

Submission to Consumer Affairs Victoria

Dispute Resolution Issues Paper
Residential Tenancies Act Review

June 2016



Peninsula Community
Legal Centre INC

Introduction

Peninsula Community Legal Centre (PCLC) is pleased to be given the opportunity to comment on the third stage of the Victorian Government's Review of the Residential Tenancies Act 1997 (*the Act*), namely the Dispute Resolution Issues Paper.

PCLC is an independent, not-for-profit organisation that has been providing free legal services to Melbourne's south-eastern communities since 1977. Our centre is one of the largest community legal centres in Australia, spanning a catchment of over 2,600 square kilometers, six local government areas and almost one million people. In 2014-15, the Centre provided 7,655 advices and opened 2,988 cases. Our clients overwhelmingly experience disadvantage, with around three-quarters reporting no or low income (less than \$26,000 per annum).

PCLC has provided specialist tenancy and consumer services since 1998. The Centre receives funding from Consumer Affairs Victoria (CAV) to deliver the Tenancy Advice and Advocacy Program (TAAP) across ten local government areas in Melbourne's south-east, and the Melbourne Metropolitan Rooming House Residents Support Program which operates across seventeen local government areas in Melbourne's south and east. With the TAAP funding the Centre's tenant advocates provide advice, casework, negotiation services and representation at the Victorian Civil and Administrative Tribunal (VCAT). In addition, the Centre offers duty advocate services at the Dandenong and Frankston VCAT venues. PCLC's rooming house outreach workers visit rooming houses and community locations to engage with residents, provide information about rights and responsibilities, to make referrals to relevant tenancy and other services and to identify issues and trends.

Tenancy issues were in the top ten problem types addressed by our Centre in the 2014-2015. We commonly help with a wide range of matters including possession, rent arrears, repairs, compensation, bond claims, lease breaks, tenancy agreements and rent increases.

Summary of our submission to the first stages of the Review

Security of tenure and affordability issues are of great concern to our Centre given that a large portion of our client base are seniors, people with low income, sole parents, people with disabilities and people who live in social housing, rooming houses and residential parks.

In our previous submissions, we highlighted what we perceive to be the key obstacles to secure, safe and sustainable housing for vulnerable people, these being the lack of security of tenure and the inequality of bargaining power experienced by tenants and residents. We also focused on the broader industry practices and current culture of the rental market and highlighted how these have an impact on security of tenure. We briefly proposed options and initiatives (drawn partly from overseas jurisdictions), which may appropriately address and improve the inequality of bargaining power in the current rental market, including considering renewable leases with options to ensure security of tenure is achieved.

We concluded that the private rental market is currently unable to meet the housing needs of Victorians on low incomes. We submitted that a review of the rental market as a whole is required, particularly the regulatory framework. It was our opinion that the requisite industry change will not come from simply amending certain provisions of the Act but that the culture and practices of the current rental market as a whole requires change.

Scope of this submission

We are pleased to see that the Review is also covering dispute resolution as it applies between landlord and tenants and residents under the Act.

As we set out briefly in our first submission to the Review, we believe that it is easier for landlords and operators of rooming houses and caravan parks to access redress in terms of the Act than a tenant or resident. We noted that fear of retaliation through either rent increases or notices to vacate (this is particularly so in terms of tenants not pursuing repair issues) stop tenants and residents from seeking a remedy. Tenants and residents of caravan parks and rooming houses are often reluctant to seek a remedy due to the threat of homelessness or other retaliatory action by a landlord, an operator, head tenant or other residents.

We discussed that whilst landlords are frequently assisted by real estate agents, tenants and residents are frequently at the disadvantage of not knowing or understanding their rights and lacking the skills and confidence to pursue them. These disadvantages are magnified for vulnerable and disadvantaged tenants and residents who may be unable to navigate the obstacles and barriers when utilising VCAT's services without assistance.

