

Friday, 5th June 2015

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SUBMISSION TO THE REVIEW OF THE
Victorian Charter of Human Rights and Responsibilities Act 2006

Background

The Tenants Union of Victoria (TUV) is a charity and service organisation which aims to:

- Inform and educate Victorian Tenants about their duties and rights;
- Improve the conditions and status of renters; and
- Represent the collective interest of tenants in law and policy making.

In the context of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**), we provide advice and assistance to tenants who have been affected by the decisions of the Director of Housing, and community housing providers. The former clearly being a public authority, and the latter serving a public function which is arguably a public authority for the purpose of the Charter.

We also provide advocacy at the Victoria Civil and Administrative Tribunal and the Supreme Court.

As the “home” is an integral human right and platform from which a person is able to make valuable contributions to society, the following submission shall focus on the Charter in light of the relevant rights.

Our submission shall largely focus on Victorian Civil and Administrative Act (VCAT), the *Residential Tenancies Act 1997* (RTA) and the issue of eviction.

The main human rights identified in the Charter that are relevant to housing are sections 13, 17, 19, 20 and 24.

Referral to previous 2011 submissions

Please note that the Tenants Union of Victoria Ltd (TUV) also made submissions in the Review in 2011. We affirm our prior submissions for your consideration, and we now make further submissions to the same ends with further and alternative recommendations. We also affirm a joint submission made 9 September 2011 endorsed Justice Connect (known then as PILCH), the Human Rights Law Centre and TUV.

Much of this submission seeks to engage the constitutionally enshrined relationship between the parliament (legislation) and the executive (administration of power regulated by policy and administrative law), and address the unequal burden on each of the respective limbs of the separation of powers.

We take this opportunity to propose recommendations to enhance the Charter liberally, with the knowledge that any major changes are unlikely.

It is important to be candid and acknowledge that human rights are always in tension with the economic costs of what it takes to realize them and the impact of those that would vexatiously advance their rights and cause a significant financial cost to the state.

The Charter and the community generally, would benefit substantially if inferior courts could determine compliance with section 38 of the Charter. Specifically, in the case of housing, this would mean empowering the Victorian Civil and Administrative Tribunal (VCAT) in some way beyond the empowering enactment.

Our main proposal in this regard is outlined on page 8.

A review of the Charter should include a return to the origins of the original Human Rights Declaration; a treaty between nation states to protect all humans and that the atrocities of war, committed by one human against another, should not only never occur, but that our communities should work towards rules of law that promote a character in the individual and the state, a character of which the law can never require only encourage.

In many respects, the language of “rights” is about minimum thresholds, and it is unfortunate that the realization of rights which are intended to give people dignity and respect, are fleshed out in the context of conflict, with very real and significant impacts on welfare, health and the ability to survive.

In a modern context, the traumas of litigation between the state (or state powers) and the private individual may distort the original intention of the Charter. It is therefore, important with respect to charter litigation to make the realization of Charter rights as simple and cost effective as possible.

Therefore, TUV wishes to affirm two aspects of the original Declaration of Human Rights:

1. *“Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge;” and*
2. *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

Currently, the *Residential Tenancies Act 1997* has very little room to provide security for people who have major life events such as serious illness or loss of employment. VCAT currently has no discretion other than granting an extension of 30 days to a warrant for possession in situations where the hardship to the affected tenant would be greater than any hardship to the landlord. There is no moratorium when such events occur in private tenancies. The inability of people to access appropriate housing in the private market is a burden displaced on the State.

Those that cannot afford private rental, are dependent upon the state. Subsequently, the state now depends on community housing and other social housing providers to fulfil this public function of housing provision. The Charter is critical to ensuring fair and reasonable treatment to protect people’s right to have a “home” that promotes health and well-being.

If someone is evicted they do not cease to need a home, and the obligation on the State remains unfulfilled. The economic impact on physical and mental health, and likelihood of contact the justice system is severe.

Who is a public authority?

While it is clear that the Director of Housing is a public authority, most other community housing agencies who receive money or subsidies from the Director are not clearly public authorities for the purpose of the Charter, and subsequently they are not held to account for many of their decisions, or for compliance with their own administrative policies.

This divide is mirrored in the public prison and private prison dilemma, with respect to the scrutiny and monitoring of local prison policy and procedures and the accompanying obligation to comply the Charter.

Other schemes in relation to housing, include private landlords under the National Rental Affordability Scheme (NRAS) represent significant concerns in relation to delegation of authority and performing public function, as compared to a simple incentive that is independent of a public function.

For the main part, TUV submits the definition of public authority needs to be made more clear, so that those who are charged with fulfilling a public function, and those are in receipt of financial or other forms of considerations from the State are clearly identified and properly subject and monitored for compliance and promotion of the Charter.

Under section 6 of the *Housing Action 1983*, one of the stated purposes is:

- (i) *to monitor the [house building](#) and housing finance industries in both the public and private sectors and to assist those industries to achieve growth and stability;*

Currently, many community housing providers will dispute whether they must even give regard for the Charter. Therefore, to compel a community housing provided even to consider the Charter, either a test case needs to be run, or changes to the legislation are required. This also affects the accessibility of proper reasons for decisions to be demonstrated because documents may not be able to be obtained without a subpoena.

Recommendation(s):

- (1) The identity of public authorities must be made clearer.**

- (2) A public register should be established and maintained in relation to organizations that are recognized as public authorities. This may be declared by the relevant Minister.
- (3) Parties who dispute the status of an organization as public authority should have liberty to apply to the Supreme Court (or other authorized body) to have a party removed or added to the register.
- (4) Parties who are registered as public authorities must keep an up to date record of their policies on a centralized network held by the relevant department. This should be the publicly available (ideally also published on the internet) unless an exemption is granted by the Minister or an alternative delegate (similar to FOI grounds for exemption). By way of example - This is currently done by Director Instructions in relation to the Prisons. The policies are located in the Department of Justice Library. However, while public prisons policies are clearly available, it is less clear in relation to private prisons policies and who is responsible for ensuring they are monitored and up to date.
- (5) Expand the obligations under section 28 to apply to public authorities when authoring policies that *directly* affect a human right (some reasonable limitation may be limit the administrative burden of a department seeking to make minor alterations to policies). Accordingly, such an amendment, policies should contain clear explanatory and compatibility statements similar to that of the legislature to demonstrate that the policy is in compliance with section 7 and 38 of the Charter.

