing her VCAT hearing

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. Nicola and her children have all been exposed to family violence from Nicola's ex-partner. Nicola also suffers from depression and anxiety and does not sleep well. At one point, Nicola was hospitalised and her youngest children had to stay overnight with a family day care worker. This resulted in a large childcare bill that Nicola paid instead of her rent. Nicola's landlord then issued her with a notice to vacate her private rental property and subsequently obtained a possession order from VCAT.

Nicola didn't attend this VCAT hearing as she hadn't been regularly checking her mail due to the family violence and the notice of hearing gave no indication that details of an upcoming VCAT hearing were inside. The inaccessibility of the notice of hearing created a further barrier to Nicola engaging with VCAT, meaning she missed her opportunity to advocate for her rights as a tenant and directly contributing to Nicola and her children facing eviction into homelessness.

When Nicola contacted Homeless Law, there was a warrant and the locks were going to be changed in coming days. She was urgently booked in to be assisted as part of Homeless Law's Women's Homelessness Prevention Project. At the initial appointment, Nicola saw lawyers and the social worker. The lawyers made an urgent application for rehearing, which put the eviction on hold. The lawyers then negotiated a payment plan with the landlord for Nicola to repay the arrears. The social worker helped Nicola access support for other essential expenses, so more money could be contributed to the rent, and also linked Nicola with assistance to help recover from long-term family violence.

At the VCAT hearing, Nicola's lawyers successfully argued for a payment plan to be put in place, which enabled Nicola to repay the arrears at an affordable fortnightly rate. As a result of legal representation, social work support and attending VCAT, Nicola and her children were able to avoid eviction into homelessness and to move forward with their recovery from family violence in stable housing.

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.

- **Change the form of the notice of hearing.** The 'fold and glue' format of the notice of hearing is confusing and difficult to open. The form also makes it difficult to include targeted and helpful information for tenants. The need to amend this form has been acknowledged for a number of years, including in 2010 by then-President of VCAT, Justice Bell who noted: "The need to redesign forms and correspondence in plain English was frequently emphasised".⁸³ Given the ongoing issue of tenant non-attendance and the increased likelihood of preventable evictions that this presents, we reiterate the need for the notice of hearing to be in a more sensible form (i.e. documents in an envelope).

⁸² *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 122.

⁸³ The Hon Justice Kevin Bell, *One VCAT – President's Review of VCAT* (25 February 2010) 23.

- **Encourage tenants to seek legal advice.** The notice of hearing does not sufficiently support tenants to seek legal assistance in relation to their upcoming proceeding, and may be seen to actively discourage people from seeking legal advice, which – given the consequences of proceedings in the Residential Tenancies List include losing your home – is not appropriate. The notice of hearing should expressly include a contact number for free legal advice (for example, Victoria Legal Aid’s Legal Help Line or Tenants Union of Victoria). More detailed information (such as details for Homeless Law for clients at risk of homelessness or Housing for the Aged Action Group for older Victorians) can still be on the website, but unless one referral option is clearly presented on the notice, tenants will not be encouraged to seek advice. This is particularly the case for tenants who have unreliable access to the internet. We also recommend that a list of free legal services for tenants is sent with the notice of hearing so tenants have ready-access to the information they need to obtain advice about their housing rights and options.
- **Clearer information about key processes for tenants.** Given the current inaccessibility of VCAT to tenants,⁸⁴ it makes sense for notices to be targeted at informing respondents of their rights, as it can be assumed applicants (i.e. predominantly landlords) are already aware of their rights and obligations. Given this, in addition to information about legal services, the information provided in the notice of hearing should be more targeted toward assisting tenants to understand key processes that affect their rights, including:
 - The process for making adjournment requests.
 - Contact information for the residential tenancies registrar.
 - Information about the right to apply for VCAT-ordered payment plans for evictions on the basis of rent arrears.
 - A note that if they miss a hearing (and have a reasonable excuse for this), they may be able to apply for a review hearing and should seek legal advice.⁸⁵
- **Not solely relying on a hardcopy notice of hearing to communicate with tenants.** Through our casework, we observe that many tenants have vacated their premises or have been forced to escape due to family violence before VCAT proceedings are started. If hardcopy notices of hearing are only sent to a physical address, it creates a risk that a party will not receive the notice of hearing and will be unable to attend. This is common for vulnerable tenants, particularly for women escaping family violence. We recommend that, together with the hardcopy notice, VCAT engage in other methods of communication with parties to tenancy proceedings, including the consistent use of SMS reminders. Every party to a VCAT tenancy proceeding should be sent a text message, notifying them of the hearing and listing VCAT’s details to obtain more information.

Amending the notice of hearing would improve the scrutiny that the Options Paper refers to. The proposed termination order process will significantly weaken rather than improve protection for tenants.