In light of this, our submission will discuss key themes coming out of the Centre's practice and the need for a flexible service delivery model that takes into account and responds to participant's legal capability. We will highlight the advantages of programs such as TAAP, including the VCAT duty advocate service, which specifically address the barriers faced by vulnerable & disadvantaged tenants and residents. In our submission we refer to research conducted by the Law and Justice Foundation of New South Wales which confirms that disadvantaged people, especially those with lower legal capability, are more likely to require third party assistance in the form of legal services to assist them in resolving their disputes.

The Issues Paper

In our response we are not aiming to represent the perspectives of all stakeholders or to address all of the questions posed in the Discussion Paper. We will be providing comment on dispute resolution issues from the perspective of our more close to twenty years of providing specialist services to tenants and residents, especially those who are vulnerable and disadvantaged. We will provide general responses in relation key matters.

Policy goals

PCLC recommends that 'timely' rather than 'fast' outcomes are a desirable outcome of an effective residential tenancies dispute resolution system. Speed of resolution is an important consideration but it should not override commitment to fair processes. Some parties to tenancy disputes, such as tenants who are experiencing vulnerability and disadvantage, may require time to, for example, access support and assistance, to understand their issues, rights and obligations, or to arrange alternate housing.

Likewise, PCLC recommends that it is desirable that the system is both 'comprehensive' and 'comprehensible'. It is possible to have comprehensive, coherent and efficient processes that some people do not understand, cannot navigate or do not feel competent to participate in. This highlights the importance of ensuring that direct assistance such as TAAP is available to help these tenants to understand their rights and options.

PCLC suggests that 'participation' is a further desirable attribute of an effective system. All parties should be encouraged and supported to knowledgeably and actively participate in processes which

impact on the very fundamental issue of housing.

PCLC believes that policy considerations relating to the training and responsibilities of landlords and property managers could also assist in the preventing and resolving residential tenancy disputes. Many tenants do not understand that the property manager is an agent for the landlord, not for them. These tenants have the expectation that property managers are there to act in their best interests and to support them and so are surprised when the property manager does not act on requests or give them advice about how to deal with problems. We recommend that real estate agents and property managers be required to disclose their interests and responsibilities to all parties – possibly in the lease agreement.

Property managers are in a good position to identify when issues related to the tenancy are arising. They should be encouraged to give good information to both the landlord and the tenants. If, for example, a tenant is asking for repairs, the property manager should inform them about the appropriate notices to use. Providing good information at the front end will assist in avoiding and/or more efficiently dealing with disputes. Property managers should also be encouraged to refer tenants to CAV, TAAP agencies or other relevant services for information about rights and responsibilities.

It is our experience that many property managers and landlords do not properly understand the provisions in the Act, nor the rights and responsibilities of tenants and landlords under the legislation. Many also do not understand VCAT legislation, rules and procedures. This can lead to confusion, unnecessary disputes and complications and delays in dispute resolution.

We understand that tenant's lack of understanding about their rights and responsibilities, such as a misconception that they can withhold rent because the landlord has not undertaken repairs, can also contribute to disputes and difficulties in their resolution. However, our position is that, as professionals and investors, real estate agents/property managers and landlords have less excuse for not understanding and complying with the legislation.

The case study below illustrates that there is a broader issue regarding the lack of knowledge by landlords and their estate agents as it relates to residential tenancy law and practice. The case also shows the associated problems when there is a lack of information exchanged by the landlord prior to a VCAT hearing.

Case Study

The landlord served the tenant with a Notice to Vacate for rent arrears. The landlord did not provide a ledger or any other proof of the claim.

PCLC called and emailed the landlord requesting an up-to-date tenant ledger in order to clarify the amount of arrears and to assess the situation for the tenant. The landlord sent a reply stating, "What is a tenant ledger?"

At the subsequent VCAT hearing the matter was adjourned as the landlord did not provide supporting documentation as to the claim. The landlord did submit a list of payments received but not in ledger form. The tenant had rental receipts proving additional payments made which landlord failed to list as payments received. These issues could have been resolved prior to the hearing had the landlord understood the VCAT process.

