



## safe steps Family Violence Response Centre & Justice Connect Homeless Law

### Joint submission: Rights & Responsibilities of Landlords & Tenants

*23<sup>rd</sup> May 2016*

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# 1. Introduction

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## About Justice Connect Homeless Law

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

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

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

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

In the 12 months from August 2014, Homeless Law provided legal assistance to 96 prisoners through the Debt and Tenancy Legal Help for Prisoners Project. Through the provision of legal representation, Homeless Law has assisted 25 Victorian prisoners to avoid eviction. Through this work we have built a stronger, better informed understanding of the common reasons that prisoners lose their tenancies while in prison and the barriers to finding housing upon release.

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

## About safe steps Family Violence Response Centre

**safe steps** Family Violence Response Centre is Victoria's 24 hour, 7 day per week service for women and children experiencing family violence. **safe steps** provides support, accommodation, advocacy and referral throughout Victoria and nationally. **safe steps** ensures that women and children experiencing family violence, including those at the highest risk of harm, receive an immediate response to keep them safe.

**safe steps** fields over 55,000 calls per year. Approximately 17.5% of **safe steps** clients in 2015 were living in private rental accommodation when they experienced violence, and a further 12% were tenants or boarders in other types of housing.

## What is family violence?<sup>1</sup>

Family violence involves an ongoing pattern of threatening, coercive and violent behaviour in a current or former domestic or intimate relationship. This not only includes physical assault, but also threats, verbal abuse, emotional and psychological abuse, abuse of institutional and administrative systems, economic abuse and control, social abuse and isolation, cultural or spiritual abuse, all of which cause a person to live in fear. All of these types of abuse are included in the definition of family violence in the *Family Violence Protection Act 2008* (Vic).

Family violence is most likely to be perpetrated by men towards women and children<sup>2</sup> – this makes family violence a gendered form of violence.

Family violence has a broader definition than domestic violence, as it includes abuse within a range of relationships involving relatives other than intimate partners, or other people in dependent or interdependent relationships with one another. Family violence, along with other forms of interpersonal violence, is most likely to be perpetrated by men.

## Family violence and tenancy

### Homelessness as a consequence of family violence

Women and children who have experienced family violence frequently leave their home in order to escape the violence<sup>3</sup>, and many subsequently experience homelessness or insecure housing circumstances. Family violence is the most common reason cited for women seeking assistance for homelessness in Victoria.<sup>4</sup> A large proportion of women move into private rental accommodation after leaving an abusive relationship.<sup>5</sup>

Housing stress in the context of a housing crisis across society contributes to women and children being unsafe, as women and children have narrowed options to escape violent relationships.<sup>6</sup> Women who are sole parents or have separated from a male partner are more

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<sup>1</sup> This submission refers to people who have experienced family violence as the victims of violence. **safe steps** and Justice Connect Homeless Law acknowledge that many people who have experienced family violence do not consider themselves victims, as this term sometimes implies that the person has no agency. We acknowledge that women and children experiencing family violence make active choices to cope with their adverse circumstances. However, experiencing family violence does result in trauma from which women and children need to recover. This submission refers to victims of family violence due to the immediate adverse impacts of violence, which are compounded when systems and institutions make it difficult to attain the stability needed to recover from violence.

<sup>2</sup> Australia's National Research Organisation for Women's Safety Limited (ANROWS) (2015) *Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012*, ANROWS, Sydney, pp. 30-32.

<sup>3</sup> *Ibid*, pp. 121-124.

<sup>4</sup> Crime Statistics Agency (2016) Royal Commission into Family Violence Specialist Homelessness Services Collection data – July 2011 to June 2014, Table 3.

<sup>5</sup> ANROWS (2015) *Op. Cit.*, p. 124.

<sup>6</sup> Spinney, A. (2012) *Home and safe? Policy and practice innovations to prevent women and children who have experienced domestic and family violence from becoming homeless*, AHURI Final Report No. 196, Australian

likely to find it difficult to afford their own home.<sup>7</sup> Women in private rental accommodation often find it difficult to obtain stable accommodation when they leave the relationship, due to lacking a rental history, liabilities for rental arrears or compensation, or due to a listing in a tenancy database.

### Economic abuse

Economic abuse involves an abuser controlling the victim's economic participation and limiting their capacity to be self-sufficient, including:

- controlling household spending and preventing unapproved spending by threatening the victim;
- keeping bank accounts in the abuser's name;
- forcing the victim to provide financial or economic support to the perpetrator, or using family funds (such as superannuation accounts) for personal spending;
- forcing the victim to undertake domestic or caring tasks, according to the methods specified by the perpetrator, while the perpetrator does not accept responsibility for domestic or caring work;
- preventing the victim from maintaining or seeking employment;
- preventing the victim from participating in or completing education or training;
- accumulation of debts or fines in the victim's name;
- initiating or prolonging legal proceedings against the victim; and
- selling, mortgaging or transferring ownership of assets belonging to the victim.

Economic abuse is a less well understood form of abuse, as it is often accepted that men and women take on different family responsibilities, and men's dominance in intimate and family relationships is reinforced by cultural and social expectations.<sup>8</sup> However, the consequences of economic abuse can affect women's housing outcomes for the long term after they have separated from an abusive partner.

### Further consequences of family violence for housing outcomes of victims/survivors

*In Australia, women are over represented in key poverty indicators compared to their male counterparts. Poverty and economic disadvantage limit the housing options available to women and place them in or at risk of significant housing stress.*<sup>9</sup>

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Housing and Urban Research Institute Limited, Melbourne, available at:

<http://www.ahuri.edu.au/research/final-reports/196> (last accessed: 17/03/2016).

<sup>7</sup> Tually, S. et al. (2007) *Too Big to Ignore: Future Issues for Australian Women's Housing 2006-2025*, Australian Housing and Urban Research Institute Limited, Melbourne.

<sup>8</sup> Our Watch, ANROWS & VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and their children*, Melbourne, p. 27.

<sup>9</sup> Equality Rights Alliance (no date) 'Housing is a Women's Issue', Fact Sheet, Canberra, available at:

[http://equalityrightsalliance.org.au/sites/equalityrightsalliance.org.au/files/images/final\\_housing\\_fact\\_sheet1.pdf](http://equalityrightsalliance.org.au/sites/equalityrightsalliance.org.au/files/images/final_housing_fact_sheet1.pdf) (last accessed: 17/03/2016).

Economic disadvantages are more marked for single women with children. Most survivors of family violence find themselves in such circumstances, managing not only the economic consequences of the violence, but also economic hardship as they rebuild their lives. These hardships include a lack of affordable housing and childcare, as well as lost opportunities to accumulate savings and superannuation. In the long term, these result in many survivors of violence facing poverty and potential homelessness.

Lack of stable housing is one major consequence of family violence that affects children's development. Children who have experienced family violence require a stable and safe environment, and access to appropriate services to sustain them. As this requires access to sustainable housing, it is necessary for residential tenancy arrangements to support healthy child development by promoting safety and stability. Without a stable home, children may face risks to their cognitive development, access to education, and long term disadvantage.

### Royal Commission into Family Violence

The Royal Commission into Family Violence considered several matters raised in the Issues Paper in detail in Volume IV of its report. Recommendations 116-120 by the Royal Commission relate specifically to tenancy matters, with recommendation 116 specifically proposing that the Department of Justice and Regulation consider amendments to the Residential Tenancies Act 1997 (Vic) (**RTA**) to provide powers to the Victorian Civil and Administrative Tribunal (**VCAT**) and the Magistrates' Court of Victoria to address family violence.