Ensuring tenants can access appropriate legal assistance

Homeless Law routinely represents 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. This opportunity would be lost if the proposed termination orders were adopted.

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.

⁸⁴ See, for eg, Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2015–2016* (8 November 2016) 45, which notes that in 2015-16 only 7% of the 56,412 applications received by the VCAT Residential Tenancies List were lodged by tenants.

⁸⁵ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 120.

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.

Recommendation 10: Abandon the proposed termination order and improve effective communication strategies with tenants

Termination orders present an unacceptable risk of turning VCAT into a rubber stamp for orders made against tenants who do not understand the case being put against them and who may not attend the hearing. They will hasten the eviction process, weaken procedural fairness, diminish VCAT's role in effectively adjudicating and lead to preventable evictions of vulnerable tenants. They should not be pursued.

To improve tenant engagement and avoid tenants vacating on receipt of a notice to vacate, the misleading term 'notice to vacate' should be changed (for example to 'request to vacate' or 'notice of intention to end tenancy agreement'), 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.

Homeless Law strongly opposes the adoption of option 11.1 and the adoption of termination orders in relation to any eviction process.

3.2 Avoiding costly evictions for rental arrears

As noted in the Options Paper, non-payment of rent is a principal reason for tenancies ending in Victoria.⁸⁶ Unaffordable rental costs place low-income people at risk of eviction and, in the current housing environment, this presents a very real risk of homelessness for too many Victorians. This is consistent with Homeless Law's experience, where falling behind in rent remains the most common reason our clients find themselves at risk of eviction. Over the last two years through the Women's Homelessness Prevention Project, we assisted 60 women who were facing eviction for rental arrears. In total – through a combination of legal representation and social work support – 48 of the women facing eviction for rental arrears were assisted to keep their housing.⁸⁷

Through this work we know that:

- An unaffordable rental market means people are living very close to the line financially. If you are paying 50% or 60% of your income as rent, it only takes an unexpected expense (like the car breaking down or time off work because the kids are sick) to fall behind in the rent.
- With the right intervention, including legal advice and representation, social work support and an injection of brokerage, the vast majority of these evictions can be avoided in a way that benefits both tenants and landlords (who avoid the cost and inconvenience of terminating the tenancy and re-letting the property).

Informed by this work, Homeless Law strongly opposes the Options Paper's proposal to amend section 246 and related provisions of the RTA⁸⁸ to make it easier to evict vulnerable tenants based on rental arrears. In the current environment of highly unaffordable rent, long social housing waiting lists and increasing homelessness, Victoria should not be embracing easier evictions of low-income Victorians.

⁸⁶ Options Paper, above n 8, 184.

⁸⁷ WHPP Two Year Report, above n 15, 8.

⁸⁸ Options Paper, above n 8, 186, 11.15-11.17.

Safeguards required to prevent unnecessary evictions

The Options Paper proposes requiring landlords to give tenants notice of rental arrears where at least seven days' rent is owed, along with an offer to negotiate a payment plan. If this does not resolve the rental arrears dispute, the landlord would be entitled to evict the tenant, including through the proposed application for termination order process.⁸⁹

While Homeless Law supports – and has previously recommended – a warning before commencing the eviction process (through issuing a notice to vacate) for arrears, Homeless Law does not support swifter access to the termination order process.

We acknowledge the importance of timely payment of rent for landlords. However, allowing the eviction process to commence when a tenant falls one week behind in rent and prescribing that VCAT can only grant one extension to a repayment plan would significantly increase the risk of avoidable evictions.

The Options Paper's proposal that repayment of arrears invalidates a termination process prior to VCAT determination would rarely protect the interests of vulnerable tenants, who are unlikely to be able to repay the full rental arrears, either via lump sum or payment plan, before VCAT proceedings.⁹⁰ Further, under no circumstances should the RTA be amended to give VCAT members discretion to make a termination order for repeated late payment of rent.⁹¹ This punitive measure will not protect the income stream of landlords. Rather, it will increase evictions of low-income people paying significant proportions of their income on rent, making it less likely that landlords will recoup any money owing after eviction and increasing homelessness and the hardship that accompanies for too many Victorians and their children.

Terminating tenancies is costly for landlords and real estate agents and, in many cases, the needs of the landlord can be better met by the tenant being quickly supported to comply with their obligations (for example, by addressing unpaid arrears), rather than terminating the tenancy. Jennifer's case study below highlights the importance of support services and the benefits of tenancy sustainment for landlords and tenants.

Single-mother with mental illness and escaping family violence avoids rental arrears eviction after accessing holistic support services

Jennifer is a single mother working part time to support three young children. She experienced family violence from a young age, and more recently from her husband after their marriage broke down.