PCLC has assisted clients whose property managers have demonstrated a lack of understanding/knowledge of VCAT processes and of the legislation. In our experience, the way that some agents and managers present at VCAT is inappropriate, for example, the use of inappropriate terminology and hostility to tenants exercising their rights. One example is a comment by an agent at a VCAT hearing – "Well I can't give the tenant a good reference because she's brought us to VCAT so

many times”, which solicited a reprimand by the presiding VCAT member. That this matter related to repairs and that there had been numerous hearings did not seem to be relevant to the agent.

Other examples include:

- applications being lodged by the real estate agent/property manager without providing the tenant with supporting documentation, particularly for bond and compensation claims. Property managers have arrived at VCAT on the day of the hearing with photos, invoices and quotes which they give to the tenant immediately prior to entering the court room.
- applications to VCAT being lodged without correct notices having been served or documents having been forwarded to the tenants. Tenants have received notification of a hearing via an SMS from VCAT and arrive not knowing what the application is about.

PCLC staff have experienced instances where real estate agents and/or landlords are unaware of provisions under the Act which can make them party to proceedings where a tenancy is affected by family violence. We suggest that there may be a role for CAV providing education to the real estate industry regarding this matter.

We recommend that all property managers and property investors, especially those who intend to manage the tenancies, be required to undertake adequate training.

Some attention to tenant ledgers could also assist in avoiding or more quickly resolving tenancy disputes. In our experience, tenants can find the ledgers difficult to understand and the language confusing.

Case Study

The landlord served the tenant a notice to vacate for rent arrears, which the tenant disputed. The landlord, through their real estate agent, provided a copy of a tenant ledger. The tenant did not understand the term “credit,” as used in the ledger. To the tenant, credit indicated she was ahead in rent when the opposite was true.

It is also PCLC’s experience that the failure of landlords/property managers to maintain accurate and up-to-date tenant ledgers can lead to disputes. Often these disputes end up in VCAT.

Dispute resolution arrangements

Information and advice services

In an effective dispute resolution system, all tenants should be able to obtain information and assistance which is timely, accessible and appropriate taking into account factors such as vulnerability and disadvantage, legal capability, life circumstances, urgency, seriousness and potential impact of the matter.

PCLC believes that there should be multiple points of access for services, with a ‘no wrong door’ policy and tenants connected with the most appropriate service at the earliest opportunity. We support CAV and the Tenants Union of Victoria as highly visible, but not the only, entry or triage points. We believe that co-ordination and communication across services needs to exist to ensure co-operation and, as far as possible, seamless access and service delivery.

It is our view that tenants should be able to access relevant services at the earliest possible point in the

dispute, with a view to trying to resolve disputes at the earliest possible stage. However, we highlight that while for some people telephone or website information when the dispute arises will be appropriate and sufficient, for others the earliest point will be obtaining assistance from a TAAP duty advocate at VCAT just before the hearing.

“...the ‘tipping point’ for seeking help is later for some people than for others and disadvantaged people are over-represented among those who delay help-seeking” (Forell, 2015, p. 4).

“It may well be the case that assistance provided early in the life of a problem can ‘nip it in the bud’ and prevent the escalating costs associated with ongoing disputes. However, for those disadvantaged clients with disproportionately high legal need but lower capability to address that need, assistance may be most effective if it is responsive to their legal problems(s), appropriate to their capability, and provided at a time and place where it can and is most likely to be used” (Forell, 2015, pp. 10-11).

PCLC is of the view that a continuum of service is required by tenants. This ranges from information prior to and at the commencement of tenancies, to matter specific advice, to assisted dispute resolution, to advocacy and representation in VCAT, through to enforcement of VCAT orders. Tenants should be able to access service at the point/s along the continuum when and where they need it.

CAV, TAAP agencies, Victoria Legal Aid, community legal centres and housing agencies all make important contributions to service provision along the continuum. We note that CAV has recently completed a Review of the Specialist Services Program (including TAAP services and the relationship between CAV and the services which it funds) and refer the Fairer, Safer Housing Review to those recommendations.