Furthermore, the Royal Commission has recommended that the Victorian Government promotes access to sustainable and safe housing for victims of family violence through the private rental market, and promotes the rights of victims of family violence to remain in their own home or their preferred region. These policy aims will be facilitated by tenancy laws that:

- provide clear directions that tenants have the right to be safe in their home, and landlords have a role to facilitate this;
- prevent family violence victims from bearing the consequences of abusers' actions; and
- create smooth pathways for family violence victims to meet their housing needs, whether this involves remaining safely in their homes or relocating.

As the Victorian Government has accepted the recommendations of the Royal Commission, this submission focuses on providing additional comments about specific provisions which would give effect to the Royal Commission's recommendations.

### Note

Names and details in case studies have been changed to protect clients' identities.

## 2. Executive summary and key recommendations

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Justice Connect Homeless Law and **safe steps** Family Violence Response Centre welcome the opportunity to contribute to the Victorian Government's Residential Tenancies Act Review (**Review**) and to respond to the *Rights and Responsibilities of Landlords and Tenants (Issues Paper)*.

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

The RTA creates a framework for balancing the rights and responsibilities of all parties to a tenancy agreement. In the current housing environment that is tough on tenants – including a lack of affordable housing options, soaring waiting lists for social housing, and homelessness services that are overwhelmed with demand – we need modern legislation that ensures tenants' rights are adequately protected and equitably applied. This is especially the case for vulnerable tenants, in particular victims of family violence.

Through our respective services, Homeless Law and **safe steps** see victims of family violence inadequately protected in relation to their tenancy rights, burdened with debts as a result of damage or arrears attributable to the perpetrator and, consequently, at risk of homelessness.

Although Homeless Law also assists clients who are not affected by family violence, the high representation of family violence victims among Homeless Law's clients is the context for this submission, its focus on family violence, and the broader collaboration between Justice Connect Homeless Law and **safe steps**.

This submission therefore has a strong focus on issues for women experiencing family violence, as well as recommendations relating to tenancy issues for people at risk of homelessness more broadly.

Informed by the evidence-base gathered from both Homeless Law and **safe steps**, this submission makes the following 15 recommendations for changes to the RTA that will contribute to fairer, more accessible and more sustainable housing for all Victorians.

## RECOMMENDATIONS FOR FAIRER, SAFER, MORE ACCESSIBLE AND MORE SUSTAINABLE RENTAL SECTOR

### Setting up successful tenancies from the outset

#### 1. Standardise rental references

In order to provide greater protection for disadvantaged tenants, particularly victims of family violence:

- Consumer Affairs Victoria should produce a standardised form for the giving of rental references;
- the RTA should be amended to mandate using the standardised rental reference form when giving rental references;
- the RTA should include a provision that specifies any breach of duty by a tenant or loss to a landlord that arises due to family violence cannot be relied on by a landlord or agent as the basis for refusing a request for a written reference by the victim of that violence; and
- an offence should be created under the RTA for landlords and agents to refuse to provide a standardised reference provided the tenant can satisfy the requisite criteria.

#### 2. Provide better resources for engagement and support of tenants

Given the potential length of a relationship between landlord and tenant, and the unforeseen circumstances that can arise during the course of a tenancy, it is vital for landlords, real estate agents and tenants to have access to resources and services that can potentially provide support and assistance during a tenancy. A booklet provided to tenants at the beginning of a tenancy and used by landlords would ensure that both parties could make referrals to appropriate services, including financial counsellors and housing, family violence and legal services.

#### 3. Improved notices and information for tenants

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



## RECOMMENDATIONS FOR FAIRER, SAFER, MORE ACCESSIBLE AND MORE SUSTAINABLE RENTAL SECTOR

### 4. Work with the private sector to support eviction prevention

To support real estate agents and private landlords to sustain tenancies, the private sector, including real estate agents, should be given guidance and support to act early to avoid evictions for clients experiencing hardship. More specifically, a voluntary 'Code of Conduct for Private Landlords and Real Estate Agents who Support Victims of Family Violence' should be introduced to equip signatories to avoid eviction of victims of family violence into homelessness wherever possible.

### Preventing avoidable evictions: evictions as a last resort

### 5. Time limited compliance orders

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

### 6. Prevent unnecessary evictions for rental arrears

Terminating tenancies is costly for both landlords and tenants 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 arrears owing), rather than terminating the tenancy. In relation to rental arrears, Homeless Law and **safe steps** recommend that:

- landlords are required to give tenants a 'rent arrears warning' within 14 days of rent arrears arising. This warning, which could be a form provided by Consumer Affairs Victoria, 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 can be issued if the tenant owes at least 28 days rent to the landlord.

## RECOMMENDATIONS FOR FAIRER, SAFER, MORE ACCESSIBLE AND MORE SUSTAINABLE RENTAL SECTOR

### 7. Abolish no reason Notices to Vacate

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

### 8. Preventing orders of possession where damage was caused by family violence

Victims of family violence are vulnerable to immediate eviction if a perpetrator of family violence damages the property as section 243 provides for the issue of an immediate Notice to Vacate in cases where malicious damage has occurred. Preventing orders of possession where malicious damage was caused by family violence will prevent victims from becoming homeless due to the actions of the perpetrator.

### 9. Give VCAT jurisdiction to consider human rights

To make sure that evictions from social tenancies only ever occur as a last resort, VCAT should be given jurisdiction to consider the human rights compatibility of eviction decisions by social landlords.

## Removing barriers to accessing safe housing

### 10. Regulate residential tenancy databases ('black lists') to allow victims of family violence to prevent their personal details from being listed and to remove existing listings where the relevant breach or damage occurred in the context of family violence.

These amendments to section 439 of the RTA will reduce the barriers victims of family violence face when seeking to re-enter the private rental market after leaving a violent relationship. It will contribute to a reduced risk of homelessness and shorter periods in crisis or refuge accommodation.

### 11. Create clear mechanism for apportionment of liability in compensation claims against tenants who are victims of family violence and ensure victims of family violence are not held liable for damage caused by perpetrators

This will avoid victims of family violence being held liable for damage or debts caused by a perpetrator. It will reduce one barrier

## RECOMMENDATIONS FOR FAIRER, SAFER, MORE ACCESSIBLE AND MORE SUSTAINABLE RENTAL SECTOR

victims of family violence face when leaving violent relationships, by removing the fear that they will be legally responsible for damage they didn't cause and rent arrears that were accrued after they had fled.

A streamlined process for victims of family violence to have their bond returned should be created to ensure that they are able to secure alternative housing.

### **12. Clarify and expand section 234 to ensure that victims of family violence can apply to have a fixed or periodic tenancy reduced due to family violence.**

Section 234 and other relevant provisions in the Act should be amended to provide that:

- 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 a previous co-tenant(s) continues 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;
- VCAT members hearing applications under section 234 in relation to fixed term tenancies are prohibited from ordering lease breaking costs against applicant tenants; and
- 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 relevant hardship, will commit an offence under the RTA.

### **13. Remove the requirement for a final intervention order with an exclusion condition in creation of tenancy applications under section 233A**

Amend section 233A of the RTA to remove the requirement for a final intervention order with an exclusion condition and undertake further research and engagement with sector stakeholders, including family violence and relevant legal services, to determine appropriate criteria for VCAT members to have regard to when

**RECOMMENDATIONS FOR FAIRER, SAFER, MORE ACCESSIBLE AND MORE SUSTAINABLE RENTAL SECTOR**

	determining whether family violence has occurred, and whether an order under section 233A should be made.
<b>Promoting safe and sustainable rental housing</b>	<b>14. Enable victims of family violence to recover and store belongings</b> Given the importance of access to goods left behind for victims of family violence, Homeless Law and <b>safe steps</b> recommend that the Department of Justice and Regulation works with specialist family violence services to extend the program to recover and store household belongings of victims of family violence who have had to leave rental premises.
	<b>15. Ensure that landlords cannot unreasonably withhold consent to reasonable modifications to a rental property</b> Homeless Law and <b>safe steps</b> recommend that the Act is amended to specify that landlords cannot unreasonably withhold consent to reasonable modifications to a rental property that would improve the security of the property for a victim of family violence.