Who has the powers to grant relief against public authority decisions?

Contrary to *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328 (31 March 2010), the Supreme Court's decision in [Director of Housing v Sudi \[2011\] VSCA 266 \(6 September 2011\)](#) closed the door for VCAT to be able to consider the discretion by the Director and types of errors of law described in *Burgess* at [147-148], specifically the unjustified departure or disregard for polices that were clearly relevant.

It the interim between the initial Sudi decision and the appeal, VCAT did not appear to struggle with the application of administrative principles in the context of the Charter. It prudently considered the degree of compliance and held accountable the public authority without allowing substantial or arbitrary interference with public

authority's. For example, [Director of Housing v KJ \(Residential Tenancies\) \[2010\] VCAT 2026 \(16 December 2010\)](#)

Extension of VCAT Powers

Currently, there is no overseeing body who can independently determine if a policy has been correctly followed. Neither the Ombudsman, nor VHREOC has proper grounds to make such determinations as to policy compliance.

In relation to investigations, in a housing context, once there is a VCAT proceeding, VHREOC and Ombudsman are excluded, and the speed with which proceedings take place, precludes any intervention in relation to issues such as eviction in any effective way. Once the home is lost, restitution appears not to be an option unless there are exceptional circumstances to obtain an order in the nature of mandamus (even for the Supreme Court once a warrant has been executed).

While, VCAT has some administrative decision making capacity as a public authority, in a judicial context it has none. *Sudi* clearly delineated that VCAT does not have the necessary remedies nor is it proper even to hearing matters that are not relevant under the *Residential Tenancies Act 1997*.

Therefore, TUV contends given VCAT's currently range of lists and exposure to the community, that VCAT is the most economically sensible and logical option to fulfil not only a quasi judicial role, but to have "quasi administrative investigatory" role.

Co-dependency of Administrative Law principles and the Charter

Whether a decision made by a public authority amounts to an error in law is an administrative law question which can be subject to review, but only in particular forums, predominately the Supreme Court.

The nature of the separation of power dictates that "decisions" affecting a person (not being a party to a litigation proceeding) will always be from the executive limb or its delegate. These departments are established by the enactments that create them.

The issue of *who* has authority to intervene and determine that an error of law in the administrative context is the key factor in relation to who has access to challenge determining Charter compliance and human rights.

As rights under the Charter are arguably insufficient to form a self-contained cause of action independent of administrative law principles as described in section 39, there is

an inherent co-dependency of the Charter to grow not through legislation but rather through the principles of administrative law.

The “error of law” threshold is in increasingly narrow window and if the Charter rights, which are sought to be promoted are dependent upon the finding of an administrative error, then the realization and growth of human rights law is going to be profoundly stunted.

The limited number of cases, predominately in relation major crimes, or parties who are impecunious and the remedy of real significance, undermines the “common understanding” of the rights in the community and day to day decision making.

The corollary of the co-dependence between administrative law and Charter means that individuals are forced into the Supreme Court against a public authority, and despite Model Litigant Guidelines (which may not apply to all public authorities), there is a gross disparity between the financial resources of both parties.

While protective costs orders exist, the public interest component of the litigation is not determined until litigation has already commenced.

This co-dependency demands a specialist area of law, it requires private individuals to engage in forum which is statistically unsuccessful, and has one of the highest cost brackets in the legal profession.

The difficulty of divesting the Charter from administrative law remedies appears to be an impossibility without larger changes to the separation of powers, or without greater clarity to the types of decision that can be reviewed by inferior Court and Tribunals, that is a fractioning or categorization of rights than may be reviewable and those that might not be appropriate for such forums to determine.

Equality of Access to the Human Rights adjudication - an imbalance of power

It is common for a private party who has breached legislation to be adjudicated by a relevant court based on the jurisdictional limits of the forum. In many cases, monetary limits or the type of offence or injury that has occurred.

It appears inconsistent that the private individual must attend the relevant forum and escalate through the hierarchy of courts whereas the administration does not. That is

to say, administrative decision fiercely guarded, even by the judiciary because of not wanting to stall the thousands of decision that need to be made on a daily basis.

The increase in demand for judicial services (and the lack of increase in funding) is increasingly structuring our society to increase the burden of appealing a decision. Though when such a decision is made the implications are far reaching, and with a good degree of finality.

There is a similar issue in relation to parties are VCAT having to appeal directly to the Supreme Court. A trade-off between the requirements under section 98 of the VCAT Act, and the detailed scrutiny of the Supreme Court.

The length of time of the proceeding, the costs, hinder the ability to hold accountable those administering power as a public authority. Hence, the deficient number appeals from VCAT in relation to the residential tenancies since 2011. The costs, time to conduct the appeal and lack of effective remedy prevent tenants from pursuing action and obtaining a timely relief against errors by the Tribunal.

Quasi Inquisitorial Function by VCAT in relation Administrative Decisions

While VCAT does not have the power to grant remedies of mandamus and certiorari, the Charter (in complement with significant changes to the VCAT Act), may provide an investigatory role for VCAT to *observe* administrative compliance, and if there is reasonable doubt as the correct lawful application of policy and exercise of power, may stay the related proceeding (also being heard by VCAT) and refer to the Supreme Court (similar to section 33), despite the empowering legislation, which grants VCAT original jurisdiction to hear the matter.

In this sense, the Tribunal may hear evidence, and determine if weight is relevant to the matter on foot. If there is relevance of doubt, the Tribunal may adjourn and refer the matter to an independent Member. If this Member is of the view that there has been a substantial departure, while they may not have authority to grant administrative remedies, there is no reason the Tribunal cannot perform a triage function, and potentially to consider the protective costs consideration (upon such a referral), to improve the link between the private individual and the public authority.

Similarly, it may be desirable in some cases, for the public authorities to utilize the Supreme Court to expeditiously affirm a decision of the department, by examining the

individual in first instance. Such proceedings may well be considered to be quasi inquisitorial in nature by the Supreme Court, with the support and tension of the section 35 parties of AG and VHREOC.