TAAP services could be improved by additional funds to assist them to better respond to consistently high demand for services.

Tenants, especially those experiencing vulnerability and disadvantage, often require associated services such as links to housing agencies, mental health services and family violence services. All service providers should be cognizant of the need for a holistic approach to service provision and equipped to provide it. PCLC is currently piloting the employment of an in-house social worker to work alongside lawyers and TAAP advocates to enhance the resolution of legal matters by addressing associated non-legal matters. This approach has had demonstrated benefits for vulnerable tenants, particularly in assisting them to access appropriate alternative housing.

“Further, as client’s needs may well stretch beyond the tight remit and resources of the legal sector, legal services need to be connected: working as part of a broader service network in order to (together) provide holistic, targeted, client-centred responses” (Forell, 2015, p.10).

TAAP services could be improved through the provision of funding to support them to better deliver and/or broker holistic services for vulnerable and disadvantaged tenants.

It is PCLC’s experience that there are gaps in advice and assistance for co-tenancy matters and for public housing tenants. Current services could be improved by promoting a better understanding of the role and extent of service which is provided by Supported Housing Advocacy and Support Program (SHASP) services and by providing additional funds to either SHASP services or TAAP services to meet public tenant tenancy advice and assistance needs.

Co-tenancy matters can be very complex and difficult for those people who are in dispute. There are limited information and advice service options available to them. PCLC makes referrals to the Dispute

Settlement Centre of Victoria for facilitated dispute resolution.

As stated in a previous submission, PCLC also has experience in delivering proactive, community legal education for prospective and current tenants to help them secure and maintain rental accommodation and to initiate and respond to VCAT applications and hearings. Our Centre is also active in providing education workshops to workers from other organisations and in providing information and ‘secondary consultation’ type services. PCLC notes the important information and education work undertaken by CAV and the TUV and other organisations such as ours on a more local level. We believe it is important to consider expanded support and education for tenants and “problem noticers” (Forell and Gray, 2009, p. 9) as part of the suite of approaches directed at preventing renting-related problems and more effectively resolving disputes which may arise.

“Targeted and tailored legal education and information may therefore be critical to assisting more disadvantaged groups to ‘get help’, as well as assisting the health and welfare advisers they often use to ‘give help’ by connecting them with legal assistance” (Forrell and McDonald 2015, quoted in McDonald & Wei, 2016, p.10).

Independent third-party assistance

While supporting appropriate dispute resolution at the earliest possible point in a tenancy dispute, PCLC believes that parties entering into front line resolution, mediation or conciliation should first have the opportunity to receive advice regarding their legal rights and responsibilities.

It is generally understood that a range of factors affect an individual’s ‘legal capability’. Vulnerable and disadvantaged tenants often experience significant barriers in identifying, addressing and resolving their tenancy disputes. For some tenants, the nature of their disadvantaged (such as low income) and their vulnerability (such as mental health issues), mean that they are more likely to live in lower standard housing and/or experience tenancy problems. For tenants who are experiencing forms of vulnerability and disadvantage, access to timely, appropriate and skilled assistance is critical, both when they are initiating action (such as for repairs) or when they are responding to action initiated by the landlord or property manager (such as a Notice to Vacate).

“Given the lower legal capability of the most disadvantaged, targeted and tailored assistance strategies are critical to their access to justice. More broadly, to efficiently and effectively assist more disadvantaged people and groups, services should be targeted to reach those with the highest legal need and lowest capability, joined-up with other services to address complex life problems and provide effective legal pathways and maximize the utility of services, and appropriate to the legal needs and capability of users” (McDonald and Wei, 2016, pp. 10-11).

