

# Rights and Responsibilities of Landlords and Tenants

## Submission to the Residential Tenancies Act Review

27 May 2016

### Civil Justice Program – Victoria Legal Aid

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**Disclaimer.** This submission includes case examples based on the stories of our clients. For some case examples VLA obtained the consent of the client and de-identified the content to protect their identity and the identity of others involved in the matter. Other case examples are composite examples, which illustrate the story of many VLA clients but do not refer to a particular individual.



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## About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA lawyers provide phone advice, in person advice and duty lawyer representation to tenants. We prioritise tenants who are homeless or at risk of eviction, living with disability (including mental illness), or who are otherwise socially and economically disadvantaged. We provide duty lawyer services daily in the residential tenancies list at the Victorian Civil and Administrative Tribunal (VCAT) in Melbourne and if able to do so on an as needs basis around the state. We also provide limited casework services for eligible tenants with ongoing hearings at VCAT and occasionally assist people seeking judicial review in the Supreme Court. VLA is represented on the VCAT Residential Tenancies User Group and the Federation of Community Legal Centre's Tenancy Working Group.

In the 2014/15 financial year we received approximately 3,184 enquiries through our Legal Help telephone line in relation to landlord/tenant disputes and other real estate matters. We provided advice in relation to landlord/tenant disputes and other real estate matters on 2,230 occasions. On 827 occasions the person we provided advice to was born outside of Australia and in just under 28% of these occasions, the person we assisted had arrived in Australia within the last 5 years. On 390 occasions we provided representation to tenants, and in just over 33% of these occasions the person we represented disclosed having a disability.

## Key contacts

Dan Nicholson

Executive Director

Civil Justice, Access and Equity

(03) 9269 0691

Dan.Nicholson@vla.vic.gov.au

Damian Stock

Acting Program Manager, Social Inclusion

Civil Justice Program

(03) 9269 0698

Damian.Stock@vla.vic.gov.au

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## 1. Executive summary

VLA supports reforms to the *Residential Tenancies Act 1997* (RT Act) to ensure more sustainable, secure and safer housing for Victorians. In addition to this submission, VLA has also provided three previous submissions supporting amendments to the RT Act to ensure that tenancies are managed sustainably and evictions occur only as a last resort. VLA has also advocated for reforms that enable people to exercise their legal rights and that remove barriers that prevent people from obtaining housing. These reforms are central to achieving safe and secure housing, particularly for people facing social and economic disadvantage and marginalisation.

Many of our previous recommendations are also relevant to the important questions raised in this issues paper. We have not restated these, but instead summarised them in the attached appendix so that they can be considered where relevant as part of this submission.

## 2. Summary of recommendations

### Before a tenancy

#### **Recommendation 1: Address the prevalence of discriminatory practices against prospective tenants**

VLA supports amendments to the RT Act to eliminate the prevalence of discriminatory practices against prospective tenants. This could be through standardisation of the application process and / or referencing EO Act considerations in the RT Act.

#### **Recommendation 2: Prohibit the use of particular terms in residential tenancy agreements**

Amend s 27 of the RT Act to specifically prohibit particular terms in tenancy agreements.

#### **Recommendation 3: Amend the Standard Form Residential Tenancy Agreement to include a mandatory Schedule informing tenants of prescribed information prior to signing the agreement.**

Amend s 26 of the RT Act and Schedule 1 of the RT Regs to introduce a mandatory schedule in the standard form residential tenancies agreement that advises tenants of prescribed information.

Explicitly legislate a right for tenants to apply to VCAT within the first 28 days of the agreement to rescind the contact if a misrepresentation has been made by the landlord in the Schedule.

### During a tenancy

#### **Recommendation 4: Amend s 68 of the RT Act to explicitly require the premises to be in good repair at the beginning of the tenancy**

Amend s 68 (1) of the RT Act to include the words “provided and” before the word “maintained”.

#### **Recommendation 5: Amend the standard of care for tenants avoiding damage so that it is consistent with the majority of other jurisdictions in Australia**

Amend ss 61 and 68(2)(a) of the RT Act to provide that the standard of care for tenants to avoid damage to the rental premises is “intentionally or negligently”.

#### **Recommendation 6: Introduce a duty to require landlords to take action as a member of the owners corporation**

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Amend the duty provisions of the RT Act to introduce a duty that requires a landlord to take all reasonable steps to enforce rights and obligations they have under the *Owners Corporation Act 2006* to ensure that they comply with their duties to tenants and residents under the RT Act.

**Recommendation 7: Introduce a new duty requiring landlords to comply with local government laws, regulations and rulings.**

Amend the duty provisions to introduce a new duty requiring a landlord or rooming house operator to ensure the use of the premises complies with local government laws, orders or rulings.

**Recommendation 8: Amend the RT Act to allow applications to VCAT where the landlord or rooming house operator unreasonably withholds consent to the installation of fixtures**

Amend ss 64 and 115 of the RT Act to incorporate obligations under the EO Act and to allow applications to VCAT where the landlord unreasonably withholds consent.

**Recommendation 9: Create a single notice for notifying a landlord or tenant of a failure to comply with the RT Act**

Merge and simplify the Notice to Landlord and Breach of Duty Notice forms.

**Recommendation 10: Maintain the distinction between duty provisions and other terms of the agreement for certain remedies under the RT Act**

Continue to limit the availability of eviction and termination as a remedy to circumstances where a person has failed to comply with one of the duty provisions in the RT Act.

**Recommendation 11: Prohibit refusal to provide accommodation to a person with a disability because of an assistance animal**

**Recommendation 12: Prohibit landlords from unreasonably withholding consent to a pet**

## **At the end of a tenancy**

**Recommendation 13: Amend s 250 of the RT Act to provide that the Tribunal may only find that a tenant has used the rented premises, or permitted their use, for an 'illegal purpose' if charges have been found proven in a criminal court.**

**Recommendation 14: Amend s 322 of the RT Act to provide that the Tribunal must not make a possession order following service of a s 250 Notice to Vacate if satisfied that the illegal use has ceased and will not be repeated.**

**Recommendation 15: Require mortgagees to comply with the RT Act processes, and extend the timelines for Notices to Vacate**

Amend section 229 of the RT Act to include mortgagees as a class of persons for whom it would be an offence for them or someone acting on their behalf to require a tenant under a tenancy agreement to vacate the premises.

Amend section 268 of the RTA Act to require that a 60 day notice period is required to be given to tenants.

**Recommendation 16: Amend s 319 of the RT Act to require landlords to provide supporting information when issuing notices to vacate.**

**Recommendation 17 – Enable challenges to all retaliatory notices to vacate**

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Amend ss 266, 289, 315 and 317ZH of the RT Act to enable a challenge to all types of notices to vacate which are given in retaliation to an exercise or proposed exercise of rights, application or proposed application to VCAT or any current VCAT orders.

**Recommendation 18: Regulate the circumstances in which Notices to Vacate can be served electronically**

Regulate the circumstances in which Notices to Vacate can be served electronically under s 506(3) of the RT Act by creating a requirement that the recipient has provided email consent to the form of service, and that the consent has not been revoked.

**Recommendation 19: Introduce a right for tenants to obtain access to their goods and personal documents in the 7 days following termination of the agreement**

Amend ss 382 and 389 of the RT Act to introduce a requirement that landlords provide reasonable access to tenants to remove any goods or personal documents after termination of the tenancy. Any access should be sought within 7 days of the tenancy terminating.

**Recommendation 20: strengthen protections for rooming house residents**

20.1 Amend section 289A of the RT Act to ensure it applies regardless of whether the building owner has consented to the use of the property as a rooming house.

20.2 Amend section 344 of the RT to explicitly state that a possession order cannot be made unless the Tribunal is satisfied that a person entitled to a notice to vacate under section 289A has been given that notice.

20.3 Amend section 355(2)(b) of the RT Act to enable the selective execution of a warrant against a head tenant and prohibit the execution of the same warrant against the head tenant's rooming house residents. Require Tribunal Members to include a statement in the warrant and possession orders addressed to police that the warrant can only be executed against the named tenant and not other occupants.

20.4 Amend section 289A of the RT Act to state that this section still applies when only part of the premises are being used as a rooming house. This could be done by including a definition in section 289A of the RT Act for 'building' as "a building including part of a building".