With due respect to VCAT and their current number of matters, while it would be ideal for VCAT to be able to delve into Charter compliance with non-binding decisions, it would likely carry a high risk of administrative error with substantial implications.

We therefore propose the following alternative to improve the realization of the Charter and improve access for private parties to judicial review.

Recommendation(s):

- (6) Grant the VCAT president and/or an associate justice powers to remit the matter for rehearing, similar to section 51A of the VCAT Act. That is to invite the original decision maker to remake the decision, if a Charter Right is substantially affected and an error appears on the record.**

- (7) Alternatively, while it may well not be possible, to divest the Charters dependency on administrative law principles, it may be possible for interior courts and tribunal to a quasi -investigatory role.**

This process is intended to look specifically at the issue of housing, and focuses on the question of eviction and the right to housing.

It would be proposed that VCAT be granted two keys powers to affect an investigative and administrative law and Charter accountability function (without usurping the remedies and jurisdiction reserved by the Supreme Court);

- a. Tribunal Member or Judges would be able to make direction Orders for the public authority to provide all relevant judicial review information to be provided directly to the affected person in a timely manner (either interim/interlocutory/final).
- b. Providing a non-binding recommendation (with an accompanying provision to rendering immune such recommendations from being a satellite litigation) as to whether there reasonable doubts as to the correctness of the decision and the grounds for judicial review (even where the empowering enactment does not explicitly provide them power to do this).

In this sense a Tribunal Member could:

- a. choose to refrain from making a possession order and adjourn it for a reasonable period of time for an interlocutory remedy against the decision to render the Notice (cf. Burgess – once a PO has been made, certiorari is no longer available in relation to the reasons for the giving of the notice), or;
- b. If genuinely concerned about a radical departure from the public authorities own policy, make a referral under an amended provision similar to section 33 of the Charter.
- c. Affirm their orders, and the person may still be in a position to immediately seek judicial review of their own volition;

In the proposal above, the VCAT powers remain the same, the relevant evidence should not be obtained prior to the decision in first instance being made. Currently, under the RTA, the Tribunal cannot give regard for non-compliance with policy in their decision. It does not however mean, they cannot hear or see this evidence for the purpose of a section 33 type recommendation.

This proposal is an alternative compromise that allows the Tribunal member to serve an independent review function and to enhance the private person's access to judicial review in the timely manner.

This proposal does not grant VCAT powers to give injunctive relief or the remedy of mandamus or certiorari, it simply allows a procedurally fair amount of time to protect an interest that cannot be replaced by money or restitution (ie. you cannot order a new house to be provided if it doesn't exist).

Consistent Standards between the Separations of Powers

Section 32 is an essential plumbline for the judiciary in aiding the realization of the Charter. However, it is contended that all three limbs of the separation of powers must be "infected" by the Charter in a compelling way for human right to become a "common understanding."

The controlled development (albeit limited) of section 32, should demonstrate that an amendment to section 38 would be possible and give grounds for radical improvement to administrative processes and accountability. It would significantly advance the human rights contained in the Charter, if an additional provision was inserted into section 38:

...So far as it is possible to do so consistently with their purpose, all administrative policies must be interpreted in a way that is compatible with human rights.

In order for any policy to be applied, it must first be interpreted. Currently, if there is an ambiguous, the proper consideration principle is *not* the same requirement as an obligation to interpret the policy to be compatible. While section 7 seeks to enforce this reading, this is an overarching statement of the balance of the competing interests. Such a positive statement is required so that ambiguous policies are not exploited and enable unnecessary departure from the promotion of the Charter rights.

The proposed amendment would prevent serious misconstructions of policy that inevitably results in distorted applications of power, and ultimately unnecessary attrition of human rights.

The propose amendment, would ensure that the object purpose of a decision by a administration should always remain consistent with the purpose set out in the legislative instrument from which the power is sourced.

Such a provision would substantially re-enforce what section 38(1) is trying to accomplish.

Case Example:

In the Janusauskas matter [[Janusauskas v Director of Housing \[2014\] VSC 650 \(17 December 2014\)](#)] (Refer to full case study at Appendix 1)], there was no clear policy as to when a person should be evicted when found to be subletting without consent. While under the RTA there is a clearly entitlement to obtain the possession order, it did not address the issue if the Director should evict Mr. Janusauskas.

It has never been made clear why the financial restitution and undertaking to not sublet in future was not sufficient to prevent an eviction.

The Director refused in what amounted to be a relentless effort to evict him. It was in the author's opinion ultimately about punishment and deterrence. Not a clear purpose within the Act, and a decision that departed from section 38(2).

Unfortunately, the client was so exhausted by the appeal, and had already relocated because of the pending warrant, that judicial review was not sought.

Recommendation(s):

(8) Amend section 38 to include an additional provision:

...So far as it is possible to do so consistently with their purpose, all administrative policies must be interpreted in a way that is compatible with human rights.

The “Incompatibility” threshold

The wording of section 38(1) provides for a lower threshold of “incompatibility” rather than requiring compliance and promotion of the human rights where possible. The same standard that is required and incumbent upon the judiciary, should be imposed on public authorities to ensure the tension between the separation of powers is not displaced.

The judiciary is all too often constrained by the legislature allocating budgets.

A public authority’s need to protect and preserve their discretion when they apply a policy is captured by the qualification contained in section 38; *“in so far as it is possible to so consistently with their purpose.”*

This also reinforces and is consistent with modern principles of interpretation of legislation as described in [Project Blue Sky Inc. v Australian Broadcasting Authority \[1998\] HCA 28](#). It is contended that the same driving purpose and obligation be imposed upon public authorities when administering power under policy.

Least Restrictive Alternative Test

In many cases, the Charter is treated as something to dispense with, a procedural necessity that must be observed rather than properly considered. The decision is already made and then then the Charter considerations and the procedural fairness are observed.

Section 7 clearly states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom In many cases, further information or procedural fairness should be afforded before rendering the decision where possible.

Unfortunately, “*as can be*” demonstrably justified creates a radically different test with respect to transparency. That is to say, if the provision read “*has been*” this would alter the chronology of the decision and give effect to the quality of the limitation as actually some that *has* been demonstrated, rather than something that “can be” or “could be” justified.