Beyond providing initial information and advice, TAAP advocates, for example, provide assistance in completing forms and preparing applications, reviewing documents, negotiating with the other party, initiating VCAT proceedings, preparing the tenant for self-representation, providing representation at VCAT and following up VCAT orders. The advocates may also liaise with other agencies to put in place strategies to support the existing tenancy or to identify alternative housing options. In many cases the involvement of an advocate will result in matters being resolved at an earlier stage through negotiation or more streamlined VCAT hearings. In other cases, the involvement of an advocate may extend the time taken for the matter to be resolved because the tenant is made aware of their rights and assisted to exercise them. The involvement of an advocate can make an enormous difference to the outcomes achieved for vulnerable and disadvantaged tenants, it is imperative that services such as TAAP be

maintained and extended.

PCLC views service flexibility as an important strength of the TAAP Program. It enables funded agencies to respond to local conditions and needs. Some agencies which receive TAAP funding, for example, offer duty advocate services at various VCAT hearing venues.

PCLC has been offering duty advocate services for a number of years since piloting this form of service delivery in partnership with CAV and VCAT. We note that VCAT has supported this initiative. Over time we have reviewed and adjusted the location(s), timing of and approach to service delivery and have sought feedback from our advocates, tenants who have been assisted and VCAT staff. Based on all of this information, we have continued the duty advocate service as one of the range of ways in which services are made available to vulnerable and disadvantaged tenants in our catchment area. PCLC currently provides duty advocate services at the Dandenong and Frankston VCAT hearing venues. In our opinion, offering a VCAT duty advocate service:

- enables PCLC to provide services to clients whom we may not otherwise reach – data collected from tenants who have been assisted demonstrates that most have not accessed advice/assistance prior to the hearing and all found the assistance very useful; and
- facilitates a good relationship with VCAT Registry staff and Members – who are then aware of the available services and may refer vulnerable and disadvantaged tenants to them.

It is a matter of concern to us that tenants often do not attend VCAT hearings and this is an ongoing matter which requires attention. The fact that there is a hearing indicates that a fairly serious matter is at hand.

In our experience, the assistance and representation provided by tenant advocates (both as part of pre-arranged representation and duty advocate services) can make a considerable difference to tenant outcomes. Tenant advocates are regularly able to assist to save tenancies, preventing homelessness and the cost to community for crisis assistance. This is usually where the landlord has made an application for a possession order for rent arrears and the advocate has assisted in negotiating consent orders or obtained a VCAT Member's decision for a payment plan. Examples of other matters include dismissal or lowering of landlord initiated bond and compensation claims, obtaining restraining orders to enable a tenant to enter a property to collect belongings and obtaining an extension of time before the tenant is required to vacate premises.

The availability of dedicated facilities, such as signage to enhance visibility and lockable interview rooms to enhance utility, at all VCAT locations would support the delivery of duty advocate services.

Case Study:

A tenant who was elderly, in poor health and who was suffering from depression was referred to the PCLC tenant advocate at a duty advocate service. The tenant had received a 60 day Notice to Vacate as the landlords had sold the premises. The landlords attended the hearing with two property managers. The client arrived at the Tribunal without having received advice and without representation.

The tenant was seeking an extension of the time to vacate the premises as alternative accommodation had potentially been secured but she was vague about the details, however, the landlords were not willing to negotiate.

Prior to the hearing, the advocate contacted the property manager of the potential alternate accommodation and clarified the position regarding its availability. Although a possession order was granted, the advocate was able to negotiate with the other party for an extension on the vacate date which enabled the tenant sufficient time to vacate and clean the current property without being under undue pressure.

Without the duty advocate service this tenant would have attended the hearing without any assistance and struggled to present her evidence in a clear manner. The outcome may not have been as favourable.

CAV inspections and advice

The role of CAV inspectors in undertaking inspections in relation to non-urgent repairs, rent increases and abandoned goods is an important one which can be effective in resolving disputes both at an early stage and in providing evidence for VCAT proceedings. It is PCLC's opinion that the parameters of the inspector's role needs to be very clear and the provision of reports should be subject to reasonably strict time frames, even if the inspector is in negotiations with one of the parties. We recommend that if an inspector has taken photos of the property as part of an inspection, these should be included with the report. Finally, we note that CAV inspectors and other compliance officers potentially have a key role in distributing information about rights and responsibilities and in referring the parties to appropriate further assistance.