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## 3. Before a tenancy

### Discrimination against prospective tenants

Barriers to the private rental market, including unlawful discrimination, are a significant cause of disadvantage for many Victorians. The Victorian Equal Opportunity and Human Rights Commission's report *Locked out: Discrimination in Victoria's Private Rental Market* analysed the findings of survey results of 165 people who sought accommodation.<sup>1</sup> The report found that:

- Survey participants had experienced discrimination in the private rental market based on characteristics which are protected under the *Equal Opportunity Act 2010* (Vic) (EO Act), including race and disability;
- Participants reported that rental agents and landlords made decisions about their suitability as tenants based on myths and stereotypes;
- It is difficult to prove discrimination as rental agents give other reasons for the refusal;
- There appears to be a general lack of awareness among consumers about their rights; and
- Discrimination has wide ranging consequences for individual health and wellbeing.

In VLA's practice experience, tenants report facing discrimination based on their age, race, gender, family responsibilities and disability. In practice however, it can be very difficult to prove that this has occurred to a standard sufficient to bring a claim under the EO Act.

VLA supports standardising the application process to prevent the request on an application form for information that falls within the definition of a protected attribute under s 6 of the EO Act and to minimise the collection of irrelevant personal information which may be used to discriminate against prospective tenants. The introduction of a standardised rental application form which only contains relevant considerations could be one option to reduce the prevalence of discriminatory practices in this area. It could also provide an evidential basis for aggrieved tenants to bring a claim under the EO Act. The standardised application form could also contain an explicit reference to the right not to be discriminated against in relation to the protected attributes in the EO Act, to better ensure landlords, real estate agents and tenants are aware of these protections.

#### **Recommendation 1: Address the prevalence of discriminatory practices against prospective tenants**

VLA supports amendments to the RT Act to eliminate the prevalence of discriminatory practices against prospective tenants. This could be through standardisation of the application process and / or referencing EO Act considerations in the RT Act.

## Beginning a tenancy

### Form of agreement - prohibit particular terms in tenancy agreements

The standard form tenancy agreement prescribed by s 27 of the RT Act includes provision for parties to agree to additional terms and conditions. The effect of s 27 is that additional terms and conditions will be invalid if they exclude, restrict or modify (or attempt to exclude, restrict or modify) the operation of the RT Act, that is, the protections it provides and the obligations it imposes. Section 505 also prohibits demanding or receiving a charge from a tenant who has failed to comply with a duty under the agreement or the RT Act.

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<sup>1</sup> Victorian Equal Opportunity & Human Rights Commission, *Discrimination in Victoria's Private Rental Market* (2012).

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In practice tenants may be presented with a list of additional terms and conditions imposing significant additional burdens, or protecting the landlord from certain liabilities, which may or may not conflict with the RT Act. It is standard for agreements to include set penalties for breaking the lease, a set cost for assignment of the tenancy and a requirement that the tenant steam clean the property at the end of the tenancy. The first two requirements engage s 505 of the RT Act. The second modifies the tenant's obligation to keep the premises reasonably clean by introducing an additional requirement to steam clean. Most tenants will not be familiar with the RT Act or consumer protection laws, and will not be in a position to judge the legitimacy of these terms.

In the event of a dispute, landlords will usually assert an entitlement to rely on the terms of the signed agreement and many tenants comply with them in the mistaken belief they are valid. This distorts the legal rights and responsibilities of landlords and tenants under the RT Act.

VLA considers it would benefit both tenants and landlords to make it clearer within the RT Act common additional terms that are likely to be unenforceable and invalid. This is the approach taken in New South Wales by s 19 of their *Residential Tenancies Act 2010*.

The terms which are currently prohibited in NSW, and which would be of equal benefit to expressly prohibit in Victoria include:

- that the tenant must have the carpet professionally cleaned, or pay the cost of such cleaning, at the end of the tenancy;
- that the tenant must take out a specified, or any, form of insurance;
- those exempting the landlord from liability for any act or omission by the landlord, the landlord's agent or any person acting on behalf of the landlord or landlord's agent; and
- that, if the tenant breaches the agreement, the tenant is liable to pay all or any part of the remaining rent under the agreement, increased rent, a penalty or liquidated damages.

We recommend s 27 of the RT Act be amended to include both invalid and prohibited terms, with an addition provision within that section detailing the prohibited terms.

#### ***Mercuri v Jefferis (Residential Tenancies) [2013] VCAT 2141***

Ms Jefferis advised the real estate agent who managed the property she was renting that she was no longer able afford the rental amount after a deterioration in her income related to her disabled son's care needs. This meant that she would be breaking her lease. The real estate agent required payment of the "lease break costs" set out in the tenancy agreement before any action would be taken to relet the premises. The landlord refused to re-advertise the property until Ms Jefferis had paid the lease break costs. This caused a significant delay in reletting the property.

The agent's correspondence to Ms Jefferis stated:

*"Our office will not enter into any negotiations until the Lease Break Agreement is signed; and all moneys paid in advance. We calculate your pro rata letting fee cost is \$761.40 inclusive of GST; and up front advertising costs are \$198 inclusive of GST. Therefore we require the above amounts to be paid, with the return of the signed Lease Break Agreement. Please note that no action will occur until the above conditions are agreed to."*

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VCAT in this instance considered that this and other correspondence in relation to this issue was “at least in part incorrect and misleading. It is clearly intended to intimidate tenants into agreeing to conditions and costs that they may not be liable to pay.”<sup>2</sup>

In VLA’s experience this practice is widespread and in many cases tenants are pressured into agreeing to costs they may not be liable to pay, without oversight from VCAT.

## **Recommendation 2: Prohibit the use of particular terms in residential tenancy agreements**

Amend s 27 of the RT Act to specifically prohibit particular terms in tenancy agreements.

### **Introduce a landlord’s statement at the beginning of the tenancy**

There are features of a rental premises that can be difficult to identify at an initial inspection and which may cause ongoing detriment to tenant’s amenity. Landlords are not required to provide tenants detailed information about the property prior to entering into an agreement. Agreements under the Act are unique in this regard. Under the *Retail Leases Act 2003* (Vic) landlords are required to provide commercial tenants a detailed disclosure statement 7 days prior to signing the lease.<sup>3</sup> Similarly under s 32 of the *Sale of Land Act 1962* vendors are required to provide prospective purchasers a s 32 statement which sets out detailed information about the land and property that would otherwise be difficult to ascertain.<sup>4</sup> Both Acts also afford commercial tenants and prospective purchasers the ability to terminate the agreement where this information has not been provided.<sup>5</sup>

As a consequence tenants sometimes sign fixed term tenancy agreements for properties with structural repair issues, mould and ventilation problems and malfunctioning appliances such as heaters, air conditioners or hot water systems. There may also be a lack of certain services such as telephone lines and internet, or an inability to obtain parking permits. It is common for tenants to be evicted during the fixed term agreement where the landlord defaults on their mortgage, and VLA also assists tenants facing eviction because landlords have rented premises in breach of the municipal planning laws. Much of this information will not be accessible to tenants prior to signing the tenancy agreement but often it would have significantly influenced their decision to enter into the tenancy agreement or the price they were prepared to pay. Once the tenancy begins they are bound to the agreement for the duration of the fixed term.

A mandatory schedule advising tenants of prescribed information would reduce the likelihood of tenants finding themselves in properties that did not meet their expectations, and increase their legal options in the instance that there has been a misrepresentation. The schedule could form part of the standard form residential tenancy agreement contained in Schedule 1 of the *Residential Tenancies Regulations 2008* (Vic) (RT Regs).

Some key issues that a schedule could address include:

- The existence and connection status of certain utilities;
- Whether utilities are in good order and have been recently serviced;
- Confirmation that the property is legally able to be occupied according to local planning laws;
- The existence of parking or the ability to apply for Council parking permits,

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<sup>2</sup> See also *Chee v Hunter & Anor* [2011] VCAT 327 for an example of liquidated penalties in the tenancy agreement in breach of the Act.

<sup>3</sup> *Retail Leases Act 2003* (Vic), s. 17 and *Retail Leases Regulations 2013*, R 8, Schedule 1 and Schedule 2

<sup>4</sup> *Sale of Land Act 1962* (Vic), Part II, Division 2.

<sup>5</sup> *Retail Leases Act 2003* (Vic), s17(6) and *Sale of Land Act 1962* (Vic), s. 32K

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- Whether the landlord has obtained consent from a mortgagee bank to let the property;
  - Whether a mortgagee bank has initiated enforcement proceedings to enforce a mortgage;
  - A statement about whether the premises are subject to an owner's corporation;
  - A statement clarifying the landlord's interest, ie are they the registered proprietor or are they themselves a tenant.

Should the Schedule misrepresent the property, the Act should enable tenants to apply to VCAT for a rescission order within 28 days of the tenancy beginning.

**Recommendation 3: Amend the Standard Form Residential Tenancy Agreement to include a mandatory Schedule informing tenants of prescribed information prior to signing the agreement.**

Amend s 26 of the RT Act and Schedule 1 of the RT Regs to introduce a mandatory schedule in the standard form residential tenancies agreement that advises tenants of prescribed information.