This led to Jennifer fleeing the family home into a private rental property. She began to accrue rental arrears as a result of confusion over the frequency of her rent payments, and this confusion was exacerbated by serious depression and anxiety, a lack of any support or counselling after recent trauma, and further health complications that forced her to exhaust all her sick leave at work. Jennifer contacted Homeless Law after receiving a notice to vacate for arrears.

Through Homeless Law's social worker, Jennifer gained access to \$900 private rental brokerage, which her lawyers then used to negotiate a repayment plan with her real estate agent. The landlord was happy to withdraw the eviction proceedings and avoid the stress and inconvenience of attending VCAT.

Jennifer repaid her arrears and signed a new two-year lease. She is also now getting support for her mental and physical health issues following a referral from the Homeless Law social worker and has been able to maintain her employment and a home for her young family.

Balancing landlord and tenant interests

In Homeless Law's experience providing legal representation and social work support to tenants facing eviction for arrears, the majority of tenancies are salvageable, and this offers benefits to both tenants and landlords. On this basis, we recommend that section 246 and related provisions of the RTA be amended to implement the following processes:

- Landlords are required to give tenants a 'rent arrears warning' within 14 days of rent arrears arising. This warning, which could be a Consumer Affairs Victoria form, should contain referral options for appropriate services, including financial counsellors and housing, family violence and legal services.

⁸⁹ Options Paper, above n 8, 186, 11.15.

⁹⁰ Options Paper, above n 8, 186, 11.16.

⁹¹ Options Paper, above n 8, 186, 11.17.

- If steps are not taken by the tenant to address the arrears in response to the 'rent arrears warning', a notice to vacate could be issued if the tenant owes at least 28 days rent to the landlord.
- Real estate agents should be better supported to understand alternatives to eviction, including through making early referrals to support services when they identify a tenant having difficulty complying with their obligations.

We support the Options Paper's proposed amendment of section 281 of the RTA, which would change the rooming house processes for late payment of rent and rental arrears to be consistent with general tenancy provisions.⁹² This would limit the already significant risk of vulnerable rooming house residents being forced to seek crisis accommodation or sleep rough.

Recommendation 11: Reduce preventable evictions for rental arrears, which are detrimental to landlords and tenants

The eviction process is costly for both landlords and tenants, and the needs of the landlord can often be appropriately met by the tenant receiving timely support to comply with their obligations (for example, by addressing unpaid arrears), rather than through termination of the tenancy.

To address rental arrears, Homeless Law recommends that section 246 and related provisions of the RTA should be amended to implement the following processes:

- Landlords are required to give tenants a 'rent arrears warning' within 14 days of rent arrears arising. This warning, which could be a Consumer Affairs Victoria form, should contain referral options for appropriate services, including financial counsellors and housing, family violence and legal services.
- If steps are not taken by the tenant to address the arrears in response to the 'rent arrears warning', a notice to vacate could be issued if the tenant owes at least 28 days rent to the landlord.
- Real estate agents should be better supported to understand alternatives to eviction, including through making early referrals to support services when they identify a tenant having difficulty complying with their obligations.

Section 281 of the RTA should be amended to make rooming house processes for rental arrears and late rental payments consistent with general tenancy provisions, reducing the significant risk of immediate homelessness faced by residents.

Homeless Law strongly opposes the adoption of options 11.15 and 11.17, and supports the adoption of option 11.18.

3.3 Minimising the risk of unnecessary evictions for breaches and 'antisocial behaviour'

While acknowledging the challenges of landlords in managing competing priorities of tenants and neighbours or rooming house residents, Homeless Law urges the Government not to go down a path where easy evictions of vulnerable people are Victoria's solution to these challenges.

To do so would undermine the unprecedented leadership in relation to housing and homelessness that the Victorian Government has provided.⁹³

⁹² Options Paper, above n 8, 187, 11.18.

⁹³ See, eg. Minister for Housing, Disability and Ageing, *Reform Grown and Better Outcomes for Social Housing* (23 February 2017) available at: <https://284532a540b00726ab7e-ff7c063c60e1f1cafc9413f00ac5293c.ssl.cf4.rackcdn.com/wp-content/uploads/2017/02/170223-Reform-Growth-And-Better-Outcomes-For-Social-Housing.pdf> - the Victorian Government has established a \$1 billion Social Housing Growth Fund, including to build new social and affordable homes for Victorians in need of housing assistance; Minister for Housing, Disability and Ageing, *Over 1100 Public Housing Homes set for Redevelopment* (1 December 2016) available at <https://probonoaustralia.com.au/news/2016/11/vic-10-year-plan-for-ending-family-violence-momentous/> - the Victorian Government introduced a 10-year family violence plan which includes \$185 million to redevelop ageing public housing estates, and generate an increase of 10 per cent in social housing stock on those estates. An additional \$33 million of new funding was also be used to extend private rental brokerage programs providing rapid rehousing for women and children fleeing family violence.