Victorian Civil and Administrative Tribunal

Access and Barriers

It is PCLC's experience that VCAT management, staff and Members are generally aware of, or open to be advised of, barriers which parties may experience in accessing VCAT and in participating in VCAT proceedings. It is also our experience that they are proactive and responsive in addressing access issues. Regular meetings of the VCAT Residential Tenancies Users Group, the availability of the Family Violence Support Worker and support which has been provided to PCLC and other agencies to establish and offer duty advocate services are all examples of this.

However, procedures to bring a matter to VCAT and proceedings once there are, by their nature, still relatively formal and legalistic. We encourage VCAT to continue to review its own processes and to work with others to ensure that access, especially for those who are vulnerable and disadvantaged, is a constant consideration and priority.

Interpreters

We note that VCAT is mostly responsive when a request for an interpreter is made. However, we also note that interpreters often do not show up. Further frustration can be experienced when not enough time is allocated for the hearing given that it takes extra time with an interpreter, which results in an adjournment. We recommend that VCAT should allow one hour if an interpreter is booked.

There are also times when matters have to be adjourned because the interpreter has not been booked for sufficient time and they have to leave to attend another booking.

Advice and assistance

We recommend that VCAT consider the possibility of including information about services through which parties can access information and assistance with notices of hearing and on the VCAT website.

Family Violence Support Worker

PCLC's tenant advocates report that they have a positive and effective relationship with the Family Violence Support Worker at VCAT and view this as an important service offered by the Tribunal. The involvement of the Family Violence Support Worker enables a smoother and more streamlined service for victims of family violence. The worker is easy to contact and promptly responds to messages, she quickly assesses if the matter fits within her role and, if so, is proactive in assisting with the carriage of the matter. Applications can be made through the worker, she can attempt to expedite hearing dates,

and ensures that appropriate arrangements are made at the Tribunal.

Enforcement of VCAT Orders

There are times when disputes are not finalised upon VCAT making an order and further action is required to enforce the VCAT decision. Where repairs have not been undertaken by the landlord, VCAT's power to order that rent be paid into the Rent Special Account has proved effective. However, orders for payment of monies are often not complied with and action to enforce the orders falls outside of VCAT's jurisdiction.

Case Study:

After the final hearing in a repairs/compensation matter where there had been a number of hearings and adjournments, the rooming house operator said to the tenant "I'm not going to pay you any money".

Tenants often express frustration when advised that VCAT can make but not enforce monetary orders. Many vulnerable and disadvantaged tenants do not have the funds to initiate further proceedings. Issues of cost, more formal legal processes and either low or unrealistic expectations about results can present significant barriers to tenants entering into enforcement proceedings through the Magistrates' Court. We have often heard the comment – "What's the point?"

TAAP and other agencies will usually assist with writing letters of demand and provide advice about further enforcement options. However, more urgent and competing demands on worker time and resources, and cost/benefit considerations, mean that access to assistance in enforcement proceedings is more limited.

We recommend that options for low cost and streamlined processes to enforce monetary orders, preferably within VCAT's jurisdiction, be explored.

Fee Waiver

In PCLC's experience, many tenants find the VCAT *Financial Hardship Form* complicated and time consuming to complete.

Conclusion

Peninsula Community Legal Centre would welcome the opportunity to address any queries or provide further information related to this submission.

References

- Forell, S 2015, *Is early intervention timely?*, Justice issues paper 20, Law and Justice Foundation of NSW, Sydney
- Forell, S & Gray, A 2009, Outreach legal services to people with complex needs: what works?, Justice issues paper 12, Law and Justice Foundation of NSW, Sydney
- McDonald, HM & Wei, Z 2016, *How people solve legal problems: level of disadvantage and legal capability*, Justice issues paper 23, Law and Justice Foundation of NSW, Sydney