Explicitly legislate a right for tenants to apply to VCAT within the first 28 days of the agreement to rescind the contract if a misrepresentation has been made by the landlord in the Schedule.

## 4. During a tenancy

### Duties and breaches of duty

#### Landlord's duty to maintain premises – premises to be in good repair

In the absence of minimum standards for rental properties, the duty on a landlord to maintain the premises in good repair (s 68 of the RT Act), is fundamental. VCAT has at times interpreted the duty as imposing a requirement on a landlord to merely maintain the premises in the condition it was at the commencement of a tenancy, irrespective of whether that condition was 'good repair'.<sup>6</sup>

#### Heather's story

In 2008 Heather, who suffers from a mental health condition, found herself in a desperate housing situation and was living in her car. She applied for a property in regional Victoria that was in very poor condition, with holes in the walls, mould, water damage, a hole in the bathroom floor, water leaks and faulty doors. Assisted by her mental health support worker, Heather made a number of requests for repairs during her five-year tenancy. Some repairs were attended to, and others were not. Heather was unable to secure a more suitable property. In 2013 Heather requested further repairs and was issued a notice to vacate in response. After vacating Heather claimed compensation for the landlord's failure to maintain the premises in good repair.

The Tribunal dismissed the compensation application in its entirety, in part as the Member found that the landlord had attended to repairs that arose during the course of the tenancy, and was under no obligation to 'upgrade' the property where repairs were required at the commencement of the lease.

Other jurisdictions expressly provide that a party to a tenancy agreement must put the premises into good repair and thereafter maintain it in good repair.<sup>7</sup> Such an amendment would clarify the important purpose of s 68 of the RT Act to ensure that premises are maintained in good repair.

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<sup>6</sup> Kerr-Lubelski v The Landlord (Residential Tenancies) [2015] VCAT 326.

<sup>7</sup> Residential Tenancies Act 1987 (WA) s 42; Residential Tenancies Act 1995 (SA) s 68; Residential Tenancies Act 2010 (NSW) s 63; Residential Tenancy Act 2015 (NT) s 57.

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A further ambiguity in s 68 of the RT Act is the exception to a landlord's obligation when damage is caused to the property by the tenant's 'failure to ensure that care was taken to avoid damaging the premises'. This interacts with a tenant's obligation under s 61 of the RT Act. Too often landlords assert damage was caused by a tenant's lack of 'care' despite the damage being remote or unforeseeable. Tenants should only be liable for damage that is foreseeable and not remote. In VLA's experience, the application of s 68(2)(a) of the RT Act in VCAT decisions is inconsistent, with some Members imputing the preferred higher standard of the common law of negligence, making it difficult for accurate advice to be given to tenants.

In NSW, WA, QLD, SA, ACT and NT the equivalent provision in the legislation includes the higher thresholds of "intentionally or negligently".<sup>8</sup> The use of the word "care" in s 61 and s 68 of the RT Act suggests that a similar threshold was intended, however there would be significant benefit in clarifying this to provide increased certainty about tenants' responsibilities.

#### **Peter's story**

Peter contacted his landlord's agent to explain that a pane of glass had broken in an internal door. The damage was caused by a gust of wind blowing through the apartment. The agent responded that it was their view that the damage had been caused by the tenant failing to take reasonable care in ensuring either external windows were closed or the door properly tethered on a windy day. Peter contacted a tenant advocate who advised that VCAT had taken inconsistent approaches in similar circumstances.

VLA recommends amending s 61 and s 68(2)(a) of the RT Act to provide that the standard of care for tenants to avoid damage to the rental premises is "intentionally or negligently".

#### **Recommendation 4: Amend s 68 of the RT Act to explicitly require the premises to be in good repair at the beginning of the tenancy**

Amend s 68 (1) of the RT Act to include the words "provided and" before the word "maintained".

#### **Recommendation 5: Amend the standard of care for tenants avoiding damage so that it is consistent with the majority of other jurisdictions in Australia**

Amend ss 61 and 68(2)(a) of the RT Act to provide that the standard of care for tenants to avoid damage to the rental premises is "intentionally or negligently".

#### **Introduce a new duty in relation to owners corporations**

VLA has assisted clients in a number of cases in which landlords have refused to comply with their duties under the Act due to issues arising from the fact that the property is part of an owners corporation. In particular, some landlords refuse to carry out repairs or take steps to ensure that a tenant has quiet enjoyment of the property because they say that the issue is one that is the responsibility of the owners corporation. Some landlords also refuse to take action to comply with their duties because the owners corporation refuses to consent to works.

Tenants may apply to have a dispute in relation to an owners corporation resolved at VCAT under the *Owners Corporation Act 2006* (Vic) (OC Act).<sup>9</sup> However, such proceedings can be complex,

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<sup>8</sup> Residential Tenancies Act 1987 (WA) s 38(1)(c); Residential Tenancies Act 1995 (SA) s 69(1)(c); Residential Tenancies Act 2010 (NSW) s 51(1)(d); Residential Tenancy Act 2015 (NT) s 5(1)(c); Residential Tenancies and Rooming Accommodation Act 2008 (QLD) s 188(3); Residential Tenancies Act 1997 (ACT), Schedule 1, clause 63 and s 57.

<sup>9</sup> *Owners Corporation Act 2006* (Vic) ss 162(b), 163 (1)(d).

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costly and slow. The provisions in the RT Act that allow for swift resolution where landlords and tenants are in breach of their obligations do not apply to matters under the OC Act. Requiring tenants to enforce the landlords' rights under the OC Act creates a significant impediment to the ability of tenants to enforce their rights under the RT Act. VLA's view is that it is more appropriate for the RT Act to be amended to place a duty on landlords to take all reasonable steps in relation to their dealings with owners corporations to ensure that they fulfil their duties under the RT Act in relation to repairs and quiet enjoyment.

### **Aliya's experience**

Aliya lived in an apartment in Melbourne's West with her three year old daughter. In the three years that Aliya lived in the apartment, it was badly affected by mould. Aliyah had the mould treated by professionals every winter, but it kept coming back. Aliya was particularly worried about the impact that the mould might have on her daughter's health. Aliya made repeated requests for the landlord to address the cause of the mould. After a number of requests, Aliya's landlord sent a building inspector to investigate the cause of the mould.

The building inspector wrote a report saying that the issue would be fixed by either installing a dehumidifier or installing ventilation to ensure that condensation did not build up in the apartment. Aliya's landlord, however, said that they could not take either of these steps because the owners corporation had deemed both of them to be 'structural changes' to the building and had denied the landlord permission to carry out the works. Aliya's landlord said that there was nothing further that they could do.

### **Recommendation 6: Introduce a duty to require landlords to take action as a member of the owners corporation**

Amend the duty provisions of the RT Act to introduce a duty that requires a landlord to take all reasonable steps to enforce rights and obligations they have under the *Owners Corporation Act 2006* to ensure that they comply with their duties to tenants and residents under the RT Act.

### **Introduce a new duty in relation to local laws**

At present, the RT Act does not require landlords to ensure that rental properties comply with local government laws. While landlords and rooming house operators have duties in relation to the condition of the property, there is nothing that specifically requires landlords to comply with local laws.<sup>10</sup> For example, a landlord may fail to obtain the proper permits for a property, the property may be zoned in a commercial zone, or it may fail to satisfy the minimum standards set out for rooming houses in the *Public Health and Wellbeing Act 2008* (Vic) (PHW Act).

VLA has seen a number of cases in which landlords and rooming house operators use non-compliance with local laws to evict tenants. For instance, where a property is in need of repairs, a landlord may be ordered by the local council to carry out building works. Rather than addressing the issue in the council order, however, some landlords then issue a notice to vacate to the tenant under s 245 of the RT Act or equivalent provisions because they claim that the premises are unfit for human habitation. The landlord therefore uses their own non-compliance with local laws as a defence to failing to comply with their other duties under the RT Act.

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<sup>10</sup> *Residential Tenancies Act 1997* (Vic) ss 65, 68, 120, 120A.

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The issue also frequently arises where a local council has ordered a rooming house operator to obtain registration as a rooming house or carry out repairs and improvements to satisfy minimum standards and compliance with the PHW Act.

The absence of a duty on landlords to take the steps necessary to comply with local laws creates a risk of eviction for tenants and residents who complain about serious repairs issues and undermines the other duty provisions in the RT Act.