Effective, well-informed and adequately resourced services that support tenants to sustain their tenancies, while simultaneously addressing concerns of landlords, must be the priority for managing challenging tenancies.

Evicting for any three strikes or for two strikes

As discussed above in part 2, Homeless Law supports the proposed option of abolishing notices of termination for successive breaches of duty. We see through our work that it is common for the breaches alleged (e.g. causing nuisance or failing to keep the premises reasonably clean) to be directly linked to a tenant's vulnerability, including mental illness, family violence, disabilities of tenants or their children or neighbourhood disputes and discrimination.

For the same reasons, Homeless Law opposes the two alternative options presented in the Options Paper:

1. Broadening the three strikes rule, but limiting it to a 12 month period and requiring a VCAT termination order to terminate for repeated breaches (option 5.2A); or
2. Abolishing the three strikes rule, and instead allowing VCAT to terminate if the breach is sufficient to justify termination (option 5.2B).

Currently, tenants have to breach the same duty three times in order to be subject to termination of their tenancy by VCAT and, even then, Homeless Law sees tenants facing evictions for minor conduct often stemming from mental illness and/or deteriorated relationships with neighbours.

Under the first option above, the three strikes rule will be broadened so that tenants who breach three *different* duties successively within a 12 month period will now be subject to an application for a VCAT order terminating their tenancy. By way of example, someone could be breached for loud noise from children or pets, two months later they could fail to mow the lawn and three months later could again be dealing with loud noise from children. For this, they could face eviction. This is not an appropriate feature of a fair, balanced rental system that aims to avoid unnecessary evictions and should be abandoned.

Similarly, Homeless Law does not support the option of abolishing the three strikes rule and allowing VCAT to terminate tenancies if the breach is sufficient to justify termination. Essentially, this is replacing the three strikes rule with a two strikes rule, which again would present an unacceptable risk of vexatious complaints or genuine vulnerability contributing to evictions into homelessness.

Evicting for 'antisocial behaviour'

The Options Paper proposes to amend the RTA and create a new provision enabling termination based on 'antisocial behaviour'. This proposed expansive provisions would include:

- A threshold that the behaviour be 'reasonably likely' to cause a person to be 'alarmed, distressed, intimidated or harassed' (whether or not any abusive threat or language has been directed towards the person); and
- A range of people who may be affected by the behaviours of a tenant (or the tenant's visitor or other occupant of the premises), including another person (such as neighbours, landlords, agents and any contractors or employees of either).⁹⁴

Homeless Law strongly opposes the creation of a new termination provision based on 'antisocial behaviour'. This will inevitably target people experiencing complex circumstances, including those experiencing family violence and mental health concerns.

Kylie's case study below highlights the problems that will inevitably arise through legislating a broad prohibition on 'antisocial behaviour'. Kylie's landlord sought to evict her after she self-harmed and was injured and distressed in common areas. While undeniably confronting for Kylie's neighbours, it is difficult to justify evicting a young woman with serious mental health concerns on that basis. In Kylie's case, the notice to vacate was invalid, but under the proposed antisocial behaviour provisions, it is highly likely that Kylie would be evicted for displaying such behaviour.

⁹⁴ Options Paper, above n 8, 196, option 11.24.

Woman experiencing family violence and trauma facing immediate eviction due to mental health incident

Kylie received a notice to vacate on the grounds of danger due to the fact that she was walking in the common areas of her apartment bleeding and screaming. The police and ambulances attended the property and Kylie was taken to hospital. Kylie experiences post-traumatic stress disorder and severe anxiety, as she was previously a victim of sexual assault. Kylie had self-harmed, which was why she was bleeding and screaming in the common areas.

After viewing the VCAT documents, the Homeless Law lawyers ascertained that the notice to vacate was invalid. However, if the notice to vacate had been valid, it is highly likely that Kylie could have been evicted as a direct result of her mental illness.

In 2010, former Homeless Law Manager and Principal Lawyer, Chris Povey, undertook a Churchill Fellowship in the United States, Canada and the UK and produced a detailed report, *Investigating tenancy sustainment programs and approaches in relation to clients at risk of homelessness*. The depth of international insights from this report are more relevant than ever and we commend the report to Victorian policy-makers, particularly those contemplating the regulation of 'anti-social behaviour'. Importantly, in a detailed and balanced report, Povey states:

The need to prevent homelessness is not an earth shattering recommendation. Of course we must prevent homelessness! Such an observation is made even more prosaic by the realisation that everybody is already trying to do it. Clearly the value in such a statement exists in the practical realisation of such aspirations.