Section 7(e), and the second limb of section 38 of the Charter, support a positive obligation for administrative bodies to find alternative solutions to problems confronted by administrative bodies.

(2) *Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.*

While this process is hard to evaluate, it is contented that in many residential tenancies situations there are numerous alternatives to evictions. It is perhaps the nature of the Charter having to be couched in another cause of action as per section 39 in the litigation sense, that blinds parties to looking for genuine solutions to the actual problems the effect the individuals human rights under the Charter.

Recommendation(s):

- (9) **Amend legislation to give effect or establish a clearer legislative test that would give practical effect to section 7 and 38 of the Charter. This is fundamental to prevent a cultural of retaliation from when a person seeks to exercise their rights under the Charter.**
- (10) **This would allow an application for alternative resolutions, or a more clearly identify errors of law on the ground that a reasonable option is being arbitrarily refused.**
- (11) **That is to say it is positive and enforceable obligation for a public authority to give proper consideration, not only to the Charter right that is effected, but the actual nature of the decision and what is trying to be achieved by the decision.**

Human Rights Culture - potential Victimization

In the author’s experience, (both tenancy and advocacy for people in prisons), the private individual is often treated radically different once litigation documents are filed. Public service sector employees and delegates, often present negatively to the

client and there is a feeling of blame projected for causing issues for the department, and the inevitable stress of if someone is found to be at fault (i.e. who made the decision, and was it wrong?).

For many people involved with public authorities, they are tied and depending upon the public authorities while they continue to litigate against each other.

In the prison environment, and housing environment, both authorities have tremendous powers to intimidate, cause interview and render other notices under the Act, which is difficult to challenge if it is bona fide or some form of victimization. It is in the author's opinion a real issue that relates to behaviour and the human response to litigation.

Recommendation(s):

- (12) Introduce a provision which entitled a person to request all future correspondence be in writing, unless the private individual consents.**

- (13) Provide VHREOC the right to investigate during litigation but only in relation to unfavourable treatment in relation to a private individual who is complaining of victimization or unfavourable treatment**

- (14) Provide VHREOC with the power to recommend certain public sector employees not deal further with the private individual or their file/matter. While not formally a conflict of interest it follows similar proper principles.**

Better drafting of administrative policy

Poorly drafted or ambiguous policies can eventually lead to dispute and litigation, that may not necessarily amount to an error of law for the purpose of administration law, but severely hinder the realization of human rights under the Charter. This is the effect of section 39.

Case Example:

Under the Housing Appeal component of the current Office of Housing "Business Practice Manual"

Part 4.3.4 of the Manual states (inter alia):

There are a number of decisions made about housing matters that fall within the jurisdiction of the Residential Tenancies Act 1997 (RTA), such as

evictions, subletting and breach notices. These issues are determined by VCAT and cannot be reviewed within the appeals process.

Human Rights Appeals

All clients have the right to lodge an appeal in regard to the department failing to take their Human Rights into consideration when making a decision. An appeal on the grounds of Human Rights can be lodged in regard to ANY decision made by the department concerning the management of a client's tenancy or application, regardless if the matter falls under the jurisdiction of VCAT.

The Department's clients are able to lodge an appeal on the following grounds:

- *that in making the decision, failure to comply with the obligations under the Charter of Human Rights and Responsibilities Act 2006 (the Charter) (i.e. to act compatibly with the human rights contained in the Charter) has occurred, and/or failure to give proper consideration to the relevant Charter rights, and/or*
- *that the decision made in relation to that person is incorrect in the circumstances, which includes taking into account policy and that person's human rights under the Charter."*

In the next paragraph of 4.3.4 it has clear headings that state (again inter alia with our emphasis):

- *"Matters that **CAN** be appealed... Human Rights"*
- *"Matters that **CANNOT** be appealed..."*
 - *Rental Arrears Recovery Procedures, such as:*
 - *orders for possessions*
 - *evictions*
 - *notices to vacate*
 - *Breaches of the **RTA** or Tenancy Agreement"*

This policy appears to be inconsistent, and render ambiguous the ability of a tenant to make an internal appeal about a notice to vacate, a choice to evict or persist to seek a warrant; or a decision to render a breach of duty notice without giving the tenant the opportunity to review the evidence, or respond to allegations against them.

In the Janusauskas matter, TUV assisted in relation to an appeal for a tenant having been found to be unlawfully subletting by inviting backpackers to look after his dog and property while on a temporary absence of leave. The appeal to the Supreme Court was successful. However, the decision of Burgess was handed down at the same time. TUV wrote to the Director requesting an internal review in line with the *Burgess* decision and pursuant to Charter.

The VGSO (engaged by the Director of Housing) referred to the above policy and indicated an internal appeal could not be made under this policy. [Refer to the full case study at Appendix 1.

While it is obvious that departments utilise internal counsel and legal advice, the necessity for independent assessment of policy with respect to Charter compliance is important to prevent departments who instruct their own solicitors from contriving policy intended to subvert as much as possible the operation of the Charter or being deliberately ambiguous.

If a policy does not exist, then regular administrative principles provide for review of an unreasonably wide power, and inconsistent applications of power (a paramount principle of natural justice).

Recommendation(s):

(15) Independent review on major policy drafting pre-implementation. Section 28 and 36 of the Charter should be enhanced to apply to administrative policy not only to legislation but also to administrative policy. That is, policies should have compliance statement to demonstrate that policy itself has been given proper consideration with respect to the impacts, and the least restrictive options under section 7 and 38(2).

(16) An appointed and independent delegate (other than the Supreme Court) can make a non-binding recommendation that a policy is not compatible with the Charter.

Such mechanisms would ensure simplicity, accessibility and functionality with respect to the Act. Ultimately, it is up to ground level workers (who are not Charter lawyers) to implement policy and they should be able to exercise a reasonable discretion with confidence; the more clear the rule of law, the less likely private persons will be required to litigate.

Further, should an alternative model of VCAT be empowered to determine Charter compliance, the more accessible practical alternatives can be assessed, and proper consideration can be demonstrated by the relevant public authorities.