### **Leslie's experience**

Leslie was living in a bungalow behind his landlord's house in Coburg. Leslie had numerous issues with his landlord turning off the power to his bungalow, and had been to VCAT to get a restraining order that ordered the landlord to stop switching off the power. His landlord had repeatedly breached the order, and had been ordered to pay him compensation.

Leslie was then served with a notice to vacate. The reason on the notice to vacate was that the property was unfit for human habitation under s 245 of the RT Act. Leslie's landlord provided an order under the *Building Act 1993* (Vic) issued by the Moreland City Council. The order said that the bungalow must not be used for occupation because the relevant permits had not been obtained. That order referred to an earlier notice that was issued by the council and had not been complied with.

VLA advised Leslie that it was uncertain whether he could challenge the notice to vacate on the basis that the landlord had not taken all reasonable steps to obtain the relevant permits, as there is nothing in the RT Act that specifically requires the landlord to do so. Faced with the stress of immediate eviction, Leslie opted to negotiate a time to leave the property rather than risk being evicted at VCAT.

### **Recommendation 7: Introduce a new duty requiring landlords to comply with local government laws, regulations and rulings.**

Amend the duty provisions to introduce a new duty requiring a landlord or rooming house operator to ensure the use of the premises complies with local government laws, orders or rulings.

### **Enabling fixtures and alterations to the premises where reasonable**

The provisions in relation to fixtures contained in s 64 and s 115 of the RT Act assist landlords and rooming house operators by preventing tenants and rooming house residents permanently modifying the premises by installing fixtures without obtaining consent. They also require tenants to remove any fixtures at the end of the tenancy and rectify any damage. These provisions cover both substantial and trivial modifications to the property, and apply regardless of the general condition of the premises, the amenities that are provided and the length of the tenancy. They also provide no direction to a landlord or rooming house operator to comply with their obligations under the EO Act in relation to accommodation and owners corporations.

#### *Interaction with the Equal Opportunity Act 2010*

Sections 55 and 56 of the EO Act seemingly fetter the discretion of a landlord or rooming house operator to refuse consent to fixtures in that they require them to allow reasonable alterations to meet special needs. There are also existing policies for the Department of Health and Human Services and some community housing tenancies regarding modifications. It is expected that under the *National Disability Insurance Scheme* there will be additional scope for funding for reasonable adjustments for tenants and residents.

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There is nothing in the RT Act which requires a landlord or rooming house operator to take these obligations into account when a request for modifications is made, or to consider circumstances where it might be otherwise unreasonable for consent to be withheld. Section 64 and s 115 of the RT Act simply requires the tenant not to make modifications without the landlord's consent.

### *Unreasonably withholding consent*

If a tenant commits to removing the fixture at the end of the tenancy and compensating for any damage, the landlord can still withhold consent, even in circumstances where this might be considered unreasonable. For example, tenants on long leases, or in properties where the general standard of repair is low may well wish to make improvements to the property that increase their amenity, such as the installation of temporary shelving, painting or picture hooks.

### *Proposed amendments*

Where a tenant or rooming house resident is of the view that a landlord is unreasonably withholding consent to a proposal in relation to the installation of fixtures, either because of the obligations under the EO Act, or for some other reason, then they should have a right to apply to VCAT to consider whether the withholding of consent is reasonable. In NSW, Tasmania, ACT and SA, there are provisions that require that landlords not unreasonably withhold consent.<sup>11</sup>

The specific criteria in ss 55 and 56 of the EO Act should be explicitly set out in the RT Act to assist VCAT and the parties to determine whether the fixture request fits within the EO Act parameters.

### **Recommendation 8: Amend the RT Act to allow applications to VCAT where the landlord or rooming house operator unreasonably withholds consent to the installation of fixtures**

Amend ss 64 and 115 of the RT Act to incorporate obligations under the EO Act and to allow applications to VCAT where the landlord unreasonably withholds consent.

### **Simplify breach of duty notices**

Tenants frequently claim compensation for a landlord failing to maintain the premises in good repair. As an attempt to resolve compensation disputes outside of VCAT, it is our experience that the breach of duty notice process fails. This is because landlords generally do not pay the amount requested without the matter being tested by VCAT. Without a timely application for compensation during the tenancy, the issuing of a breach notice may also be considered an insufficient assertion of rights to found a later claim for compensation.<sup>12</sup>

Issuing a Breach of Duty Notice should not be a condition precedent to claiming compensation during a tenancy. A tenant should be required to demonstrate that the landlord knew, or ought to have known, of the breach. This can arise by the issuing of an email or a Notice to Landlord. Given the perceived duplication of a Notice to Landlord and a Breach of Duty Notice, consideration should be given to merging and simplifying the two forms. One notice should suffice as both the vehicle of escalating steps toward having repairs undertaken, and notice to the landlord that compensation may be claimed at a later date.

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<sup>11</sup> Residential Tenancies Act 1995 (SA) s 70(1); Residential Tenancies Act 2010 (NSW) s 66(1); Residential Tenancy Act 1997 (TAS) s 54(1); Residential Tenancies Act 1997 (ACT), Schedule 1, clause 67 and s 68(1).

<sup>12</sup> Alex Taxis Pty Ltd v Knight (Residential Tenancies) [2016] VCAT 528, at [37]

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**Recommendation 9: Create a single notice for notifying a landlord or tenant of a failure to comply with the RT Act**

Merge and simplify the Notice to Landlord and Breach of Duty Notice forms.

**Breaches of terms of the agreement that are not duty provisions**

We refer to part 4.1.2 of the Issues Paper and in particular, Question 20, which considers the inclusion and enforcement of additional contractual provisions that go beyond the prescribed agreement and statutory duties.

One of the ways the RT Act strikes a balance between the rights and responsibilities of tenants and landlords is to provide enhanced remedies for particular duties of one or the other party. These statutory duties are an overlay to other rights and responsibilities under the RT Act. The duty provisions are defined in s 207 of the RT Act and for each of these a person is not limited to claims for compensation, but also has other options available to them that fall into the category of specific performance like remedies.

Specific performance is traditionally a remedy reserved for situations where damages are not adequate. It could ultimately lead to the eviction of the tenant, and this is one of the outcomes available to landlords where a tenant breaches the duty provisions. For other breaches, tenants and landlords still have rights to obtain orders requiring compliance with the agreement under ss 452 and 472 of the RT Act, and are able to obtain compensation under the same provision.

We consider that the legislation currently gets this balance right in the distinction it makes for duty provisions. The rights and responsibilities that might ultimately lead to eviction should be universal duties set out in the RT Act so the parties are aware of them, and should not be a matter for negotiation between the parties. This creates certainty and consistency in the management of tenancies, and the circumstances where a breach can escalate to eviction. It ensures eviction is not a constant threat for tenants where there is a dispute about compliance with a term in the agreement.

**Recommendation 10: Maintain the distinction between duty provisions and other terms of the agreement for certain remedies under the RT Act**

Continue to limit the availability of eviction and termination as a remedy to circumstances where a person has failed to comply with one of the duty provisions in the RT Act.

**Animals in rented premises***Assistance animals*

Tenants with disabilities, including people with physical or vision based disabilities, autism, diabetes, post-traumatic stress disorder and dementia may require an assistance animal. Assistance animals provide their owners with independence, a sense of self-confidence, safety, mobility and self-esteem. Studies have shown that the use of assistance animals promotes health, mobility, social interaction and facilitates employment.<sup>13</sup> Tenants with disabilities and assistance animals will frequently face discrimination in the market place when applying for rental properties. Section 54 of the EO Act prohibits people from refusing to provide accommodation to a person with a disability because they

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<sup>13</sup> Susan L. Duncan et al, 'APIC State-of-the-Art Report: The Implications of Service Animals in Health Care Settings' (2000) 28(2) *American Journal of Infection Control* 171 and Victorian Law Reform Commission, 'Community Law Reform: Assistance Animals Consultation Paper 5, (May 2005), 14

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have an assistance dog. Whilst in our experience this discrimination is common, it will often be difficult for tenants to prove, making the remedies under the EO Act inaccessible for many renters.

### **Hannah's experience**

Hannah is a tenant with a disability. As a consequence of her disability she has an assistance dog called Humphry who helps her with daily tasks and mobility. Hannah recently applied for a rental property through a reputable real estate agency franchise. When Hannah inspected the property she immediately identified that it suited her needs and contained a comfortably sized backyard for Humphry. Following her inspection of the property Hannah put in a formal application for the property and several days later she was telephoned by Megan a property manager at the agency and advised that she had been approved. When Hannah went to the agency to sign the agreement she needed to bring Humphry to assist her. When the agent saw that Hannah had an assistance dog she told Hannah that the landlord would need to be consulted and that he would have the final say about whether or not she could keep a pet. Hannah explained that Humphry was an assistance dog and not a pet and that she required him because of her disability. Several days later Hannah received a call from the agent advising her that the landlord had said the property was not suitable for a person with a disability or a pet and he had signed a tenancy agreement with another tenant. The dispute was eventually resolved and the agent apologised but as the landlord had already signed an agreement with another tenant Hannah was inconvenienced and needed to seek alternative housing.