There is a chasm between talking about preventing homelessness and actually doing it. If everyone is working towards (and spending money on) preventing homelessness, why isn't it working? The answer to this question is equally simple: because it is hard work. The best explanation of the challenges involved in such an undertaking is encapsulated in Scottish Government policy which states: 'developing and operating a prevention centred service is widely seen as requiring a distinct break with the traditional reactive and legalistic culture of homelessness work'.⁹⁵

... The issue of regulating behaviour is relevant to clients at risk of eviction. In England there has been considerable effort to create tools to respond to behavioural issues. The evidence suggests that regulating non criminal behaviour is challenging. Much of the difficulty arises from the fact that 'anti social behaviour' is a vague term that time has failed to clarify. It also appears that disproportionate numbers of young people and those with a disability are increasingly subject to these interventions, which often fail to resolve the underlying issues. One academic told me, 'don't go down this path.'

... Strengthened legislative protections of tenants do not simply lower eviction rates – such provisions remove eviction as a 'quick and efficient' way of resolving housing difficulties and make homelessness prevention real. Furthermore, legislative protections are vital to ensuring that the rights of vulnerable and disadvantaged tenants are considered and addressed. This is entirely appropriate for countries experiencing housing crises. It is also entirely appropriate for countries with thousands of people who are homeless.⁹⁶

'Anti-social behaviour' provisions are antithetical to a fair, balanced rental system where vulnerable people can live their lives in stable, safe housing. They are susceptible to misuse, including by neighbours who take issue with tenants on the basis of their social status, mental illness, race, gender identity or sexuality, or by neighbours where relationships in high density living have become fraught. They will inevitably disproportionately impact on tenants and residents experiencing mental illness and must be rejected as part of Victoria's modern legal and policy rental framework.

Making it harder to prevent unnecessary evictions for breach of compliance order

As discussed in detail in Homeless Law's submission to the *Security of Tenure Issues Paper*, the ability for tenants to defend an application for possession based on breach of compliance order (under sections 248 and 332 of the RTA) is already extremely constrained by the requirement to cumulatively satisfy the Tribunal that:

- The failure to comply with the order was trivial or has been remedied as far as possible; and

⁹⁵ The Churchill Report, above n 10, 7.

⁹⁶ Ibid 8.

- There will not be any further breach of the duty; *and*
- The breach of duty is not a recurrence of a previous breach of duty.

We note that the Options Paper cites a case that was not in fact dealing with an application under section 248 or the application of section 332 of the RTA (*Director of Housing v Drechsel* (Residential Tenancies) [2016] VCAT 128 (29 January 2016)). For an example of how these provisions are interpreted in practice, we refer to *Director of Housing v Zimonyi* (Residential Tenancies) [2013] VCAT 742 (16 May 2013) (**Zimonyi**) and *Director of Housing v TRB* (Residential Tenancies) [2017] VCAT 85 (23 January 2017) (**TRB**).

In *Zimonyi*, the Tribunal granted a possession order for the tenant's breach of section 248(1) of the RTA and held that section 332 of the RTA did not apply. The tenant was very vulnerable and suffering significant personal hardship; she was struggling to deal with the loss of her daughter, and had a history of mental health and drug and alcohol issues. Although she was remorseful and seeking treatment, the Tribunal held that section 332(1) was only intended to 'permit the Tribunal to excuse one-off breaches' or excuse behaviour 'where the cause of the breach has gone from the property'.⁹⁷ The Tribunal also considered that it was the tenant's responsibility to establish the conditions precedent set out in section 322(1)(b) and that the test to be applied for alleged breaches is the 'usual and reasonable community standard' and whether a reasonable person in the position of a neighbour would have suffered interference with their peace, comfort or privacy.⁹⁸

Similarly in *TRB*, the Tribunal upheld the approach taken in *Zimonyi*.⁹⁹ In this case, the breaches referred to the conduct of the tenant's 13 year old son. The Tribunal held that 'the proof of only one incident is sufficient to found [a] notice to vacate ... [and] ... proof that if any one of the breaches subsequent to the serving of the notice is not trivial' is sufficient to grant a possession order.¹⁰⁰ Evidently, the current drafting of section 332(1)(b) and the Tribunal's strict interpretation of the provision facilitates the granting of possession orders and subsequently the termination of tenancies.

The Options Paper proposes that 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
- The breach of duty is not a recurrence of a previous breach of duty.

The proposed removal of the third condition that 'there will not be any further breach of duty' streamlines the eviction process for landlords, because it leaves no room for the tenant to provide comfort to the Tribunal or the landlord that the concerning conduct will be addressed (for example, because their mental health has stabilised, they have an IVO against their violent partner, they have sought assistance with their hoarding or support with their children). This proposal makes evictions for breaches of compliance orders punitive, rather than targeted at addressing the concerning conduct. It should be rejected.

Homeless Law recommends:

- Maintaining the requirement that 'there will not be any further breach of duty' under section 332(1)(b)(ii) of the RTA; and
- 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.