## 3. Setting up successful tenancies from the outset

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### 3.1 Standardising rental references

1. Under what circumstances do tenants encounter unfair treatment or unlawful discrimination?
2. What are the obstacles to tenants challenging discriminatory treatment and seeking remedies, and what are the solutions to these obstacles?

The combined impact of an increasingly competitive private rental market and the ongoing shortage of social housing stock in Victoria is forcing many low-income individuals and families to rely on unaffordable private rental properties as a means of avoiding homelessness. This is the case for many victims of family violence who escape violent households, often with children in their care, only to find there are very limited housing options available to them.

For example, a recent rental affordability snapshot found that for single parents receiving a government pension with one or two children in their care, less than 1% of rental properties in metropolitan Melbourne are affordable.<sup>10</sup> A large proportion of women experiencing family violence are in these circumstances.

Many victims of family violence will also face additional barriers to accessing private rental accommodation, because:

- they will usually experience a reduction in income as a result of the relationship breakdown (e.g. loss of employment due to change in location); and/or
- they may have accumulated housing debts and poor rental history as a result of family violence that may have occurred at a previous rental property (e.g. property damage caused by a perpetrator for which a claim against the bond was made).

In the competitive environment of rental property applications, where an applicant tenant's income and relevant rental history will often be the two most decisive factors going to a landlord's final decision, the above factors can place many victims of family violence in a particularly disadvantageous position.

In **safe steps'** and Homeless Law's view, this disadvantage is in part further entrenched by the current lack of visibility and regulation around the provision of rental references.

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<sup>10</sup> Anglicare Australia, *Rental Affordability Snapshot*, April 2016, page 80, available at: <http://www.anglicare.asn.au/docs/default-source/default-document-library/rental-affordability-snapshot-2016.pdf?sfvrsn=7> - 'affordable' is defined as less than 30% of income.

Currently, while the RTA provides a detailed regime for landlords and real estate agents to maintain tenancy databases for tenants who breach their duties under the Act, there is no equivalent regime that tenants who comply with their duties can rely on to obtain accurate and written rental references that may assist them in securing rental properties in the future.

In this context, we note with support a recent submission of Victoria Legal Aid (**VLA**), which indicates that in the experience of its client group, many real estate agents providing oral references refer to irrelevant considerations, including a tenant's lawful exercise of a right to request repairs or claim compensation.<sup>11</sup> As a result, many tenants can be reluctant to enforce their legal rights during a tenancy for fear of being labelled 'difficult' and receiving a negative reference from their landlord.

Similarly, **safe steps** and Homeless Law believe that many landlords and real estate agents providing oral references would be potentially unaware that a tenancy is affected by family violence, or may not properly understand the dynamics of that violence. This could lead to victims being given negative rental references where, for example:

- they take action to terminate a lease early due to family violence, and the landlord suffers financial loss;
- arrears accrue because a victim of violence is forced to flee a premises but the perpetrator remains and does not pay rent or only pays their share;
- a victim refuses or is unable to pay for property damage caused by a perpetrator in the context of family violence.

For this reason, **safe steps** and Homeless Law would strongly support VLA's call for a standardised system of written rental references.

The process for provision of a standardised rental reference should be a clear mechanism under the RTA that tenants can rely on, provided they have met certain criteria based on their relevant duties under the Act (e.g. payment of rent, keeping premises reasonably clean).

Importantly though, in our submission a tenant should not be said to have failed to meet the criteria for provision of a standardised written reference where any relevant breaches of duty are the result of family violence. For example, a tenant whose co-tenant damages property whilst perpetrating family violence against them should not be prohibited from obtaining a standardised reference if they otherwise complied with their duties under the Act.

In our view, the introduction of standardised written rental references would help to prevent real estate agents and landlords relying solely on oral references, which may be informed by

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<sup>11</sup>VLA, security of tenure submission, p 21: [https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities#Residential\\_Tenancies\\_Act\\_Review](https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities#Residential_Tenancies_Act_Review).

irrelevant considerations or a misunderstanding of complex dynamics (e.g. family violence). The use of standardised references would instead promote reliance by landlords and agents on more objective criteria when assessing rental applications, and for victims of family violence, it would help to ensure they are not further disadvantaged by family violence after making the decision to leave a violent relationship and apply for new private rental housing.

### Recommendation 1: Standardise rental references

**safe steps** and Homeless Law recommend that:

- Consumer Affairs Victoria produces a standardised form for the giving of rental references;
- the RTA is amended to mandate using the standardised rental reference form when giving rental references;
- the amendment includes a provision that specifies any breach of duty by a tenant or loss to a landlord that arises due to a family violence cannot be relied on by a landlord or agent as the basis for refusing a request for a written reference by the victim of that violence; and
- the RTA is amended to create an offence for landlords and agents to refuse to provide a standardised reference provided the tenant can satisfy the requisite criteria.

## 3.2 Form and service of documents

11. What additional information should a landlord be required to give a tenant at the start of a tenancy, if any?

13. What requirements and approaches, including communication channels and support, should govern the form and service of documents for tenants, landlords and agents?

### Beginning a tenancy

The start of a tenancy presents an important opportunity to fully inform tenants and landlords of their rights and responsibilities under the tenancy agreement and the RTA. Given the potential length of a relationship between landlord and tenant, and the unforeseen circumstances that can arise during the course of a tenancy, it is vital for landlords, real estate agents and tenants to have access to resources and services that can potentially provide support and assistance during a tenancy. Currently a significant barrier to the successful sustainment of tenancies is the lack of knowledge of, or access to, support services for real estate agents to refer struggling tenants to, including women experiencing family violence. Homeless Law and **safe steps'** strong view is that real estate agents need to be better supported to explore alternatives to eviction and to enforcing unfair terms upon

victims of family violence, including through making early referrals to support services when they identify a tenant having difficulty complying with their obligations. The necessity of early intervention should not be confined to the social housing sector. It is an integral component of making sure private landlords are supported to make choices other than eviction, which is costly for both tenants and landlords. A booklet provided to tenants at the beginning of a tenancy would ensure that both parties could make referrals to appropriate services, including financial counsellors and housing, family violence and legal services.

### During a tenancy

In Homeless Law and **safe steps**' experience, clients find the form of important notices difficult to understand and, in some cases, do not receive important information about their rights. In particular, this results in a high rate of non-attendance at VCAT by tenants.

Changes to the current forms would increase tenant attendance at VCAT hearings. Increased attendance and representation at hearings ensures that existing mechanisms provide a more equitable outcome and better balance the rights of landlords and tenants. By way of example Justice Connect Homeless Law's Women's Homelessness Prevention Project assisted 15% of its clients to lodge review applications of possession orders made in the client's absence. Each application was accepted by the Tribunal, avoiding eviction.

In particular, 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 and **safe steps** have assisted many clients who have interpreted the notice as a finalised order to vacate by the specified termination date, and who believe they cannot defend the proceedings and must vacate by the specified termination date. Renaming the notice as a 'Request to vacate' or similar term would better communicate the notice to tenants and increase understanding of their rights.

Notices to Vacate should also include information about legal and referral services to encourage tenants to engage with their rights and subsequent VCAT processes. In Justice Connect and **safe steps**' experience the majority of notices will contain, at most, a referral to VCAT or Consumer Affairs Victoria, neither of which can provide legal advice or ongoing case work. A referral to relevant legal services such as Victoria Legal Aid, Tenants Union of Victoria or relevant community legal centre would provide tenants with the opportunity to seek legal assistance and better understand their rights and responsibilities.