### **Recommendation 11: Prohibit refusal to provide accommodation to a person with a disability because of an assistance animal**

#### *Pets*

Pets can also be fundamental to a person's peaceful enjoyment of their rental home. For some, pet ownership can be transformative in turning a building into a home. Tenants with pets will frequently face considerable difficulty accessing private rental accommodation. Similarly, 'pet clauses' in tenancy agreements will often prevent, or purport to prevent, a tenant's ability to acquire a pet during their tenancy. Most tenancy agreements will prohibit tenants from having pets and similar prohibitions are often included in Owners Corporation Rules which extend to lot occupiers.

Similarly, disadvantaged renters such as rooming house residents will also frequently face challenges in finding accommodation which will allow them to have pets. This is because rooming house residents are currently expressly forbidden from keeping pets without the consent of the rooming house owner.<sup>14</sup> Other than some specialised community run rooming houses, most private rooming houses will not permit residents having pets. Given the short term nature of many residencies and the transient nature of this population, difficulties in finding accommodation that accepts pets is often a significant hurdle for people accessing low cost housing.

#### *Victims of family violence*

Victims of family violence who own pets may also face significant challenges in obtaining private rental accommodation. Tenants with children fleeing family violence will often try and retain pets to ensure their children have a sense normality and continuity during a fractured and displaced period in their lives. Victims of family violence will often need to flee their homes urgently and even those without pets will frequently struggle to establish themselves in private accommodation. Tenants with pets who experience family violence will encounter even more difficulties and will face added prejudice. The

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<sup>14</sup> *Residential Tenancies Act 1997* (Vic), s. 117

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Royal Commission into Family Violence also identified a link between family violence and harm to pets, with some victims reporting reluctance to leave the family home without the pet.<sup>15</sup> Private rentals need to be able to support victims with pets to enable them to leave violent situations.

There are already existing State and local government laws which regulate the possible noise or nuisance caused by a tenant's pet which are considered sufficient to regulate owner occupiers with pets. Concerns about damage and cleanliness issues caused by pets are also already regulated under the RT Act and the ability to request a tenant to pay a bond and claim compensation on top of this bond are sufficient to protect a landlord's interest in the property. In our view the introduction of an additional pet bond is unnecessary, however in our experience, many tenants would be prepared to pay a pet bond in order to be allowed to have a pet.

VLA would support the introduction of similar provisions to Part 2 – Division 7 of the RT Act (assignments and subletting) but for pets. This would prohibit landlords from unreasonably withholding consent to a tenant having a pet and provide a mechanism for the parties to have VCAT determine whether or not consent to the pet is necessary if it is being unreasonably withheld.

**Recommendation 12: Prohibit landlords from unreasonably withholding consent to a pet**

## 5. At the end of a tenancy

### Tenancies and family violence

VLA supports strengthening the RT Act to afford better protection to tenants experiencing family violence. VLA welcomes the Royal Commission into Family Violence's report and recommendations in relation to tenancies and family violence. We particularly endorse recommendations 116 to 120 of the Royal Commission's final report.<sup>16</sup> These recommendations must be implemented as a matter of priority, in accordance with the timelines laid down by the Royal Commission.

VLA has previously made a number of submissions in relation to tenancies and family violence. Specifically, we refer to and reiterate the following recommendations:

- Simplify the reduction of fixed term tenancy applications under s 234 of the RT Act (Recommendation 13, Security of Tenure submission);
- Enforce the provision of information about tenants' rights in relation to tenancies and family violence (Recommendation 14, Security of Tenure submission);
- Amend the provisions relating to tenancy databases (Recommendation 15, Security of Tenure submission);
- Create a fund to assist tenants experiencing disadvantage to fund costs associated with lease breaking (Recommendation 12, Security of Tenure submission) and increased use of the Residential Tenancies Fund (Recommendation 1, Rent, Bond and Other Charges submission);
- Amend s 233A of the RT Act to allow VCAT to make orders for a new tenancy agreement without the need for a final intervention order (Recommendation 10, Rent, Bonds and Other Charges submission); and

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<sup>15</sup> Royal Commission into Family Violence, *Report* (March 2016).

<sup>16</sup> Royal Commission into Family Violence, *Report and Recommendations*, Volume IV.

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- Amend the RT Act so that VCAT has the power to apportion liability for rental arrears where a tenant has left the rented premises due to family violence (Recommendation 10, Rent, Bonds and Other Charges submission).

## **Amend illegal use provisions**

The codification of residential tenancies law in Victoria in 1980 introduced a statutory obligation on a tenant not to use the premises for an illegal purpose. The consequence of eviction in such circumstances reflected the seriousness of the conduct as common law courts had found that certain criminal acts committed by a tenant had the capacity to either taint a building, causing ongoing damage to the owner and landlord, or to potentially lead to liability of the owner for failing to take reasonable steps to prevent the commission of the offence. The purpose of the provision was to protect the landlord's interest,<sup>17</sup> not to punish the tenant,<sup>18</sup> which was and remains entirely the jurisdiction of criminal law.

The consequences of eviction, particularly from public and community housing, is significant. VLA has concerns that s 250 of the RT Act is currently used beyond the scope of its purpose, and can lead to a disproportionate eviction of tenants and their families in circumstances where the landlord's interest is not at risk.

Currently VCAT is empowered to decide whether premises have been used 'illegally' on the civil standard of the balance of probabilities. VCAT is not bound by the normal rules of evidence and may evict a tenant on the basis of evidence from a landlord or police officer that charges have been laid, irrespective of whether these charges have been found proven beyond a reasonable doubt.

To properly balance the rights of tenants and landlords, and to ensure residential tenancies legislation does not stray into attempting to fulfil a purpose of the criminal law, VLA recommends that the following safeguards are introduced:

- That VCAT can only make a finding that the premises has been used for an 'illegal' purpose when a criminal court has found charges proven.
- An amendment similar to s 332(2) (regarding serious disruption) is introduced to provide the Tribunal with discretion not to make a possession order where it finds the illegal use has ceased and will not be repeated. This would enable a Tribunal to avoid evicting innocent family members of a person incarcerated for an illegal act other occupants were unaware of.

**Recommendation 13: Amend s 250 of the RT Act to provide that the Tribunal may only find that a tenant has used the rented premises, or permitted their use, for an 'illegal purpose' if charges have been found proven in a criminal court.**

**Recommendation 14: Amend s 322 of the RT Act to provide that the Tribunal must not make a possession order following service of a s 250 Notice to Vacate if satisfied that the illegal use has ceased and will not be repeated.**

## **Notices to vacate – mortgagees and tenants**

Sections 268 and 325 of the RT Act provide a process for mortgagees to obtain possession of the rental premises regardless of whether the tenant has a fixed term agreement at the property. They also provide that only 28 days notice is required to evict a tenant. These sections outline the process

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<sup>17</sup> *Director of Housing v TP (Residential Tenancies)* [2008] VCAT 1275, at [37].

<sup>18</sup> *Director of Housing v TK (Residential Housing)* [2010] VCAT 1939, at [92].

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for mortgagees to assert their legal rights under s 42(2)(e) of the *Transfer of Land Act 1958* (Transfer of Land Act) where the mortgage predates the tenancy agreement.

VLA recommends that the RT Act or Transfer of Land Act explicitly reference the requirement that a mortgagee follow the process set out in the RT Act. The recent practice has been for banks to follow the process under the RT Act, however this has not always been the case. Arguably a mortgagee could proceed with an eviction without having to follow the RT Act process. This is because their right to possession arises from different legislation and s 229 of the RT Act, which prevents a person from requiring a tenant to vacate a premises, does not apply to mortgagees. Tenants are not engaged in the County or Supreme Court processes that give the bank an entitlement to possession, and it may be that in fact their tenancy agreement predates the mortgage, which under the Transfer of Land Act would mean they are not entitled to possession. A requirement that mortgagees be required to apply to VCAT ensures that tenants have a right to be heard, that the criteria in relation to the timing of the mortgage and tenancy under ss 269 and 325 of the RT Act can be considered and that tenants who are being evicted are entitled to the protections under the RT Act.

Tenants rarely receive notice that their landlord has failed to comply with the mortgage agreement and as such the notice to vacate would normally come as a surprise. 28 days is a very short period of time for tenants to arrange new housing. Mortgagees have other legal options such as a right to request redirection of rent. They can also sell the property whilst the tenants are there. A 60 day notice period would allow tenants to better arrange their affairs and provide the standard notice period for other notices under the RT Act.