⁹⁷ *Director of Housing v Zimonyi* (Residential Tenancies) [2013] VCAT 742 (16 May 2013) [20].

⁹⁸ *Ibid* [16]-[20].

⁹⁹ *Director of Housing v TRB* (Residential Tenancies) [2017] VCAT 85 (23 January 2017) [18].

¹⁰⁰ *Ibid* [20].

Recommendation 12: Avoid making it easier to evict tenants for minor breaches and ‘antisocial behaviour’ and ensure VCAT has discretion to consider alternatives

To avoid increasing the risk of vulnerable tenants being evicted for minor misconduct and conduct directly related to mental illness, fraught neighbourhood relationships, discrimination or special needs of tenants and their children, Homeless Law recommends:

- Do not broaden the potential to get a termination order for any three breaches in a 12 month period or convert the three strikes rule into a two strikes rule.
- Do not include a new termination provision with a broad definition of antisocial behaviour.
- Do not remove the ability of VCAT to consider that ‘there will not be any further breach of duty’. Instead, section 332(1)(b)(ii) of the RTA should be maintained and section 332(1)(b) of the RTA should be amended, so that each of the subsections are alternative bases on which VCAT can refuse a possession order.

Homeless Law strongly opposes the adoption of options 5.2A, 5.2B, 11.20, 11.21 and 11.24.

3.4 Avoiding resorting to easier evictions of highly vulnerable people

Beyond noise, nuisance, a messy property and ‘antisocial behaviour’ there is a range of more serious conduct in tenancies and rooming houses that needs to be managed. This includes malicious damage and danger.

This conduct is rare and presents a concern for all parties exposed to it.

In Homeless Law’s experience, and as the case studies in this part show, this conduct is almost always linked with family violence, mental illness, disability and fraught relationships in neighbourhoods and rooming houses. While no less challenging for landlords, neighbours or fellow rooming house residents, these underlying causes should prompt us to re-think whether eviction into homelessness is the most effective mechanism for addressing this conduct.

We recognise the concerns of community housing providers, particularly those operating rooming houses. We reiterate, however, that social housing landlords provide housing for people at the end of the line in the Victorian housing market. If evicted, homelessness is almost inevitable. In light of this, we urge the Government to equip community housing providers with resources, training, access to tenant support services (for example, the Social Housing Advocacy and Support Program, which is currently only available for public housing tenants) and a supply of stock available for transfer options where necessary. These mechanisms will support genuine contemplation of alternatives to eviction.

Homeless Law strongly recommends that every effort is made to prevent escalation of conduct, to address conduct through supports, and to make sure we have a legal, policy and services framework that means we resort to eviction only as an absolute last resort.

Broadening the description of damage

As it currently stands, section 243 of the RTA allows a landlord to give an immediate notice to vacate on the basis that the tenant’s conduct or their visitor’s conduct maliciously caused damage to the premises or common areas.¹⁰¹

Importantly, as the Options Paper recognises, this termination provision is designed to be used in urgent, current and imminently threatening situations concerning damage to a property, where the conduct is continuing at the time the notice is given.¹⁰²

The Options Paper proposes amending section 243 of the RTA to enable tenancies to be terminated if a tenant ‘intentionally or recklessly’ caused or permitted serious damage to the premises or any common areas.¹⁰³ The proposal suggests including

¹⁰¹ We note we have discussed this amendment in relation to family violence in section 2.3 of this paper. Specifically, we recommended that: victims of family violence are able to challenge the validity of a notice to vacate through VCAT (at or before the hearing of an application for a possession order) if the relevant action or conduct was committed by a perpetrator of family violence; and landlords and real estate agents are provided with guidance to support them act early to avoid evictions for clients experiencing family violence.

¹⁰² See *Director of Housing v Pavletic* (2002) VSC 438 (dealing with a notice to vacate under s 244); *Director of Housing v Cochrane* [2014] VCAT 1180.

¹⁰³ Options Paper, above n 8, 174, option 11.3.

damage to safety equipment, such as smoke alarms, in the definition of serious damage. The Options Paper also proposes applying the damage provision if a tenant intentionally or recklessly caused or permitted serious injury to the landlord, the landlord's agent, an employee or contractor of either, or a neighbour or person on a neighbouring property or premises used in common with the tenant.

The case study below is an example of the kinds of situations Homeless Law currently sees where landlords seek to evict for malicious damage.

Young man with serious mental health conditions almost evicted for relatively minor damage

Ari is a transitional housing tenant who received a notice to vacate for malicious damage. Ari moved to Australia in his late teenage years, suffers from depression, schizophrenia and a mild intellectual disability. Ari had been working with a caseworker to find sustainable long-term housing.