In the current state of the law, there is as much Charter issues caught up in the policies intent to subvert or render unclear the Charter rights, as the decision from which judicial review appears. If the policy departs from the Charter (or seeks to divest from it as much as possible) then any decision will obviously be contaminated also.

Review of policies or comments in relation to compatibility of the Charter could be a role of VHREOC (or an alternative body) in a similar manner SARC reporting function in relation to legislation.

TUV contends, as an alternative to litigation, improved processes for policy drafting are a better preventative approach than relying on litigation to improve the realization of the Charter.

Strategic Litigation and Diminished Public Change

Most litigation matters settle. While this is good for the individual persistent issues may only be resolve in the individual incident.

Case Example:

Recently, Victoria Legal Aid approached a community housing operator attempted to run a judicial review that would require the determination of the community housing operator to be determine to be a public authority. The matter settled with the individual being allowed to remain in his property.

While beneficial for the individual, repeat issues or systemic problems are not genuinely resolved through litigation without major decision such as *Burgess* or *Sudi* or *Momcilovic* or *Castles*. Even then the novelty of the circumstances do not promote positive change.

Legislation and Original Jurisdiction at VCAT

In the case of housing, the reason that the section 38 amendment has been suggested is that the *Residential Tenancies Act 1997* has been drafted to apply to both public and private tenants without distinction (save for a few novel exceptions).

In almost all cases, despite the Tribunal being capable of identify relevant policies driving a decision by a public authority, there is no power to even consider policy facts and decisions as a relevant consideration. To give any weight to such administrative law would be *ultra vires*, and amount to a jurisdiction error unto itself.

Transparency of Decision Making

It is a clearly entrenched principle of law that justice must be seen to be done.

Section 38 of the Charter makes it unlawful (an error of law for the purposes of judicial intervention), for a public authority “to act in a way that is incompatible with a human right, or in making a decision, to fail to proper consideration to a relevant human right.”

Sufficiency of Reasons and Administrative Burden

In tension with the accessibility of human rights in inferior forums is the “flood gate question” and the administrative burden that Emerton J established with respect to section 38 of the Charter to protect in *Castles v Secretary, Department of Justice* at [79]:

Proper consideration need not involve formally identifying the ‘correct’ rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person’s human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

This has again been affirmed in *XX v WW and Middle South Area Mental Health Service* [2014] VSC 564 (17 December 2014).

This decision represents the intention of the Court to protect public authorities from unnecessary interference in performing their public service. This is the inherent tension between economics and the preservation of human rights. Human rights are administratively burdensome and expensive.

The provision is simultaneously the greatest benefit of the Charter, while at the same time being its greatest deficiency because of inaccessibility to the process that actually led to the decision.

It is a strength because it provides for judicial intervention in relation to a decision by a public authority if proper consideration has not been made of a relevant human right.

It is however a profound weakness because in most cases, the lack (or the extent of the consideration) only becomes apparent upon litigation. That is to say there is no positive obligation for a public authority to communicate its consideration or apportion some sense of the weighing of those considerations.

It is common place of phrases from the legislation to be pitted against information which has been obtained through a token interview to dispense with procedural fairness requirements of administrative law, because the only context upon which that “reasoning” (as a demonstrable process) is scrutinized during cross examination and subpoenas in the Supreme Court.

If human rights are to be treated with a similar threshold to a *Wednesbury* unreasonableness test, then the current format suffices. This appears to be the current trend in light of *Castles* recently being affirmed. However, for the Charter to be fully realised section 38 should be strengthened to require a public authority to communicate its proper consideration to the person whose human rights are in question.

TUV contends that a section 38 decision must be redrafted to require a public authority to communicate its proper consideration to the person whose human rights are in question. While this is a principle of common law, there is no statutory guidance as to what such decision must include.

Case Example:

In the Janusauskas matter, an interview occurred, and after several pages of questions to the Director, address the issue of why eviction was the only viable necessity, give the restitution by

the Director and a clear undertaking not to sublet again. The Director simply provided a brief letter effectively stating that it was because of "hardship of the waiting list" and that "proper consideration has been given to the Charter", a phrase used commonly in relation to any eviction.

Recommendation(s):

- (17) Amend the Charter to require reasons to be all clearly communicated to the affected person so that the quality of the decision is proportional to the level of detriment face by the individual. That is, it is not adequate to recite phrases such as "the hardship of the Director's waiting list", or "good governance and security of the prison" where there are significant aspects of human dignity and respect in issue.**

- (18) Interim decisions should include:**
 - a. State the objective of which the decision is trying to achieve**
 - b. Acknowledge the likely detriment to affected person.**
 - c. Outline if there is still a right of internal appeal a reasonable timetable, and allow parties to make relevant submissions in a timely manner to inform the decision of the public authority**
 - d. Whether the public authority has considered a genuine alternative proposed by the tenant that would achieve the same objective.**

- (19) Ensure that copies of prior request by the affected person are made readily available upon request by the affected person without the need for a Freedom of Information Request.**

- (20) The Amendment should include mandatory qualities to be contained in the decision. This may include an obligation that a public authority must:**
 - a. Clearly state the name and position of the person who has made the decision**
 - b. Identify the relevant policy and/or laws upon which the decision has been made**
 - c. Clearly identify the charter rights that have been consideration**
 - d. And that the relevant human rights human rights are pitted and weighed against the reasoning of the public authority and that there is a clear statement that the objective which is sought to be achieved of greater importance than the detriment to the human rights in question. That is to say, the objective sought to be achieved by the authority is not arbitrary**

and in their discretion of great value to the community (ie. Usually competing rights of the individual and the state).

- (21) A decision that is a final decision (not further internal appeals possible) should be required to clearly state that this is the final decision and should they wish to challenge the decision they should seek legal advice (and/or self-litigant coordinator) to determine if the decision may be subject to judicial review (again noting that most of the community have no idea what judicial review is).

Current trend against transparency of policy documents

However, in the past two years the Director of Housing has removed its policy hotline, and policies such as the illegal use policy have been removed from public view on the internet since *Burgess*. It would appear that this movement away from transparency is intended to reduce the likelihood of judicial intervention, rather than supporting a movement toward great clarity of human rights and their reasonable limitations.