Tenants are also sometimes evicted during the fixed term of their tenancy agreement. This can cause significant detriment to those who have recently incurred expenses in finding and moving into their home, and now find that they are required to move again. Compensation is potentially claimable against the landlord, however it would be difficult to enforce judgement against a landlord who is currently in significant arrears with their mortgage. The case of *EL v EA (Residential Tenancies) [2006] VCAT 2049* provides a good example of the difficulties some tenants face. A longer period of notice in matters where a tenant has a fixed term would better protect against the arbitrary interference with the tenants' interest in the property.

**Recommendation 15: Require mortgagees to comply with the RT Act processes, and extend the timelines for Notices to Vacate**

Amend section 229 of the RT Act to include mortgagees as a class of persons for whom it would be an offence for them or someone acting on their behalf to require a tenant under a tenancy agreement to vacate the premises.

Amend section 268 of the RTA Act to require that a 60 day notice period is required to be given to tenants.

**Notices to vacate – prevent arbitrary evictions**

The RT Act sets out a number of formal steps that must be complied with before a tenant or resident may be lawfully evicted from a rental property. These steps are an important safeguard to arbitrary eviction. In general, the landlord must issue a Notice to Vacate for one of the reasons specified in

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the RT Act, and may then apply to VCAT for a possession order.<sup>19</sup> At that hearing, the Tribunal will have jurisdiction to hear the matter only if the Notice to Vacate has satisfied certain requirements.

In *Smith v Director of Housing* the Victorian Supreme Court found a valid Notice to Vacate to be a vital pre-condition to VCAT having jurisdiction to hear a possession order application.<sup>20</sup> That tenants are able to understand the case against them prior to the hearing is also fundamental to the issue of procedural fairness. The Tribunal must also be satisfied that the reason on the Notice to Vacate has been made out in evidence. These safeguards only provide a defence to a Notice to Vacate if a tenant attends VCAT to challenge the notice.

**Lin’s experience:**

Lin lived in a rooming house in Werribee. The property was in poor condition and Lin had asked the rooming house operator to clean up the common areas a number of times. The rooming house operator was also charging Lin to use common facilities, and he and Lin had a number of disagreements about those charges.

A few days after having a disagreement with the rooming house operator, Lin received a Notice to Vacate that alleged that he was causing danger to the other rooming house residents. The notice simply stated that Lin had “caused danger” to the other residents, and did not specify any further.

Lin called VLA worried that he had to move out the next day, as that is what the rooming house operator kept telling him. Lin was relieved when VLA advised him that the Notice to Vacate was only the start of the process required to evict him, and that he did not need to leave prior to the matter being heard at VCAT.

Lin believed that the rooming house operator was misusing the eviction provisions of the RT Act in the hope that Lin would just move out. He had a good relationship with all the other rooming house residents, and did not believe that the rooming house operator genuinely believed that he posed a danger to them.

VLA supports amendments to the RT Act to deter landlords from issuing Notices to Vacate without a proper basis. If Notices to Vacate were served together with sufficient supporting information to enable a tenant to understand the case against them and assess whether the notice has been issued for a valid reason under the RT Act, it would reduce the number of hearings proceeding to VCAT as well as prevent arbitrary evictions.

In particular, s 319 of the RT Act could be amended to include a subsection requiring landlords to provide supporting information together with the Notice to Vacate. For instance, notices relating to repairs may require the relevant permits to be attached. This would allow tenants to identify Notices to Vacate that are issued without a proper basis at an early stage, and provide a basis on which tenants could negotiate for the withdrawal of the notice.

**Recommendation 16:** Amend s 319 of the RT Act to require landlords to provide supporting information when issuing notices to vacate.

**Enable challenges to all retaliatory notices to vacate**

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<sup>19</sup> ss 319, 322

<sup>20</sup> [2005] VSC 46 (20 January 2005), at 23.

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In Victoria tenants and residents of other tenures are currently only able to challenge certain kinds of notices to vacate for being retaliatory. This represents a significant problem for tenants as landlords often issue certain notices to vacate in bad faith knowing that they will be more difficult for tenants to challenge at VCAT.

In jurisdictions such as NSW and the ACT,<sup>21</sup> equivalent legislation specifically enables a tenant to challenge any notice to vacate given in retaliation for the exercise or proposed exercise of a right, any application or threat of an application to the Tribunal or any existing orders in place from the Tribunal. In Victoria, only no reason notices to vacate and end of fixed term notices to vacate can currently be challenged on the grounds of retaliation. Further, the retaliation provisions are more narrowly construed in Victoria than in NSW and the ACT to include only challenges to notices issued in retaliation to the exercise or proposed exercise of a right.

We refer to our previous Security of Tenure submission where we recommended that a reasonableness requirement be introduced in possession order proceedings at VCAT. This would provide VCAT members with an additional layer of discretion when dealing with applications for possession that, while legally valid, may otherwise be unreasonable and inappropriate in the circumstances. The *Housing (Scotland) Act 2001* is an example of legislation that provides a mechanism to achieve increased fairness. That Act provides that, for certain types of tenancy agreements, the court must be satisfied that the landlord has a statutory ground for recovery of possession and that 'it is reasonable to make the order' for possession. The reasonableness test incorporates consideration of the nature, frequency and duration of action by the tenant leading to the application to evict, the degree to which the tenant is responsible for the eviction proceedings, the effect of the tenant's conduct on others and whether the landlord has considered other possible courses of conduct.<sup>22</sup> Introducing a reasonableness test would grant VCAT an additional layer of scrutiny when the basis for a notice to vacate may be legally proven but the underlying reason for the giving of the notice is retaliatory.

#### **Ashley's experience**

Ashley was a single mother renting a property in Kensington. Her son William attends a primary school which has additional needs funding for children with disabilities including autism. As William has autism he needs to have very structured routines and Ashley has invested a lot of time and energy training William to be able to walk a particular route to school each day by himself. Ashley and William lived at the rental property for several years without issue until the landlord issued her with very large rent increase she could not afford to pay. Ashley felt that the rent increase was unfair and applied to Consumer Affairs to assess whether the rent increase was excessive. Consumer Affairs and later VCAT determined that the rent increase was excessive and made orders saying that the rent could only go up by \$20.

The very next day the landlord's agent issued Ashley a notice to vacate under s 258 saying that a family member needed to move into the premises. Ashley contested this notice at VCAT when the landlord's agent applied for a possession order. She explained to the Member that the notice was given the day after the last VCAT hearing and she believes that it was given in retaliation for opposing the excessive rent increase. The VCAT Member noted that a notice to vacate under s 258 cannot be

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<sup>21</sup> See s 115 of the *Residential Tenancies Act 2010* (NSW) and s 57 of the *Residential Tenancies Act 1997* (ACT) for examples of jurisdictions which have permitted challenges to all types of notices to vacate on the grounds of being retaliatory.

<sup>22</sup> *Housing (Scotland) Act 2001* (UK), s16 (3).

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challenged on the grounds that it is retaliatory and said that he was satisfied that either the landlord or a family member needed to move into the property. The landlord did not attend the hearing and was not called upon to give sworn evidence. The estate agent's hearsay evidence about the landlord's intentions was accepted as sufficient.

As a consequence, Ashley needed to move at short notice and ended up having to rent a house in a different suburb. This meant that William was no longer able to attend the same school and this caused significant distress for William in having to learn new routines for attending a different school. For several months Ashley needed to drive William to school to ensure that he made it to school. This placed a lot of strain on her relationship with her employer who was not sympathetic to Ashley's personal situation and the fact that she was now often late to work.

Ashley later found out from her friend, who was a neighbour at her old rental property, that new tenants were living at the address and that they moved in shortly after Ashley was forced to leave. Ashley applied to VCAT for compensation but was eventually only awarded the equivalent of 1 week's rent for her inconvenience.

### **Recommendation 17 – Enable challenges to all retaliatory notices to vacate**

Amend ss 266, 289, 315 and 317ZH of the RT Act to enable a challenge to all types of notices to vacate which are given in retaliation to an exercise or proposed exercise of rights, application or proposed application to VCAT or any current VCAT orders.

### **Form of documents and manner of service – limit electronic service of Notices to Vacate**

As a notice to vacate sets out the grounds said to justify an eviction, and is a jurisdictional precondition to a possession order being made, it is imperative that a tenant actually receives a notice served on them. The RT Act also stipulates set periods of time that must be given to a tenant before they are required to move out. The requirements around service and timing are essential protections for tenants facing eviction from their home.