Finally, VCAT notices of hearing should have their physical form changed to better indicate the importance of the enclosed information, in order to bring hearings to the attention of as many tenants as possible. The notices should also provide relevant information to tenants, including referrals to legal services as outlined in the recommendation above.



## Recommendation 2: Provide resources for engagement and support of tenants

Homeless Law and **safe steps** recommend:

- providing tenants and landlords at the beginning of a tenancy with referral information to appropriate support services.

## Recommendation 3: Improved notices and information for tenants

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

### 3.3 Conduct of agents

37. Does the Act need to specifically deal with the conduct of agents acting on behalf of landlords, and if so what reforms would address this conduct?

In the current housing context, we are increasingly relying on the private rental market to provide housing to a significant and diverse population of Victorians, including people with low incomes and complex circumstances whose needs would be better met in social housing if not for the acute shortage of supply and prohibitively long waiting lists.

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

A number of cultural practices among real estate agents and landlords present barriers for women and children who have experienced family violence to sustaining tenancies and achieving stability for themselves and their families.

**safe steps** and Homeless Law clients have experienced the following behaviour from landlords and agents:

- reluctance to reduce a fixed term tenancy due to hardship caused by family violence and providing incorrect information to the tenant when they seek to end their tenancy;
- unwillingness to provide references for tenancy applications;
- moving quickly to evict rather than considering alternatives to eviction; and
- requirement for payment of bonds or rent in advance immediately upon offering a tenancy, which is difficult for private rental brokerage providers to fulfil.

### Voluntary code of conduct

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

This kind of leadership within the private sector could first be rolled out in relation to victims of family violence as part of the State's response to family violence and homelessness. The code of conduct could set out a range of factors that landlords and agents will consider prior to proceeding with eviction of a tenant who identifies that they are a victim of family violence, as well as a framework for ensuring that victims of family violence are not disadvantaged when making applications for housing. Signatories to such a code of conduct, particularly real estate agents, would be able to advertise their support for victims of family violence. They could also have knowledge of, and relationships with, local support services who they could link tenants with at the earliest possible point to try and sustain the tenancy.

This collaborative initiative, led by the private sector, would have significant potential to reduce evictions of victims of family violence into homelessness. It would better equip private landlords and real estate agents to make decisions about family violence, including to make early and appropriate referrals to services that can provide support, as well as providing a framework for ensuring equitable access to housing for victims of family violence.

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

### Recommendation 4: Working with agents to support eviction prevention

To support real estate agents and private landlords to sustain tenancies, Homeless Law and **safe steps** recommend:

That the private sector, including real estate agents are given guidance and support to act early to avoid evictions for clients experiencing hardship. More specifically, a voluntary 'Code of Conduct for Private Landlords and Real Estate Agents who Support Victims of Family Violence' should be introduced to equip signatories to avoid eviction of victims of family violence into homelessness wherever possible and to provide a framework for ensuring that victims of family violence are not disadvantaged when making applications for housing.

## 4. Preventing avoidable evictions

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### 4.1 Preventing avoidable evictions for breaches

17. What, if any, measure should be available for tenants and landlords to address a breach of duty before seeking redress at VCAT?

18. Should the Act require initial compliance orders for a breach of duty to be limited in duration, and if so, what limitation is appropriate?

Breach of duty and compliance orders currently operate to impose severe, unrealistic and unfair penalties on tenants that do not reflect the realities of tenancies. While landlords should retain a means by which to enforce their rights and tenants' duties, the current mechanism is unfair to tenants and creates unreasonable and unnecessary risk of evictions.

#### Broad and indefinite compliance orders

Where VCAT grants a compliance order following a breach of duty notice, a landlord is entitled to issue a Notice to Vacate for any failure to comply. These compliance orders are often granted without any timeframe, making them effectively indefinite and imposing an ongoing risk of eviction on tenants. This reduces the tenant's stability and security in their homes, and will not lapse or end with no regard to whether the tenant has subsequently complied with the order.

In addition, VCAT must make a possession order where satisfied that the landlord was entitled to give a Notice to Vacate. VCAT lacks any discretion to consider the reasonableness of or justification for eviction in the circumstances. VCAT is only empowered to decline to make the order if the tenant satisfies three cumulative tests: that the failure to comply was trivial or has been remedied, that there will be no further breach, and that the breach is not a recurrence of a previous breach. The criteria cannot be considered separately.

This mechanism is particularly unfair for tenants who are more likely to be alleged to have breached their duties, including tenants: living in close proximity to neighbours, with children, experiencing family violence, or dealing with mental health or substance dependence issues. In addition to being more likely to be the subject of a compliance order, these tenants are also at greater risk of homelessness in the event of eviction. The case study below illustrates how indefinite compliance orders place tenants at risk of eviction even where reasonable efforts have been made to comply.

#### Case study: Young man with history of homelessness faces eviction for dog barking and playing music

After years of homelessness and a traumatic childhood and adolescence characterised by periods in state care and foster homes, Zac was finally securely housed in an Office of

Housing property. He had been waiting a long time for a home and shared his apartment with his two cats and dog.

After years in the property and without his knowledge, a neighbour started complaining to the Office of Housing about his dog barking and his music being up too loud. Before he knew it, he found himself in VCAT, unrepresented, alone and unaware of what was about to unfold. A compliance order was granted.

Zac made significant changes to ensure that he couldn't be breached and wouldn't be at risk of having a possession order made against him. Despite these changes, the other tenant kept complaining. The Office of Housing acted on these complaints and threatened to evict Zac but before applying for a possession order, they offered the opportunity for mediation with the tenant making complaints. Zac attended and felt it went well. He was able to take a support person and the mediation was completed by an independent party. He has maintained his housing but is still hopeful to be able to move out of the property so he can live peacefully with his animals elsewhere.

While mediation was able to provide a mutually beneficial outcome in that case, in Homeless Law and **safe steps'** experience mediation is rarely initiated by the landlord or ordered by VCAT, and there are no formal steps required for parties to resolve issues without resorting to VCAT proceedings.<sup>12</sup>

#### **Recommendation 5: compliance orders should be time limited and eviction for breach should be subject to a reasonableness requirement**

Homeless Law and **safe steps** recommend:

- Compliance orders should be worded as specifically as possible, and should be limited to a period of six months before lapsing. Only where subsequent orders are needed should there be discretion for them to be extended for a period of up to 12 months.
- VCAT members should be given more flexibility when determining whether a tenant should be evicted for breach of a compliance order, including:

amending section 332(1)(b) of the RTA so that each of the subsections are alternative bases on which a possession order can be refused; and

giving VCAT members discretion to consider whether eviction for non-compliance is reasonable in the circumstances (which includes consideration of the nature, frequency and duration of the action by the tenant leading to the application to evict, the degree which the tenant is responsible for the eviction proceedings, the effect of

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<sup>12</sup> For a more detailed discussion of this issue, please see pp 16-21 of Justice Connect Homeless Law's first submission into the RTA review, *There's no place like home*, August 2015.

the tenant's conduct on others and whether the landlord has considered other possible courses of conduct).

#### 4.2 Notice periods that reflect the realities of the current rental market

28. For what reasons should a landlord be permitted to end a tenancy, and what notice periods should a tenant be given?

##### Notices to Vacate due to rental arrears

Rental arrears are the most common factor putting Homeless Law and **safe steps'** clients at risk of homelessness. 68% of Homeless Law's eviction matters in 2014-2015 involved clients at risk of eviction due to arrears. Evictions expose vulnerable and at-risk tenants to homelessness, and cause inconvenience and unnecessary costs for landlords and agents. 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 arrears owing), rather than terminating the tenancy. The following case study illustrates the importance of support services and negotiation in ensuring that a tenancy can be sustained.