Ari sought Homeless Law's assistance after learning that, in his absence, the community housing provider had obtained a possession order from VCAT, based on allegations that he had caused malicious damage to the property, which included staining the carpet, breaking a light fitting, removing a bathroom fan and smoke alarm. Ari's lawyers entered into negotiations with the community housing provider in an attempt to prevent the eviction, which included providing detailed information about his mental health issues. The community housing provider eventually agreed that the damage caused was 'relatively minor' and that it was important to work with tenants before evicting them.

In the below example, Peter's community rooming house provider issued a notice to vacate under section 278 of the RTA, which allows a rooming house owner to give a resident a notice to vacate if the resident 'intentionally or recklessly causes or allows serious damage to any part of the rooming house'. This is the wording being proposed in relation to general tenancies and the below example highlights the risk this presents that highly vulnerable people will be evicted for conduct related to mental illness.

Man almost evicted for alleged damage in a rooming house

Peter had been living in a rooming house run by a community housing provider for approximately 3 years. He received a notice to vacate on the grounds of serious damage and was requested to repay around \$1,700 for damage that had been caused. Specifically, he was accused of unscrewing tap fittings, putting shaving cream in power points, damaging an oven and smashing a window. Peter denied committing the alleged conduct.

Peter's relationship with the rooming house provider had deteriorated when they had refused to fix his door. Peter struggled to sleep because of the noise, which exacerbated his severe depression and anxiety and contributed to Peter attempting suicide.

Peter's lawyers attended the VCAT hearing and submitted that the rooming house provider was not entitled to issue the notice to vacate or to seek a possession order. The VCAT member dismissed the possession application on the grounds that the rooming house provider did not have sufficient evidence to prove that Peter was responsible for causing 2 out of the 3 alleged acts of conduct which caused the damage. The VCAT member held that even if Peter was found responsible for the acts, the damage did not constitute serious damage for the purposes of the legislation.

These two case studies highlight how the current provisions of the RTA already expose vulnerable tenants to the risk of eviction for relatively minor acts of damage. The proposed reforms to section 243 of the RTA would significantly broaden this provision, including by:

- Lowering the bar for conduct from ‘maliciously’ to ‘intentionally or recklessly’;
- Removing the requirement that the damage is urgent, imminent and ongoing at the time the notice is given i.e. opening up the possibility that these notices could be used in a punitive way after time has passed; and
- Expanding the scope of the provision to include, not just damage to the premises or common area, but also:
 - to safety equipment such as smoke alarms; and
 - serious injury to the landlord, the landlord’s agent, an employee or contractor of either, or a neighbour or person on neighbouring property or premises used in common with the tenant.

These proposed provisions depart so significantly from the intention of section 243 of the RTA that they are a new provision, rather than an amendment. They are too broad and present an alarming risk that people will be evicted for actions that are directly related to their mental illness, fraught relationships with other tenants or neighbours or a poor relationship with their landlord.

Evicting for past danger

Section 244 of the RTA provides that a landlord may give a tenant an immediate notice to vacate ‘if the tenant or the tenant’s visitor by act or omission endangers the safety of occupiers of neighbouring premises’.

In *Director of Housing v Pavletic* (2002) VSC 438, the use of ‘endangers’ was interpreted by the Supreme Court to mean that the conduct must be continuing at the time the notice to vacate was given. The Court stated that to interpret it in the opposite way would lead to ‘harsh, unfair and absurd results’, including because it would not matter how long ago the alleged act or omission endangering the safety of occupiers of neighbouring premises occurred. Smith J further stated:

In addition, the intention of the Parliament was to impose a mandatory obligation on the Tribunal to make a possession order where the landlord was entitled to give the notice and it had not been withdrawn. Bearing in mind the serious consequences that could flow from eviction for the tenant, and for any family the tenant might have, and the absence of any form of discretion or any opportunity to postpone the operation of the order which might ameliorate any harshness of the result, such an interpretation could produce unfair and harsh results.

It is one thing to empower a landlord with the power to give the notice and provide a blunt and speedy procedure where, at the time of the notice, acts or omissions of the tenant’s visitor are endangering the safety of occupiers of neighbouring premises. It is another to give such a power and procedure where there is no such present endangerment but there was in the past.¹⁰⁴

The Government is proposing amendments to the RTA which would enable a tenancy to be terminated if the tenant or the tenant’s visitor by act or omission *had caused* a danger to the occupiers of neighbouring premises, *or the landlord, their agent, contractors or any other person on the premises.*¹⁰⁵

These proposals should cause us to reflect on Smith J’s reminder. Evictions for danger are a harsh and blunt tool. They remove any discretion from VCAT, including the ability to postpone the purchase of the warrant. The risks of this mechanism were apparent in 2002 when Pavletic was decided. These risks are more acute in the current housing environment where homelessness is almost inevitable for low income people who are evicted for danger.