The recent amendment in the *Consumer Acts and Other Acts Amendment Act 2016* explicitly provides for electronic service of Notices to Vacate under the *Electronic Transactions Act 2000* (ET Act). It is likely that this amendment will encourage an increase in the use of electronic service as the norm.

A move toward the more modern method of electronic service, while efficient for those with the resources and knowledge to communicate in that manner, runs the very real risk of prejudicing the most disadvantaged tenants who require the greatest protection. There are many tenants who do not use email, particularly those who are socially or economically marginalised whose access to the internet is unreliable or infrequent. It is during times of crisis that this lack of access may be amplified for many disadvantaged tenants, rooming house and caravan park residents. Tenants who are not aware of the notices to vacate, or whom are not given the full period of notice under the RT Act will be subject to arbitrary interference with their home as any eviction will be in breach of the protections provided in the RT Act.

Issues with electronic service are not confined to those whose use of email may be limited. Electronic service can create serious complications in the following circumstances:

- The email address provided at the beginning of a tenancy is a work email and the person no longer works in that role.

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- The Notice to Vacate is provided to only one of the tenants at the premises whose email address has been provided to the landlord. If that person is overseas, hospitalised or in prison then other tenants may not receive notice.
  - Some notices have very short time periods, such as immediate notices and 14 day notices. Tenants may not receive these notices before the termination date.
  - There can be errors in the way servers process and file email messages. It is unreasonable to expect tenants to monitor their junk mail folders for potential Notices to Vacate.

As the ET Act currently stands a Notice to Vacate would be deemed served in all of these circumstances and VCAT would have no discretion but to evict if the grounds for the Notice to Vacate were made out.

There are also serious concerns for landlords and potentially VCAT due to the uncertainty the ET Act introduces into possession order applications. The ambiguity in the ET Act around consent opens up a new basis for defending a possession order application. It will likely be a question of evidence in each case whether there has been consent to the Notice to Vacate being communicated via email, and whether that consent can be inferred from the recipient's conduct. It has the potential to introduce significant uncertainty to the termination process for both tenants and landlords as these are factual disputes that are difficult for the parties to resolve between themselves without the intervention of VCAT.

For these reasons VLA favours regulations setting a high bar for enabling service under the ET Act. Section 6A of the ET Act enables regulations to be made limiting the operation of the service Act in particular circumstances. VLA recommends regulations to the effect that for the purpose of s 506 (3) of the Act electronic service will only be deemed service where the recipient has confirmed via email that they are willing to accept future service of Notices to Vacate via email, and they have not revoked that consent in writing before the Notice to Vacate has been served.

### **Recommendation 18: Regulate the circumstances in which Notices to Vacate can be served electronically**

Regulate the circumstances in which Notices to Vacate can be served electronically under s 506(3) of the RT Act by creating a requirement that the recipient has provided email consent to the form of service, and that the consent has not been revoked.

### **Enable tenants to access goods and personal documents left behind**

Tenants who are evicted can have difficulties obtaining the return of their goods and personal documents in the days immediately following their eviction. Legal eviction occurs when police attend at the rented premises to execute a warrant and tenants are required to leave immediately and the locks are changed. Tenants are unlikely to have made arrangements for their goods and personal documents, which are usually left in the property, with access dependent on arrangements with the landlord. Where tenants are illegally evicted from rental properties and rooming houses there can be similar difficulties.

Arrangements for obtaining the goods can be difficult for those evicted into homelessness. The evictee's immediate focus is usually on obtaining urgent accommodation, and access to appropriate support services can take time.

The current provisions governing goods left behind provide both a right of access to the goods and personal documents where the tenant pays the reasonable costs of storage incurred by the landlord, and further protections to prevent goods being disposed of if they are assessed at a value that

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exceeds the costs of their storage. The rightful owner of the goods or personal documents only has a right to reclaim them if they pay the reasonable costs of storage upfront. It is common for landlords to dispose of goods as a result. Personal documents are also often disposed of in breach of the RT Act, in part because the definition of personal documents encompasses many items that landlords might otherwise consider are goods.

A person seeking access to their personal documents or goods in the days following termination should not incur an upfront cost in obtaining the return of the goods. The upfront cost is an impediment to easy access to the goods, and can cause delays in getting the house cleared out and obtaining essential items. In some instances, a fractious relationship between the parties prior to the termination of the tenancy can lead to landlords refusing to allow tenants any access at all to obtain their items.

A simplified process for tenants to remove goods left in the property in the days immediately following eviction or termination would assist to prevent ongoing disputes about goods left at the property. Landlords can be compensated for any loss suffered via a claim on the bond on the basis that the property was not reasonably clean, and not able to be re-let due to the presence of the tenant's goods.

VLA recommends amending ss 382 and 389 of the RT Act to include a requirement for landlords to provide reasonable access to the property to allow removal of goods and personal documents if access is sought in the 7 days following an eviction. Landlords could claim compensation for any loss suffered as part of any bond claim.

**Recommendation 19: Introduce a right for tenants to obtain access to their goods and personal documents in the 7 days following termination of the agreement**

Amend ss 382 and 389 of the RT Act to introduce a requirement that landlords provide reasonable access to tenants to remove any goods or personal documents after termination of the tenancy. Any access should be sought within 7 days of the tenancy terminating.

**Strengthen protections for rooming house residents**

With the increasing demand for low cost housing, particularly for disadvantaged groups, international students and visa holders, VLA is seeing a surge in large operators running rooming houses out of premises they rent and do not own. Section 289A of the RT Act seeks to deal with situations where a tenant is using the premises to operate a rooming house. Section 289A applies where the tenancy has ended but the rooming house residents remain in occupation. It sets out the rights and obligations of the owner or landlord to the residents.

Where the owner or landlord does not wish to continue to operate their tenant's rooming house, s 289A requires the owner or landlord to give each of the residents a 45 day Notice to Vacate, and then to apply for a possession order under s 323A of the RT Act. The RT Act does not impose on the landlord the obligations of a rooming house operator, and residents are required to pay rent to the landlord during the notice period unless they can prove that they have already paid this rent for this period to the tenant. This section has caused several interpretive problems. Despite being amended by the *Consumer Affairs Legislation Amendment Bill 2013*, in practice it fails to provide the protections originally intended by the legislature.

*Interaction between sections 344 and 289A of the RT Act*

The RT Act does not explicitly state whether s 289A applies when the tenant has operated premises as a rooming house without the consent of the owner or landlord. This has led some Tribunal Members

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to conclude that s 289A does not apply to an owner or landlord who has not so consented and they can instead bring an immediate application for possession against the residents for occupying without consent under s 344 of the RT Act. In practice, this interpretation renders s 289A of the RT Act completely ineffectual.

VLA supports amendments to the RT Act to explicitly state that section 289A applies to situations where the landlord did not consent to their tenant operating the property as a rooming house. Section 344 should also be amended to introduce a new subsection 344(1)(c), similar to s 330(1)(e) to require the Tribunal to be satisfied before making a possession order “that a person who is entitled to a period of notice under s 289A has been given the required notice”.

#### **Vera’s experience**

Vera and her partner sought temporary accommodation in Melbourne for 4 months. She responded to an advertisement online and moved into a bedroom at a property where another couple was residing in a second room. The property was let to the residents by a head tenant who assured the residents of the legality of the arrangement telling them that he was good friends with the landlord who was aware he was renting out the rooms. The head tenant did not charge a bond but he did demand 4 months’ rent in advance from each of the residents. The head tenant would sleep on the couch and come and go as he pleased however after a few weeks, he stopped coming to the property all together.

Shortly after this, they were contacted by the landlord who advised them that they were illegally squatting at the property and needed to leave immediately. The landlord advised that the head tenant had not paid rent in weeks and had abandoned the property. The landlord applied for a possession order against the residents under s 344 of the RT Act alleging that they were occupying without consent. The residents lodged their own application for a restraining order arguing that they were entitled to a 45 day Notice to Vacate under s 289A of the RT Act. At the hearing the landlords and residents were both cooperative and able to negotiate a resolution. This was fortunate as the VCAT Member stated that it was unclear whether or not s 289A applied in situations where the head tenant was using the premises as a rooming house without the landlord’s consent. The Member pointed out that s 289A did not necessarily preclude a landlord from applying for a possession order under s 344 (in lieu of a 45 day notice) and that whilst this may not have been the intention of Parliament, the RT Act needed to be read as a whole.