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

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

As a result of her reduced income, Bianca fell behind in the \$270 weekly rental payments, and quickly accrued rental arrears. The real estate agent issued a Notice to Vacate and then applied to VCAT for a possession order, putting Bianca and her children's housing at risk.

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

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

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

Currently a significant barrier to the successful sustainment of tenancies is the lack of knowledge of, or access to, support services for real estate agents to refer struggling tenants into. Homeless Law and **safe steps'** strong view is that real estate agents need to be better supported to explore alternatives to eviction, including through making early referrals to support services when they identify a tenant having difficulty complying with their obligations. The necessity of early intervention should not be confined to the social housing sector. It is an integral component of making sure private landlords are supported to make choices other than eviction, which is costly for both tenants and landlords.

In cases of rental arrears, Homeless Law and **safe steps** recommend that a hardship process is commenced within 14 days and, if steps are not taken by the tenant to address the arrears in this time, a Notice to Vacate can be issued after 28 days. Homeless Law reiterates that, based on our experience providing legal representation and social work support to tenants facing eviction for arrears, the majority of tenancies are salvageable. The focus should be on getting tenancies back on track as soon as possible and this can be effectively done through negotiation and links with appropriate supports prior to issuing a Notice to Vacate.<sup>13</sup>

#### **Recommendation 6: Preventing unnecessary evictions based on rental arrears**

Homeless Law and **safe steps** recommend that:

- landlords are required to give tenants a 'rent arrears warning' within 14 days of rent arrears arising. This warning, which could be a form provided by Consumer Affairs Victoria, 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 can be issued if the tenant owes at least 28 days rent to the landlord; and
- 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.

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

The availability of 'no reason' Notices to Vacate under section 263 of the RTA creates a risk of arbitrary evictions, and significant inequality in the relationship between the tenant and landlord. 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. This is particularly concerning given the

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<sup>13</sup> For a more detailed discussion of this issue, please see pp 13-17 of Justice Connect Homeless Law's submission on the Rent, Bond and Other Charges Issues Paper, April 2016.

discrimination that victims of family violence already face in the rental market. 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.

The threat of an eviction for no specified reason may also deter tenants from requesting repairs or peace and quiet in the property because of the risk that landlords will choose to terminate the tenancy rather than adhere to their obligations.<sup>14</sup> At the time of the Second Reading Speech for the Residential Tenancies Act, Parliament flagged the potential for abuse of such notices, and that the Real Estate Institute of Victoria considered the Residential Tenancies Act to be fair and equitable without such notices being included.<sup>15</sup>

### **Recommendation 7: Abolish no reason Notices to Vacate**

120-day 'no reason' Notices to Vacate under section 263 of the Residential Tenancies Act should be abolished, as they are unnecessary to preserve landlords' rights, lack oversight or accountability, and are open to misuse for retaliation or discrimination.

### **Preventing eviction for malicious damage if damage caused by family violence**

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. This includes damage caused by a perpetrator of family violence. As such, victims of family violence are vulnerable to immediate eviction if a perpetrator of family violence damages the property. The case study below demonstrates how quickly a victim of family violence may be evicted if it is alleged that a visitor caused malicious damage.

### **Case study: Community housing tenant uses human rights to avoid eviction and debt**

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 prior to police arriving to respond.

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<sup>14</sup> See also Tenants' Union of Queensland, *Avoidable Evictions ... Our Next Move* (2012) 28 (TUQ Report): '[U]nder the Act, there is no requirement for specific reasons to be provided and the lessor can simply record "without ground" on the notice. This provision can result in evictions in all manner of circumstances including unreasonable circumstances ... This provision can also undermine tenants' willingness to pursue other tenancy rights, such as, repairs and their right to quiet enjoyment, due to their concerns over losing their home and tenancy as well as potentially jeopardising future tenancies'.

<sup>15</sup> For a more detailed discussion of this issue, please see pp 21-26 of Justice Connect Homeless Law's submission on the Security of Tenure Issues Paper, December 2015.



When Jacqueline’s landlord learned about the damage, they issued her with an immediate notice to vacate 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 they 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 any of the damage caused by her child.

In order to protect victims of family violence in such circumstances, the RTA should be amended to ensure that an order of possession cannot be made on the basis of a Notice to Vacate under section 243 if the damage was caused by family violence.

**Recommendation 8: A possession order must not be made if the damage was caused by family violence**

The RTA should be amended to ensure that an order of possession will not be made if a notice has been given to a tenant who has experienced family violence under section 243 and the malicious damage referred to in the notice was caused by the perpetrator of the family violence.

### 4.3 Considering human rights in tenancy matters

34. Are there any issues in relation to other rights and responsibilities that occur before, during, or at the end of a tenancy not discussed in this paper that should be considered in this Review?

In addition to their rights and responsibilities under the RTA, public and community landlords (together, social landlords) need to comply with section 38 of the *Charter of Human Rights and Responsibilities Act 2006* when making decisions about evictions. Section 38 requires them to:

- Act in a way that is compatible with human rights; and

- When making a decision, give proper consideration to relevant Charter rights.<sup>16</sup>

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

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

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

Since *Sudi*, Homeless Law has witnessed less accountability for human rights compliance, which presents a greater risk of eviction for vulnerable tenants. In our experience, social landlords are less motivated to try to comply with human rights obligations because there is little consequence of not doing so. Although social landlords still have an obligation under section 38 of the Charter to act compatibly with human rights and to give proper consideration to human rights in decision-making, it is unlikely that tenants have meaningful recourse in the event of non-compliance given the costs associated in challenging the decisions of social landlords in the Supreme Court.

### Restrictive timeframes for Charter-based challenges

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

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<sup>16</sup> Charter of Human Rights and Responsibilities Act 2006 (Vic) s 38.

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

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

To overcome these barriers to meaningful consideration of human rights in the decision-making of social landlords, Homeless Law recommends legislative amendments which give VCAT jurisdiction to consider Charter compliance in eviction proceedings brought by social landlords.<sup>17</sup>

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

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

#### **Recommendation 9: Law reform to give VCAT jurisdiction to consider human rights**

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

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<sup>17</sup> For more detailed submissions on the legislative amendments required to give effect to this recommendation, see Justice Connect Homeless Law, *Charting a Stronger Course: Submission to the Eight Year Charter Review* (June 2015).

## 5. Removing barriers to accessing safe housing

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### 5.1 Tenancy databases

8. What other issues arise from the operation of tenancy databases, and how do these impact on prospective tenants?

Victims of family violence are often forced to urgently leave rented properties, sometimes at the insistence of police who have attended the property in response to a reported family violence incident. The victim's departure will often result in the tenancy being terminated via a legal process with a VCAT order,<sup>18</sup> for example because of unpaid rent, and the victim will be left with housing related debts. This can lead to the victim's personal details being recorded for three years on a database that future prospective landlords and real estate agents may rely on when assessing their applications for private rental properties. Often, victims of family violence will be unaware that a listing has been made due to being in crisis accommodation, and will only find out about the listing when they apply for a new private rental property.

Listing on tenancy databases ('blacklisting') as a result of actions of the perpetrator is a barrier to obtaining private rental accommodation for victims and survivors of family violence. This can result in women needing to remain in crisis accommodation for longer periods, in uncertain circumstances for themselves and their children.

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, in particular 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. Given that the current regime for apportioning liability for compensation is limited and unclear (see section on 'Avoiding housing debts for victims of family violence'), victims of family violence are not adequately protected by the current legislative framework regulating tenancy databases.