The current provision is deliberately and appropriately limited. Its purpose ‘is to protect occupiers of neighbouring premises rather than to punish the tenant’.¹⁰⁶

Without diminishing the challenges public, community and private landlords can face in managing challenging tenancies, resorting to a broad, punitive tool with no built in protections will lead to unnecessary evictions of people who will end up on Victoria’s streets.

Phil and Mike’s case studies below provide examples of attempted evictions on the basis of the current danger provisions. These evictions did not go ahead, but it is highly likely that they would under the proposed reforms.

¹⁰⁴ *Director of Housing v Pavletic* [2002] VSC 438 (15 October 2002) [18]–[20].

¹⁰⁵ Options Paper, above n 8, 177, option 11.5.

¹⁰⁶ Annotated RTA, above n 30, P6-40 [244.04].

Tenant with a disability facing eviction into homelessness after indicating that he carried a knife for protection

Phil lived in a community housing rental property. Phil felt particularly vulnerable because he has an amputated leg, is permanently in a wheelchair due to a broken back, and had been assaulted at the premises before.

After being assaulted on the premises, Phil started telling other tenants that he carried a knife on him (even though he did not). The police attended Phil's property and questioned him in relation to the whereabouts of the knife, which they could not find. Phil subsequently received a notice to vacate from the community housing provider on the grounds that he endangered the safety of neighbours by carrying a knife at the property.

The Homeless Law lawyers successfully negotiated with the community housing provider to have their application for possession of the property withdrawn on the basis that the alleged incident occurred outside on the street (not at the property), the notice was issued sometime after the incident occurred and mutual intervention orders had been made between Phil and the neighbour who informed the police about Phil's alleged knife.

Vulnerable tenant at risk of homelessness for one instance of endangering conduct

Mike had lived in an Office of Housing property for around 13 months. Prior to being housed in this property, Mike was homeless for around 10 years. The OOH applied to VCAT for a possession order on the grounds of danger and Mike approached Homeless Law for assistance.

Since moving into the OOH property, Mike had experienced ongoing issues with a neighbour. Mike allegedly assaulted his neighbour which resulted in the notice to vacate being issued. The neighbour retaliated by throwing a brick through Mike's window which hit him in the head. Mike applied for an interim intervention order against his neighbour, which was approved. Mike receives the disability support pension for an acquired brain injury and back injury. He also suffers from severe depression and attempted suicide prior to receiving his notice to vacate.

The VCAT member dismissed the OOH's application because any danger to the neighbour was not continuing at the time the notice was given.

Key aspects of the above cases are:

- Phil was a community housing tenant with one leg in a wheelchair.
- Mike was a public housing tenant who had been homeless for 10 years prior to getting his housing. He had an acquired brain injury and severe depression.
- Both had fraught relationships with their neighbours and both had been assaulted.
- Both were issued with notices to vacate for danger.
- The landlord in Phil's case agreed to withdraw the notice to vacate when Homeless Law identified the problems with proceeding to evict Phil. The Director of Housing proceeded with the application for possession against Mike, but was unsuccessful.

We urge the Government to consider these cases when contemplating the wisdom of a broad, punitive approach to past danger in Victorian properties. Phil and Mike and many like them will join the ranks of Victoria's homeless population when, instead, both could be supported to sustain their tenancies and address their ongoing conflicts with their neighbours (including through case management support or, in some cases, transfer to an alternative property). The eagerness to increase the ease with which evictions of highly vulnerable people can occur is incompatible with the Government's clear commitment to preventing and addressing homelessness.

Recommendation 13: Prevent and address the escalation of conduct through supports and strengthen safeguards to ensure evictions are a last resort

In addressing challenging conduct in tenancies and rooming houses, Homeless Law strongly recommends that every effort is made to prevent escalation of conduct, to address conduct through supports, and to make sure we have a legal, policy and services framework that means we resort to eviction only as an absolute last resort.

Homeless Law recommends that:

- No changes are made to make it easier to evict for damage or danger. Instead, the clear links between this conduct and mental illness, family violence, disability and fraught relationships within neighbourhoods and rooming houses must be acknowledged and addressed.
- Tenants and residents should be supported to sustain their housing and address their ongoing conflicts with their neighbours (including through case management support or, in some cases, transfer to an alternative property), particularly through information and referral pathways to appropriate social, financial and legal services.
- Community housing providers should be supported with resources, training, access to tenant support services (for example, the Social Housing Advocacy and Support Program, which is currently only available for public housing tenants) and a supply of stock available for transfer options where necessary. These mechanisms will support genuine contemplation of alternatives to eviction.

Homeless Law strongly opposes the adoption of options 11.3, 11.4, 11.5 and 11.6.

Annexure 1 – WHPP Two Year Report

See attachment

Annexure 2 – Joint Letter to Consumer Affairs Victoria

See attachment