VLA has identified issues with s 355 and its interaction with s 289A of the RT Act. In our experience, there is often very little communication by the rooming house operator with residents about the arrangement they have entered into. It is not uncommon for the first contact between a building owner and their tenant’s rooming house residents to be when police attend the property to execute a warrant. This is problematic as s 355(2)(b) of the RT Act does not permit the selective execution of a warrant against the rooming house operator and not their residents. Even though those residents are entitled to a 45 day notice to vacate under s 289A, there is currently no way for the Tribunal to order the selective execution of the warrant against the rooming house operator only and not their rooming house residents.

Residents in this situation are forced to either urgently apply for a restraining order against the building owner or to seek leave to be joined as an interested party to the possession order proceedings and seek a review. If a restraining order is made, this may not actually prevent the execution of an active warrant, already issued, as demonstrated below. Similarly, if a review is applied for, the Tribunal may still be required to affirm the possession order given the wording of s 330 of the RT Act. If the parties do not consent to some mutually agreed termination date, all the Tribunal can do is postpone the issue

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of the warrant by 30 days under s 352 of the RT Act. This however would still not afford the residents the full 45 days' notice they are entitled to under s 289A of the RT Act.

### **Jane's experience**

Jane was a resident in a rooming house run by a private rooming house operator known as ABC Housing. ABC Housing was given a 60 day notice to vacate by the landlord under s 259 of the RT Act stating that the owner wanted to sell. ABC Housing immediately stopped paying rent to the landlord but continued to collect rent from each of the residents for two months. ABC Housing did not tell any of the residents about the notice to vacate, or that they had stopped paying rent to the landlord. One afternoon a police officer came to the rooming house and informed Jane and the other residents that ABC had not paid its rent for over 2 months and that the police would soon execute a warrant against ABC and all of ABC's rooming house residents. The police officer explained that although the warrant was addressed to ABC Housing, the RT Act did not allow police to selectively execute the warrant against ABC only and that all residents would need to vacate.

In response Jane applied for an urgent restraining order and the Tribunal made first an interim and then a final order restraining the landlord from breaching ss 273 and 289A of the RT Act. The Tribunal accepted Jane's submission that she was entitled to a 45 day notice to vacate. The landlord did issue a 45 day notice, however also continued to pressure the police to execute the original warrant against ABC which remained active. Several weeks later police attended the rooming house and advised Jane that at the landlord's request, police intended to execute the warrant the following day. The police refused to look at the restraining orders Jane had obtained from VCAT stating that the building owner could not illegally evict her and must comply with s 289A of the RT Act.

### **Recommendation 20: strengthen protections for rooming house residents**

20.1 Amend section 289A of the RT Act to ensure it applies regardless of whether the building owner has consented to the use of the property as a rooming house.

20.2 Amend section 344 of the RT to explicitly state that a possession order cannot be made unless the Tribunal is satisfied that a person entitled to a notice to vacate under section 289A has been given that notice.

20.3 Amend section 355(2)(b) of the RT Act to enable the selective execution of a warrant against a head tenant and prohibit the execution of the same warrant against the head tenant's rooming house residents. Require Tribunal Members to include a statement in the warrant and possession orders addressed to police that the warrant can only be executed against the named tenant and not other occupants.

20.4 Amend section 289A of the RT Act to state that this section still applies when only part of the premises are being used as a rooming house. This could be done by including a definition in section 289A of the RT Act for 'building' as "a building including part of a building".

## Appendix 1 – Previous recommendations relevant to this paper

### Before a tenancy

Source	Relevant issues paper question	Details of recommendation
Security of tenure	Question 4	<p><b>Recommendation 11 – Standardise rental references</b></p> <p>11.1 Have Consumer Affairs produce a standardised form for the giving of rental references.</p> <p>11.2 Introduce amendments to the RTA to mandate the using of the standardised rental reference form when giving rental references.</p> <p>11.3 Introduce amendments to enable enforcement of these changes by either imposing a penalty for non-compliance or including this requirement as a duty provision under the Act for which a tenant could seek compensation if a landlord or agent breaches these provisions.</p>
Security of tenure	Questions 8-9	<p><b>Recommendation 15 – Amend tenancy databases</b></p> <p>15.1 Amend section 439A of the RTA to redefine the words “inaccurate” and “out of date” so that the words “or the tenant becomes aware of the debt” follow the words “three months after the amount became due” in each of the definitions.</p> <p>15.2 Introduce a new section 439LA enabling a tenant to apply for early removal from a database on hardship grounds.</p> <p>15.3 Amend section 439K of the RTA to reduce the period of time in which a tenant can be listed on a database from three years to 18 months.</p> <p>15.4 Amend section 439I(4) of the RTA to require a database operator to provide at least one free method of obtaining a copy of their database report. In the alternative, introduce amendments that require a database operator to provide at least one free database report every 12 months upon request, with reports to be provided within seven days of a request being made.</p>

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## During a tenancy

Source	Relevant issues paper question	Details of recommendation
Security of tenure	Question 18	<b>Recommendation 6 – Limit the use of compliance orders</b>  6.1 Amend compliance order provisions to limit initial compliance orders to six months. Enable VCAT to extend compliance orders up to a maximum of 12 months but only where VCAT is satisfied that the extension is necessary.

## At the end of a tenancy

Source	Relevant issues paper question	Details of recommendation
Security of tenure	Question 13	<p><b>Recommendation 3 - Fairer process for rent arrears</b></p> <p>3.3 Amend the Residential Tenancies Regulations 2008 (Vic) to require the standard form notice to vacate for rent arrears to include a statement advising the tenant of:</p> <p>3.3.1 Their right to request a payment plan under section 331 where satisfactory arrangements can be made to ensure the landlord does not incur further hardship.</p> <p>3.3.2 The landlord's obligation to attempt to negotiate a payment plan with the tenant before making an application to VCAT and the Tribunal's obligation to dismiss an application where attempts have not been made; and</p> <p>3.3.3 The invalidity of the notice to vacate if the arrears are paid before the termination date.</p>
Laying the groundwork	Question 13	<p><b>Recommendation 16 – Notice to vacate should include contact details for VLA</b></p> <p>Amend the regulations so that the form of a notice to vacate includes VLA's contact details.</p>
Security of tenure	Question 26	<p><b>Recommendation 4 – Repeal notices to leave</b></p> <p>4.1 Repeal notices to leave.</p> <p>4.2 Have Consumer Affairs make available training and education material for rooming house owners and caravan park owners. This material would educate operators as to the existing powers of Victoria Police to remove violent persons and of the notices to vacate that can already be issued when residents engage in serious acts of violence.</p>
Security of tenure	Question 28	<p><b>Recommendation 1 – Repeal or extend the timelines for 'no reason' notices to vacate</b></p> <p>1.1 Abolish no reason notices to vacate.</p> <p>1.2 In the alternative, amend section 263 of the RTA to prohibit the use of no reason notices to vacate by public and community housing providers and extend the notice period required to 12 months for private landlords.</p>

Security of tenure	Question 28	<p><b>Recommendation 2 – Introduce a reasonable and proportionate test in possession order hearings</b></p> <p>Amend the RTA to reflect that VCAT must not make a possession order unless it is reasonable and proportionate in the circumstances, taking into account hardship to the tenant.</p>
Security of tenure	Question 28	<p><b>Recommendation 6 – Limit evictions for breach of compliance orders under s 60 of the RT Act</b></p> <p>6.2 Amend section 332(1)(b) of the RTA so that each of the subsections is an alternative basis upon which a possession order can be refused. Change the word “and” in sections 332(1)(b)(i) and (ii) to “or”.</p>
Security of tenure	Question 30	<p><b>Recommendation 5 – Enable challenges to all retaliatory notices to vacate</b></p> <p>Amend sections 266, 289, 315 and 317ZH of the RTA to enable a challenge to all types of notices to vacate which are given in retaliation to an exercise or proposed exercise of rights, application or proposed application to VCAT or any current VCAT orders.</p>
Security of tenure	Question 32	<p><b>Recommendation 13 – Simplify reduction of fixed term tenancy applications</b></p> <p>13.1 Amend section 234 of the RTA to allow tenants to elect for reduction matters to be listed for hearing within 48 hours.</p> <p>13.2 Amend section 234 to expressly state that VCAT has the power to reduce the term of a fixed term agreement and terminate the periodic tenancy agreement created by the reduction order.</p> <p>13.3 Amend section 234(3) to cap the maximum amount of compensation payable to a landlord to two weeks’ rent.</p> <p>13.4 Introduce a similar provision to section 100 of the NSW RTA to enable a tenant with a final family violence intervention order to terminate their fixed term tenancy agreement (without paying compensation to the landlord or without the need for a hearing) by issuing a 14 day notice of intention to vacate. Retain section 234 to provide remedies for people experiencing family violence who choose not to obtain a final intervention order.</p>