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

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<sup>18</sup> VCAT members can make orders of possession pursuant to the *Residential Tenancies Act 1997* (Vic) s 330. Once a possession order has been made, a landlord can apply to VCAT for a warrant of possession to physically take back possession of the premises.

**Recommendation 10: Amend the RTA to allow victims of family violence to prevent their personal details from being listed on residential tenancy databases and to remove existing listings where the relevant breach or damage occurred in the context of family violence.**

Homeless Law and **safe steps** recommend that the RTA is amended 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;
- 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 Residential Tenancies Act breach occurred in the context of family violence and is attributable to the perpetrator of that violence; 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.

## 5.2 Avoiding housing debts for victims of family violence

35. For tenants experiencing family violence, what changes to the Act will further promote their access to safe and sustainable rental housing?

Victims of family violence living in rental accommodation, either public or private, are often burdened with compensation claims and debts that limit their ability to obtain safe alternative housing. Victims of family violence are held jointly liable for rental arrears and compensation claims even after leaving the property permanently. At times, perpetrators deliberately do not apply to terminate the victim's tenancy in order to cause further financial hardship to the victim. These claims by landlords are normally made against co-tenants after the tenancy agreement has terminated. Claims for rent arrears are most often made at the same time as the landlord initiates eviction proceedings due to rent arrears in order to formally end the tenancy.<sup>19</sup>

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<sup>19</sup> In this section, 'tenant' also refers to rooming house residents, caravan park residents, and occupants of moveable dwellings under part 4A of the Residential Tenancies Act. This is because apportionment of liability between co-tenants/residents/occupants, applies across all types of accommodation covered by the Residential Tenancies Act. Similarly, there is no reason why the commentary in section 210 of the Annotated Residential Tenancies Act, which refers to relevant provisions of the *Wrongs Act 1958* (Vic), would not also apply to compensation claims brought against rooming house and caravan park residents under section 452 of the Residential Tenancies Act.

These compensation claims or debts can prevent people being allocated a public housing property,<sup>20</sup> and block people from obtaining a private rental property because their name appears on the tenancy database or ‘black list’.<sup>21</sup>

The following case studies illustrate the circumstances in which these claims arise.

#### **Case study: victim of family violence facing eviction due to damage caused by perpetrator**

Lisa and her 2 teenage children were informed that they would be evicted from their rental property in the following week due to the extent of property damage. All of the damage was caused by the perpetrator. Lisa was paying for all the damage costs, and as a result she fell behind in rent payments. Her only income is a parenting payment.

#### **Case study: Victim of family violence faces eviction due to rental arrears accrued by ex-partner**

Shireen had 4 young children under the age of 6 years old, one of whom has a disability. She made contact with **safe steps** as she has a significant family violence history that included financial abuse, and she was financially dependent on the perpetrator for several years.

The violent relationship ended, as the perpetrator was issued an Intervention Order and left the country. Leaving the family house after years of controlling the finances, the perpetrator of violence left Shireen with rental arrears in her name resulting in an unstable home environment for her and her children.

### **Apportionment under the Wrongs Act**

The default position under the Residential Tenancies Act is 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 is due to the principle of joint and several liability which provides that any one or all of the co-tenants can be pursued for any loss or damage that the landlord suffers as a result of a breach of the tenancy agreement or the Residential Tenancies Act by any one of the co-tenants.

This default position is altered to some extent as a result of Part IVA of the *Wrongs Act* 1958 (Vic) (**Wrongs Act**), which provides 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.<sup>22</sup> However, as the provisions of the Wrongs Act and the commentary in the Residential Tenancies Act both make clear, there are limitations and

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<sup>20</sup> See, e.g., OOH Allocations Manual, chapter 8 ‘Special Housing Needs’ (**OOH Allocations Manual**), which provides that offers of housing cannot be made to applicants with special needs unless outstanding debts are addressed (available here: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/allocations-manual/special-housing-needs>).

<sup>21</sup> Issues with residential tenancy database listings are discussed in greater detail above in part 3.3.

<sup>22</sup> Wrongs Act 1958 (Vic) ss 24AF and 24AH.

issues with applying the Wrongs Act provisions to assist a victim of family violence against whom a compensation claim has been made.

#### **Case study: compensation claim against co-tenants in the context of family violence**

Elaine is a 21 year old woman 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's ex-partner used family violence against her, which escalated when he became addicted to ice and his behaviour became increasingly erratic. After six months at this premises, a serious incident took place which led Elaine to flee the property back into her family home.

After fleeing, Elaine's ex-partner remained in the premises 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 after she had fled the premises.

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 premises, and rent arrears that had accumulated. The claim was made against both Elaine and her ex-partner as co-tenants.

When Elaine learned of the \$8000 compensation claim that had been made against her, she sought assistance from Homeless Law.

The Homeless Law lawyers tendered written submissions at the compensation hearing and argued that the member could apportion liability in accordance with the Wrongs Act provisions. Given the commentary in the Residential Tenancies Act and wording of the Wrongs Act provisions, there was uncertainty as to whether the VCAT member would agree to apportion the arrears that had accrued after Elaine fled the property.

After reviewing the written submissions, the 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.

#### **Amendment of the Residential Tenancies Act to ensure victims of family violence are not held liable for rental arrears or compensation debts**

It is unjust for victims of violence to bear the continuing cost of abuse through being held liable for damage and rental arrears caused by perpetrators. As the above case studies illustrate, ongoing liability for rental arrears or compensation for damage can result in long term housing instability or homelessness for women and children already facing hardship due to abuse.

This was recognised by the Royal Commission into Family Violence in recommendation 116, which recommended that the Department of Justice and Regulation’s (DOJR) review into the RTA consider amending the RTA to “provide a clear mechanism for apportionment of liability arising out of the tenancy in situations of family violence, to ensure that victims of family violence are not held liable for rent (or other tenancy-related debts) that are properly attributable to perpetrators of family violence”.

**safe steps** and Justice Connect recommend that the Act is amended to provide this mechanism as a matter of priority. More specifically, no victim of abuse should be held liable for any debts, damages or breaches of duty caused by the perpetrator, including any damages or breaches of duty occurring due to self-defence or the defence of another person (such as a child). This should include any damages or breaches to common areas.

A final Family Violence Intervention Order should not be required for this mechanism to be applied. Further, the perpetrator should not be required to be a party to the tenancy agreement for the victim not to be held liable.

Such an amendment would clarify the position in law of victims of abuse. This would ensure that victims were not held liable if the matter proceeded to the Victorian Civil and Administrative Tribunal. An amendment clarifying the legal position for victims would remove fear of debt and arrears as a barrier to victims leaving violent relationships. It would also reduce the number of legal proceedings brought against victims who would not be held liable by a court, and assist victims to negotiate with landlords and their agents from a position of strength and a clear understanding of their legal rights.

**Recommendation 11: Amend the Residential Tenancies Act to allow clear apportionment of liability in compensation claims against tenants who are victims of family violence and ensure victims of family violence are not liable for damage caused by perpetrators.**

Homeless Law and **safe steps** recommend:

- Amending section 211 of the RTA, ‘[m]atters which may be considered by [the] Tribunal’ when assessing compensation claims, to provide that the Tribunal may take into account:

*211(aa) In the case of a claim against multiple tenants in respect of the same tenancy agreement, and where the Tribunal is satisfied that some or all of the damage or compensation sought has arisen as a result of family violence perpetrated by one party against another, whether any amount or amounts of the claim should be apportioned between the parties to take into account their respective responsibility for the damage or loss caused ...*

*211(bb) where the Tribunal is satisfied that some or all of the damage has arisen as a result of family violence, that the tenant will not be held liable for any compensation that arises as a result of the damage.*



- Creating a streamlined process for victims of family violence to have their bond returned to allow them the best chance of securing alternative housing if needed.