In *Burgess* it is clearly stated that policy is a “relevant fact” for the purpose of administrative law and hence the rights contained in the Charter. At [148]:

...where the existence and content of such a policy is to be regarded as a relevant fact which the [decision-maker] is bound to consider, a serious misconstruction of its terms or misunderstanding of its purposes in the course of decision-making may constitute a failure to take into account a relevant factor and for that reason may result in an improper exercise of the statutory power.

If this “relevant fact” (being the policies upon which decisions are made) is removed or obstructed from the reasonable person in the community, then the Human Rights upon which such policies seek to limit cannot be held to account. The Director is rolling out new simple format information sheets, rather than the policies used by the decision makers.

A comparison can be found here:

<http://www.housing.vic.gov.au/>

[http://www.dhs.vic.gov.au/for-service-providers/housing-and-](http://www.dhs.vic.gov.au/for-service-providers/housing-and-homelessness/public-housing/public-housing-policy-and-procedure-manuals)

[homelessness/public-housing/public-housing-policy-and-procedure-manuals](http://www.dhs.vic.gov.au/for-service-providers/housing-and-homelessness/public-housing/public-housing-policy-and-procedure-manuals)

It would appear the transparency is not perceived to be in the interest of the Director with respect to efficiency. This is a serious trend against access to justice.

If there is no policy in the public domain (unless there is a recognized exemption), then the private individual is disarmed as a matter of process and the public authority cannot possibly treat people consistently. The private individual is in the dark (left with general administration law principles) to determine if there are grounds for injunctive relief from the Supreme Court.

Recommendation(s):

(22) Require all administrative bodies to make readily accessible their policies (the same used by the decision maker) on the internet (unless the minister has granted an exemption). That would reverse the onus on the administration to ensure fair and consistent application of their powers.

(23) Currently, many Community Housing agencies do not publish any of the relevant tenancy policy documentation in the public, despite this requirement by the Housing Registrar's Performance Standards¹

A Review of Section 33

Because VCAT does not hear matters in relation to administrative discretion, it is not possible for the Tribunal to effectively utilize section 33 for the purposes of a public authority's decision to issue a notice to vacate, seek a possession order, or ultimately affect an eviction by warrant.

While section 33 was drafted to demonstrate this function, there is no compelling mechanism to require a Tribunal to assess the aspects of the administrative background and reasoning behind the decision to litigate by the public authority.

The wording section 33 means, even if the Tribunal wants to refer the question of law, the question of law can never "arise" because there is no jurisdiction under the RTA to hear any of the administrative qualities of the decision that brought before the Tribunal in the first place.

¹ See <http://www.housingregistrar.vic.gov.au/Publications-and-guides/Performance-standards>

It is likely there may be some reluctance by the individual Tribunal members to refer questions of law in the event the Supreme Court concludes the answer is obvious and they are professionally chastised by peers.

This severely disarms the Charter and any party's ability to obtain clarity at law. Section 33(4) ensures that this limitation is made clear.

Recommendation(s):

(24) Section 33 should be revised to allow the Tribunal or a Court to make preliminary inquiry in relation to the administrative basis for the decision upon request of a party or of its own volition. While VCAT may still not be able to make the decision, it should be granted the power to stay or adjourn proceedings, until the matter is heard by the Supreme Court, mediated, or parties consent to VCAT determining the matter in the absence of administrative principles.

If the court refuses to exercise such an inquiry power, the decision maker should be obliged to provide written reasons for the refusal to make order requiring the reasons preceding the hearing to be provided to the affect person.

Essentially, it would be intended that administrative bodies would have an additional "summary of proofs" in relation to demonstrating what factors they had considered eviction was necessary before making the application.

Given at law, according to *Burgess*, they are already required to do this, it should place not further administrative burden on the Director of Housing, or similar public authorities. According to the Charter, these records should already exist, we are only contending that VCAT have power to required them to be produced.

Access to Justice via the Charter

Under the current law, the application of the Charter (other than as an interpretative principle) is not accessible for the community in any meaningful way. A charter right must take a separate cause of action to the Supreme Court in the form of a Judicial Review.

While judicial review formally has a 60 day time limit, for most tenants the reality in the case of a VCAT possession order is that VCAT order could be affected by eviction anywhere from 1 day to about 45 days from the purchase of the warrant. Any appeal

to the Supreme Court would be of no effect once the warrant was executed. In effect this dramatically reduces the time to consider and launch an appeal.

If an individual is to seek to obtain reasons without filing an originating motion, they must file before having any genuine idea if proper consideration has been made. This is especially significant if the change of circumstances test advanced in *Burgess* is applied. It is still not clear whether a subsequent decision to purchase a warrant can give regard to the factors that were engaged when deciding to issue the initial notice to vacate.

The only other alternative is to file a freedom of information request, which will take 45 days to process, and is therefore not a relevant alternative.

There is no genuine window for VHREOC or the Ombudsman to intervene in these cases apart from systemic issues, and own motion investigations.

Traditionally, VCAT will not issue a stay pursuant to section 149 of the VCAT Act unless an originating motion has been filed in the Supreme Court. Again, the only other alternative is file in the Practice Court of the Supreme Court of which most community members are not familiar and attracts financial undertakings for damages.

Therefore, in most cases the requirement to identify the error is only going to become apparent if the private individual is very astute as to the process which should have occurred (i.e. well aware of the policy that should have been applied), and that there has been a gross and irrational departure from this policy. In the alternative, they must file an originating motion and expose themselves to sufficient financial risk blindly.

Recommendation(s):

- (25) Provide VCAT with an investigative power in relation to the administrative pathway that led to the decision**

- (26) Provide VCAT broader stay powers in exchange for a reasonable security, before handing down their decision (in particular, in relation to evictions - a interest which cannot be easily remedied by financial contributions).**

In its current state, VCAT cannot look behind the veil of the decision to see the administrative machinations that lead to decision. It can only look at the grounds alleged, and determine the matter as if the public authority is a private landlord.