### 5.3 Improving processes to end leases due to family violence

32. What, if any, additional protections should be provided to a tenant who breaks a lease or wishes to end a lease early due to circumstances such as financial hardship, family violence or illness?

Women experiencing family violence frequently need to terminate a lease in order to relocate for their own safety. This includes situations where there is a fixed term lease in place, as well as situations where a victim of violence is party to a periodic lease. Many women also experience ongoing hardship when they are forced to leave but do not have the resources or relevant assistance to terminate their tenancy. This can lead to victims of violence being forced to pay rent and other debts at properties they have been unable to reside at due to family violence, as illustrated in the case study below.

#### **Case study: victim of family violence liable for rental arrears accrued by her abuser**

Renata had a fixed term lease with a few months left to run, but had to leave her private rental property with her 3 year old daughter due to family violence. After leaving the property, the perpetrator of violence remained residing in the house. After a period of time Renata was informed that the perpetrator had abandoned the property and had left a large amount of rent in arrears.

Renata was advised by another organisation to pay off the arrears, as the lease was still in her name as well as the perpetrator's name, and the perpetrator had left the country. The real estate agency advised Renata that she was required to pay the arrears before they would provide her a reference for any other rental application.

#### **Early termination of fixed term and periodic tenancies**

Whilst section 234 of the RTA provides a general mechanism for a party to a fixed term tenancy agreement to apply for early termination of that tenancy due to hardship, there are some issues with the operation of this provision in practice. These issues make the outcome less certain for a victim of family violence who is seeking early termination of a fixed term tenancy agreement.

In addition, there is currently no clear mechanism for a single co-tenant to a periodic tenancy agreement to terminate that periodic tenancy agreement, or otherwise remove their interest and liability in the agreement, without the consent of the other co-tenant(s) and landlord. This can have a particularly negative impact on victims of family violence, who are unlikely to be able to obtain a perpetrator/co-tenant's consent to ending a periodic tenancy or removing their name from the lease.

Each of these scenarios is discussed below in greater detail.

### Fixed term tenancies

In relation to fixed term leases, section 234 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 of circumstances, they would suffer severe hardship if the term of the lease is not reduced, and this hardship outweighs the hardship of other relevant parties. Section 234 also explicitly provides that the existence of a family violence intervention order may constitute an unforeseen change of circumstances occasioning severe hardship for the purposes of this provision, but does not make this a requirement for lodging the application.

In practice, there are a number of issues with section 234's operation that could be addressed through legislative reform, many of which disproportionately affect victims of family violence. For example:

- Section 234 is not explicit about whether, after an order has been made, a new periodic tenancy agreement is automatically created in circumstances where persons continue to reside in the property – e.g. if a victim of violence successfully applies under section 234 and a perpetrator continues to reside at the premises after an order is made, the RTA is not clear about whether a new periodic tenancy agreement is automatically created, and who the parties to that agreement are;
- Section 234 does not allow VCAT members to make orders about the liabilities of individual co-tenants when making an order for reduction of the tenancy – e.g. a victim of violence who succeeds in their section 234 application 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; and
- Section 234 is not explicit about whether or not lease breaking fees can be awarded as part of a compensation order under this provision, and as a result, some VCAT members have awarded compensation to landlords on the basis that a lease is being broken when hearing applications under this provision;
- 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 due to circumstances including family violence, are often incorrectly advised that the only option is to break the lease and pay the relevant fees.

The above factors create uncertainty about the financial and legal implications for tenants, including victims of family violence, who apply under section 234 for reduction of a fixed term tenancy. In conjunction with misleading information many tenants receive from their

landlords and agents, these factors deter many tenants from relying on section 234 where they may have grounds for a valid application, as illustrated in the case study below.

### **Case study: victim of family violence needs to terminate a lease she is bound to because of economic abuse**

After leaving a three-year abusive relationship, Sonia got involved with another man who was also abusive. He left her in an expensive rental property with \$5000 in arrears. The perpetrator spent money that Sonia had allocated for rent on gambling.

Sonia came up with the money to pay the arrears, with the rent now up-to-date. However, the rent is not affordable for Sonia to pay on her own, and she wants to end the lease to find a more affordable home. The perpetrator's name is also on the lease however he has left the property and will not contribute to the rent.

Sonia told **safe steps** that the agent has not been empathetic and is unhappy with terminating the lease early. Sonia is very unhappy with way the real estate agency has treated her despite being happy with a recent inspection.

### **Periodic tenancies**

There is currently no clear mechanism in the RTA for a party to a periodic tenancy to terminate that tenancy or otherwise terminate their interest or liabilities, without the consent of the other co-tenant(s). Section 234 does not apply to periodic tenancy agreements.

In many instances, we see the impact of this issue on victims of family violence who are co-tenants of periodic tenancy agreements where the other co-tenant is the perpetrator of violence. In these cases, without the perpetrator's consent, it can be very difficult for a victim of violence to either terminate the tenancy or end their interest and liability in the agreement, as the legal effect of a notice of intention to vacate that is signed by only one of several co-tenants is unclear.

This can result in situations where a co-tenant who has experienced family violence, and no longer resides at a rented premises because they feel unsafe, is unable to terminate that periodic tenancy agreement or have their name removed from the lease because the other co-tenant(s)'s consent cannot be obtained. This may lead to the victim of violence remaining in a violent relationship for fear of ongoing liability for rent and damage if they leave, which acts as a barrier to finding future housing. Alternatively, if they do leave the relationship and the property, the victim of violence will be liable for ongoing rent charges and damage caused at the premises after they left.

This issue was recognised in the Royal Commission into Family Violence report, which at recommendation 116, stated that the DOJR should consider amending the RTA to “enable

victims of family violence wishing to leave a tenancy to apply to the Victorian Civil and Administrative Tribunal for an order terminating a co-tenancy if the co-tenant is the perpetrator of that violence—including, where relevant, an order dealing with apportionment of liability for rent (or other tenancy-related debts) between the co-tenants”.

**safe steps** and Homeless Law support the Royal Commission’s recommendation that the Act be amended to provide victims of family violence who are party to periodic tenancy agreements with perpetrators of violence a clear mechanism for terminating their involvement in those tenancy agreements.

**Recommendation 12: Clarify and expand section 234 to ensure victims of family violence can apply to terminate either a fixed term or periodic tenancy**

Homeless Law and **safe steps** recommend that section 234 of the Act be amended to provide that persons who have experienced family violence can apply to terminate either a fixed term or a periodic lease.

In addition, we recommend that section 234 and other relevant provisions in the Act be amended to provide that:

- 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 a previous co-tenant(s) continues 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 that they contributed after the section 234 hearing has concluded and the landlord has had an opportunity to inspect the premises;
- periodic tenant(s) who decide to remain in the property following a section 234 order being made will be responsible for making additional payments to the RTBA to ensure the original bond amount is re-instated following any reduction arising from a bond claim made by the successful section 234 applicant;
- VCAT members hearing applications under section 234 in relation to fixed term tenancies are prohibited from ordering lease breaking costs<sup>23</sup> against applicant tenants; and

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<sup>23</sup> ‘Lease breaking costs’ are defined in the annotated RTA commentary to section 210 as including three types of cost: advertising costs, refund of the pro rata re-letting fee paid by landlords to agents, and rental payments between date of termination and date of re-letting.

- 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 relevant hardship, will commit an offence under the Act. Landlords and real estate agents should be required to provide a factsheet on all options available to a tenant where a lease needs to be reduced and/or a tenant discloses family violence.