In most cases, there are only two ways to compel a decision maker to render the detailed pathway of the decision:

1. Under the Director current policy, it states that the decision to evict, render a notice to vacate, or breaches of the RTA or a tenancy agreement cannot be internally reviewed.² *Burgess* would tend to suggest however, that before reaching such a decision in the first place, the rights contained in the section 24 of the Charter would necessitate the client to be interviewed.
2. In some cases, Housing workers will invite the client in for an interview. During this interview, the client is often without support, and interpreters are not always obtained when they should be. Critically, the main issue is that there is no record of interview made, or provided to the attending tenant (or resident as the case may be, when the landlord is seeking to obtain evidence).

In almost all cases, clients are vulnerable to making disclosures that may prejudice them in the Tribunal or at Court. If a comparison is made to criminal proceedings, there are three key actions by administrative bodies missing in relation to housing:

1. Section 464A (2) – being told the basis of which the interview has been occasioned
2. Section 464A (3)- let the person know that anything that is said or done can be used in evidence by the Director
3. Section 464G & H – the interview must be recorded and copy of the recording should be given to the interviewee for their own record.

While these pertain to indictable offences and in the circumstances of an arrest, the reality for many tenants is that becoming homeless is a great threat than the sentencing options available for many offences which are indictable but can be heard summarily.

This record is critical to ensuring that a person home is not arbitrarily interfered with without a record being readily available to the tenants.

² Business Practice Manual, Housing Appeals

Recommendation(s):

- (27) If a public authority is to seek a formal statement or response from an individual upon which is intended to be used in a manner that would have a “significant effect” on a human right, the individual must:**
- a. Be told the purpose and context of the interview**
 - b. Be cautioned about how the information gained from the interview may be used**
 - c. Have or be permitted to have the interview be recorded and provided to them**

Costs - Access to Protective Costs Orders

The costs of a judicial review are beyond the scope and affordability of most tenants, lest they risk bankruptcy or rely upon being judgement proof. Even in the event of being judgement proof, it is unclear whether most public authorities will require a person to enter into an affordable repayment plan to discharge the legal costs in relation to an appeal.

TUV contend that it is egregious that a tenant must risk their financial livelihood to ensure for ensuring that public authority policy (and or quasi administrative authority) is accountability.

For many, such a risk may either entrap them into reliance on benefits by way of being judgement proof, which is contrary to the objective of encouraging people into meaningful work or contributions to the community and be self-sufficient where possible, or to file for bankruptcy.

Protective costs orders are not always accessible, or becomes a satellite litigation unto itself as demonstrated in [Bare v Small \[2013\] VSCA 204 \(9 August 2013\)](#).

Most judicial review applications are going to cost at least \$50,000, assuming leave is granted or the matter is expedited and then contested. Costs can be significantly higher if litigation seeks to rely on complex Charter arguments and AG and VHREOC join.

This is not simply not accessible for private citizens against administrative resources (despite model litigant guidelines). Such costs represent a very real economic threat for the individual, and are of little economic consequence for the public authority (save for smaller community organizations).

This economic risk is also a severe risk for community housing agencies seeking to obtain clarity at law, but not able to access the forum because of costs risks.

The economic costs of running complex litigation work against the expectation that human rights should be common place and a known consideration for all. The most complex human rights become the less accessible they are to be examined.

Further, by way of general observation of TUV, it more often than not, that it is the private individual who is making the application to preserve their human rights as the appellant in relation to their appeals or judicial intervention.

It should be noted, both tenant agencies and community housing agencies concur that the Supreme Court is not an accessible forum with respect to the costs involved in obtaining a decision.

Recommendation(s):

- (28) Allow the VCAT to determine error of law in relation to Charter grounds. Specifically by way of remedy, the Supreme Court usually will only direct the matter to be remitted, and the same outcome may well be possible.**
- (29) Alternatively, allow parties to mutually cap costs to the proceeding by consent prior to the application for leave to hear the appeal is granted in the Supreme Court**
- (30) Further to 2 above, make the application for protective costs orders more accessible to the public; create a standardize form and have this heard concurrently at the leave to appeal.**
- (31) Allow the Supreme Court of its own volition to given a preliminary indication if a matter falls into a public policy consideration for the purpose of a protective costs order**

The recent decision of *Burgess* asserts that the decision to serve a notice to vacate is an administrative decision upon which judicial intervention may be sought. However, the reality is that is such procedural fairness was observed in relation to this decision, the record or reasoning is seldom communicated to the effected individual, the notice is simply sent.

In most cases, public authorities are utilizing VCAT to fulfil administrative process of inquiry and yield a conclusion for them in the limited circumstances of the *Residential Tenancies Act 1997*. Therefore, VCAT does not consider factors of the household constituents, or an individual's personal characteristics because there are no provisions under empowering enactment for the Tribunal to undertake such an exercise.

In essence, public authorities are utilising VCAT functions to discharge their own Charter obligations where it is simply not possible, Burgess again is a case in point on this issue. While this relationship is likely to have evolved because of limited resources and the likelihood that most parties will contest a decision to evict, the use of VCAT to ensure Charter rights have been observed is not sufficient.

In summary the Charter rights in relation to housing are not accessible unless the reasons for the notice are forth coming. In relation to decisions to service a notice to vacate specifically, by the time a possession order has been made the "proper consider" reasoning has become irrelevant, as the entitlement to a possession order crystalizes.

Recommendation(s):

(32) Require public authorities to render their proper consideration reasons at the time of the giving of a notice to vacate (that is to say in general terms, that no reason can be made without the actual "proper consideration" reasons being attached to the decision. In this respect, question such as judicial review can become self-contained, rather than scattered amongst protracted and obfuscating correspondence).

(33) Provide VCAT the ability to adjourn the matter until proper reasons have been provided to all parties affected by the decision

Under section 35 of the Charter, notice must be given to the Attorney General (AG) and Victorian Human Rights and Equal Opportunity Commission (VHREOC). Currently, only those matters which the AG or VHREOC have joined are listed and disclosed to the public if they have joined as *amicus curiae* or in an adversarial capacity.

In many respects, the assumed alignment between the public authority and the AG and the private individual being supported by VHREOC, is an ideological dilemma about how the state may or may not be supporting the realization of the United Nations Declaration of Human Rights.

Recommendation(s)

- (34) Increase accountability for AG and VHREOC but not only publishing those decision which they chose to intervening, but making available all filed Notices under section 35 of the Charter**

The Victorian Ombudsman has powers under section 16A to perform own motion investigations in relation to administrative decisions. In this particular, case there is a tension between a demonstrable history of tenant non-participation, and the prejudice to the individuals who attend in good faith, and are required to return at another time.