#### 5.4 Creation of new tenancy agreements due to family violence

35. For tenants experiencing family violence, what changes to the Act will help to better promote their access to safe and sustainable rental housing?

Many women experiencing family violence in rented premises who have taken action to exclude the perpetrator may wish to continue living in the premises as a sole or joint tenant. Given the dislocation and disruption that can occur when women are made homeless due to family violence, it is particularly important that victims of violence are supported as best as possible to exercise their right to stay at a rented premises after a perpetrator has been removed.

Section 233A of the Act provides a mechanism for the termination of an existing tenancy agreement and creation of a new agreement when a final Family Violence Intervention Order is in place which includes a condition to exclude the respondent from the premises, where the respondent is a party to the tenancy agreement.

However, as the following case study highlights, the requirement for a final intervention order with an exclusion clause as a pre-condition to using section 233A of the Act makes it a very difficult provision to rely upon in practice.

##### **Case study: Victim of family violence able to remain in tenancy at the last minute**

M had been living with her ex partner in a rented premises along with her three children for over a year when she began to experience family violence. M was not a tenant at the property, and her ex partner also handled all financial affairs, including payment of rent. When the violence escalated and a serious assault occurred, M's ex partner was removed by police and an interim intervention order put in place.

Shortly afterwards, M discovered that her ex partner had not been regularly making rental payments and that a large amount of arrears had accumulated. Police were due to remove the family any day due to a possession order that had been made, which M's ex partner didn't tell her about. M received legal assistance to make her own application to VCAT to take over the tenancy at the property, but this application couldn't be lodged until her intervention order became final.

Thankfully, the client was assisted at Court to obtain a final order, and the VCAT proceeding was able to take place the day before police were due to remove her and her family from the premises due to the rent arrears her ex partner had accrued.

### Improving the operation of section 233A

In practice the requirement for a final Intervention Order in order to invoke section 233A creates difficulties for women experiencing family violence because:

- a final Intervention Order 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 Intervention Order after it has been made, with some orders remaining unserved for significant periods of time, which can significantly delay finalisation of an Intervention Order;
- police do not always apply for exclusion conditions in Intervention Order applications where they would be warranted;
- the victim must apply under two jurisdictions (the Magistrates’ Court of Victoria and VCAT) in order to utilise this provision;
- many victims of family violence will simply not seek an intervention order. 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 order, or other competing personal priorities following an incident of family violence (i.e. children’s needs); and
- many Magistrates and court officers working in the intervention order jurisdiction are not aware of section 233A 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 s 233A.

These and other issues with the use of section 233A were recently acknowledged by the Royal Commission into Family Violence, which at recommendation 116 stated that the DOJR review of the RTA should consider amending the RTA to “empower Victorian Civil and Administrative Tribunal members to make an order under section 233A of the Act if a member is satisfied that family violence has occurred after considering certain criteria—but without requiring a final family violence intervention order containing an exclusionary condition”.

**safe steps** and Justice Connect support this recommendation which will help to encourage use of this provision by many victims of violence who want to stay at the rented premises after a relationship has broken down due to family violence.

In considering how best to give effect to this recommendation, we recommend that the following matters are taken into account in developing the criteria for VCAT members to consider when making an order under section 233A:

- input from stakeholders including specialist family violence services and legal services;
- requirements or criteria in other jurisdictions for the creation of a new tenancy where one tenant has perpetrated family violence against another; and
- the number of orders made under these provisions within relevant jurisdictions, and their effectiveness at promoting safety and housing security for victims of family violence.

**Recommendation 13: Remove the requirement for a final intervention order with an exclusion condition in creation of tenancy applications under section 233A**

Justice Connect Homeless Law and **safe steps** recommend:

- amending section 233A of the Act to remove the requirement for a final intervention order with an exclusion condition; and
- undertaking further research and engagement with sector stakeholders, including family violence and relevant legal services, to determine appropriate criteria for VCAT members to have regard to when determining whether family violence has occurred, and whether an order under section 233A should be made.

## 6. Promoting safe and sustainable rental housing

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### 6.1 Belongings left behind

33. What arrangements should apply to goods that a tenant leaves behind at the end of a tenancy?

Family violence often leaves women with nothing. Many women leave their homes with only a few belongings packed in a bag. After escaping family violence, many women must establish a new life with low income and few resources. Losing belongings, especially large durable items such as furniture, whitegoods, clothing, bed linen and kitchenware, can present a significant cost for women in these situations. Women may delay leaving a relationship if they do not have the financial resources to establish a new home with low or no income.

Although there are provisions in the *Family Violence Protection Act 2008* (Vic) for personal property to be returned to the protected person when an Intervention Order is made, “magistrates rarely make conditions which specifically address property issues, including economic abuse, despite having the power to do so”.<sup>24</sup>

At present women need to secure the support of local police and attend the property in person in order to recover belongings left behind at rental premises under Part 9 Division 2 of the *Residential Tenancies Act*. In practice, this is often difficult, as police are not always available to do this, or may not be available when the woman is available. In **safe steps**’ experience, when police are available, they often give short notice (such as a few hours) when they will be in the area of the property. If the woman has had to leave the area in order to be safe, it can be difficult or highly costly for her to return at short notice and arrange the removal and storage of her goods.

#### **Consumer Affairs Victoria initiative enabling women to retain their belongings**

The Department of Justice and Regulation, Consumer Affairs Victoria (CAV) in the South East Metropolitan region is establishing a new initiative to assist women to recover their belongings after leaving a rental property when they escape family violence. Under the initiative, family violence services in the area can contact CAV directly when they become aware of a woman who needs to leave a rental property in order to escape family violence. Rather than undertake the usual procedures to value the goods and issue a notice to store or destroy the items, CAV can then make arrangements with service providers to recover and store the belongings until they can be reclaimed by the woman.

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<sup>24</sup> Royal Commission into Family Violence (2016) Final Report, Vol. IV, Ch. 21, p. 110.



**safe steps** and Homeless Law recommend that this initiative is expanded state-wide, so that women who need to depart a rental property in order to escape violence can retain their belongings. This will assist women in crisis to rebuild their lives after escaping from abuse. With the option for belongings to be stored securely and recovered when they are ready, women will be able to set up their lives with significantly reduced initial costs for necessary household items.

#### **Recommendation 14: Enable victims of family violence to recover and store belongings**

Homeless Law and **safe steps** recommend that the Department of Justice and Regulation works with specialist family violence services to extend the program to recover and store household belongings of victims of family violence who have had to leave rental premises.

### **6.2 Modifications to properties**

35. For tenants experiencing family violence, what changes to the Act will further promote their access to safe and sustainable rental housing?

The Royal Commission into Family Violence recommended that DOJR consider amendments to the Act to “prevent a landlord from unreasonably withholding consent to a request from a tenant who is a victim of family violence for approval to reasonably modify the rental property in order to improve the security of that property”.

With the implementation of other recommendations from the Royal Commission, it is likely that this provision may need to be in place in order to ensure the safety of some tenants. Specifically, the Royal Commission recommended that Flexible Support Packages are provided to victims of family violence, which can support the installation of security equipment and changes to locks in the victim’s home, in order to enable them to remain in their own home. The Victorian Government has agreed to implement this recommendation, with significant increases to resourcing for this initiative. In order to ensure the success of this initiative so that women experiencing family violence can remain in their own homes, it will be important to introduce an amendment to the Act to ensure that reasonable modifications can be made to the safety of rental properties.

#### **Recommendation 15: Landlords cannot unreasonably withhold consent to reasonable modifications to a rental property**

Homeless Law and **safe steps** recommend that section 64 of the Act is amended to specify that landlords cannot unreasonably withhold consent to reasonable modifications to a rental property that would improve the security of the property for a victim of family violence.