Tenants are vulnerable as a cohort, and time off work because of a predetermine assessment that a tenant is unlikely to attend is unlawful.

Section 24 of the charter states that parties have a right to a fair hearing. This means the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing. Currently, tenant's participation in VCAT is extremely low. However, the desire for efficiency has led to an administrative bias in listings. For example, on 1 June 2015, between 9:30am and 10:30am there are 8 matters listed to be heard by a single member. This provides for approximately 7.4 minutes per hearing. It is TUV's opinion that this is not an isolated occurrence and is relevant to the Charter obligations for VCAT itself. If a tenant does make an appearance, the matter will likely be adjourned to be listed when there is sufficient time.

Recommendation(s):

- (35) Either the Ombudsman or an independent inspectorate should be charged and commissioned with monitoring and reporting in relation to quasi-administrative bodies such as VCAT. They should ensure the equitable access to hearings in fair and timely manner.**
- (36) Ensure that there is an independent annual review of VCAT by VHREOC and AG, and that this is benchmarked against current EDR benchmarks.**

The role of the Scrutiny of Acts and Regulations Committee (SARC) of the Victorian parliament should also be subject to review.

Case Example:

The *Victorian Civil and Administrative Tribunal Amendment Bill 2014* proposed to make a change to how fees would be recovered by parties to a dispute at VCAT. The previous presumption had been that the parties would bear their own costs including the cost of any application.

In SARC report No 2. Of 2014 (18 February 2014), the committee assessed an amendment that would:

“...create a rebuttable presumption that either the whole or a portion of the VCAT fees incurred in bringing a dispute before VCAT will be met by the unsuccessful party in certain types of dispute [14]”

The conclusion of the SARC was:

The Victorian Civil and Administrative Tribunal Amendment Bill 2014 is compatible with the rights set out in the Charter of Human Rights and Responsibilities.

There was no consultation with our service in relation to this amendment until several days prior the amendment being passed through parliament. However, it is of greater concern, that there was no contemplation by the SARC of how this amendment would prejudice parties from challenging notices to vacate to protect their home without suffering an arbitrary economic loss for doing so. That is to say, because there is no pre-litigation process, the information pertaining to the grounds of the notice to vacate are not readily apparent and not apparent until the proceeding is already underway before the Tribunal.

We view this to be a significant failure by the SARC committee both from a perspective of consultation, as well as their own compliance with section 38 of the Charter to give proper consideration of the rights in issue.

Recommendation(s):

(37) The role of SARC in reviewing compliance with the Charter should be better defined to ensure that proper consideration is given to any proposed regulatory reforms.

Appendix 1: Janusauskas Case Study

Recently, the Tenant Union Victoria assist in relation to an appeal, in the matter of [Janusauskas v Director of Housing \[2014\] VSC 650 \(17 December 2014\)](#).

The case presented a good example of administrative decision making that appears to arbitrarily interfere with a right to housing because of a breach, and that Director saw fit to utilize his rights to “punish” the tenant.

TUV sought the to resolve the undertaking to recurrence of what the tenant believed was a reasonable course of action to have someone looking after his dog while he was absent overseas. The issue of any profit or exploitation of the “rental rebate scheme” had been remedied by entering into an affordable payment plan. Meaning for the period of the occupations of his subletting guests, he was paying full market rent and legal entitled to have licensees but not to sublet without consent. Thus, there had been no economic loss to the Director, and Mr. Janusauskas had clearly not abandoned the property.

However, despite any such offer, the Director was insistent seeking a possession order, and was relentless in doing so. Notably, and in contract to *Burgess*, their appeared no regulatory policy about when subletting is discovered what factors and actions should be considered in relation to restitution to the Director and the decision to evict.

Both the Tribunal and Supreme Court acknowledge the subjective innocence of Mr. Janusauskas, but as it was appeal on substantive grounds rather than a judicial review including Charter grounds, the case failed. The court concluded that Mr. Janusauskas had sublet, and the Tribunal had no choice other than to reach the conclusion the Tribunal “must” (according to section 322 of the RTA) grant a possession order to Tribunal.

Notably, during trial the Supreme Court made comment that they did not see any public policy considerations that would give rise to protective costs orders (per [Bare v Small \[2013\] VSCA 204 \(9 August 2013\)](#)).

About the same time, the decision of *Burgess & Anor v Director of Housing & Anor [2014] VSC 648 (17 December 2014)* was handed down.

This provided a secondary ground to approach the Director in relation to the decision to exercise the warrant against Mr. Janusauskas, extensive submission were made to try and compel the Director to identify why less restriction remedies (not evicting the tenant), were not viable alternatives.

While the Director denied the application of Burgess, Mr. Janusauskas was immediately invited in for an interview, to afford him procedural fairness, and presumably to dispense with any grounds that render the decision subject to review on the basis of a failure to make proper consideration.

During the interview, a solicitor of TUV was present. Despite verbal undertakings that a written, *and reasoned* decision would be given, a written letter was served less than 24 hours prior to a warrant allegedly being exercised. Upon enquiry, no one could explain how the letter was drafted and sent.

Subsequently, another letter was sent 2 weeks later, amongst other things simply stating that the “hardship to the Director in relation to the waiting list” was the primary basis of the decision.

In the interim, the tenant had obtained private rental (unaffordable) because of the unlikely relief to be provided for by the Director. He relocated in unaffordable housing.

Rather, than accept an undertaking and economic restoration, the Director insisted on applying for the warrant and was never willing to engage in negotiation with a view to preserving the tenancy. The client obviously being judgment proof, meant that any costs spent by the Director were unlikely to be recoverable. Costs estimated at \$40,000 (after indicating costs would be contested and put to taxation).

The question was put to the Director on the issue of the economics of the decision, about what the practical benefit of the appeal was for the Director given the client was still eligible and likely to be a segment one (high priority allocation) due to Mr. Janusauskas suffering from a degenerative disease. The only viable conclusion was that it was intended as a punishment and deterrence, a purpose not covered by the Housing Act, rather one that is in line with criminal law policy.