


Your reference:

Our reference:

 **telephone:** (03) 9269 0691 **fax:** (03) 9269 0210

**email:** Kristen.Hilton@vla.vic.gov.au



**Melbourne Office**

350 Queen Street  
Melbourne VIC 3000

GPO Box 4380  
Melbourne VIC 3001

DX 210646 Melbourne VIC

**t:** 03 9269 0234

[www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)

ABN 42 335 622 126

19 August 2015

Gina Papas  
Principal Policy Advisor, Regulation and Policy  
Consumer Affairs Victoria  
Melbourne VIC 3000

By email: [Gina.Papas@justice.vic.gov.au](mailto:Gina.Papas@justice.vic.gov.au)

Dear Ms Papas

**Residential Tenancies Act Review – Laying the Groundwork**

Thank you for the opportunity to provide a submission to the Laying the Groundwork Residential Tenancies Act Review. Victoria Legal Aid supports reforms to the *Residential Tenancies Act 1997* (RTA) to ensure that tenancies are managed sustainably and evictions occur only as a last resort.

Please find our response to the consultation paper enclosed. Our submission is informed by our practice experience providing legal advice and representation to tenants facing social and economic disadvantage and marginalisation in Victoria

If you have any queries, please contact myself or Joel Townsend, Program Manager, Social Inclusion on 9269 0442 or [Joel.Townsend@vla.vic.gov.au](mailto:Joel.Townsend@vla.vic.gov.au). We would welcome the opportunity to meet with you to discuss any of these issues further.

Yours faithfully

A handwritten signature in black ink, appearing to read "Kristen Hilton".

**KRISTEN HILTON**

Director, Civil Justice, Access and Equity  
Director, Barwon and South Coast regions

## **Residential Tenancies Act Review**

### **Laying the Groundwork – Consultation Paper**

19 August 2015

## **Civil Justice Program – Victoria Legal Aid**

© 2015 Victoria Legal Aid. Reproduction without express written permission is prohibited. Written requests should be directed to Victoria Legal Aid, Research and Communications, 350 Queen Street, Melbourne Vic 3000.

**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.



---

## 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 almost 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

Kristen Hilton  
Director  
Civil Justice Access and Equity  
(03) 9269 0691  
Kristen.Hilton@vla.vic.gov.au

Joel Townsend  
Program Manager, Social Inclusion  
Civil Justice Program  
(03) 9269 0442  
Joel.Townsend@vla.vic.gov.au

---

## Executive Summary

Demand for housing in Victoria is increasing and private rental is becoming less affordable, particularly for low-income households.<sup>1</sup> In Victoria there are currently 34,464 people on the public housing wait list,<sup>2</sup> and research has shown that legal problems in the area of housing can cause stress-related illness, physical ill health, relationship breakdown and financial strain.<sup>3</sup> It is well understood that housing issues can also lead to other legal problems.

VLA supports reforms to the *Residential Tenancies Act 1997* (RTA) to ensure that tenancies are managed sustainably and evictions occur only as a last resort. This submission outlines reforms aimed to maintain tenancies, prevent arbitrary and unlawful evictions and improve VCAT decision-making. This submission is informed by our practice experience providing legal advice and representation to tenants facing social and economic disadvantage and marginalisation in Victoria.

## Summary of recommendations

<b>Principles and Objectives</b>	<b>Recommendation 1:</b> Review the principles and objectives underpinning the current RTA to more adequately reflect the importance of home for tenants.
<b>Maintaining Tenancies</b>	<b>Recommendation 2:</b> <ul style="list-style-type: none"><li><b>A)</b> Introduce minimum standards for all rental properties.</li><li><b>B)</b> Consider amending the RTA to:<ul style="list-style-type: none"><li>• enable the condition report to be considered a request for repairs;</li><li>• provide that non-urgent repairs must be attended to within two weeks; and</li><li>• introduce a mechanism for rent to be paid into the special account from the time a request for repairs is made and not released until any pending compensation claim is heard.</li></ul></li><li><b>C)</b> Amend the RTA to include a legal obligation that a landlord, or their agent, notify any tenant that contacts them about repairs, about how to go about seeking repairs.</li></ul>
	<b>Recommendation 3:</b> Amend the VCAT Act to remove application fees for tenants in RTA matters and to remove the discretion to order tenants to reimburse landlord fees.
	<b>Recommendation 4:</b> Provide legislated funding for Social Housing Advocacy and Support Programs.
	<b>Recommendation 5:</b> Amend the RTA to provide that its protections apply where two parties have intended to create a residential tenancy relationship even if the tenant does not have exclusive possession. Preserve the reverse onus contained within the RTA.

---

<sup>1</sup> 2015 Rental Affordability Snapshot, Anglicare Australia, 18. Cited in *Residential Tenancies Act Review. Laying the Groundwork - Consultation Paper* (2015), 9.

<sup>2</sup> Department of Health and Human Services, *Public Housing Waiting and Transfer List* (June 2015).

<sup>3</sup> Law and Justice Foundation, *Legal Australia-Wide Survey: Legal Need in Australia* (2012), 86.

---

	<p><b>Recommendation 6:</b> Amend the RTA to allow for a co-tenant to be removed from the lease whether it is of a fixed term or periodic.</p>
	<p><b>Recommendation 7:</b> Amend the RTA to enable apportionment of liability between co-tenants.</p>
	<p><b>Recommendation 8:</b> Amend blacklisting provisions such as the definition of “inaccurate” and “out of date” in section 439A so that the words “or tenant becomes aware of the debt” follow “3 months after due”.</p>
	<p><b>Recommendation 9:</b> Amend the RTA’s compensation provisions to provide clearer categories for loss, with the inclusion of a category for inconvenience.</p>
<p><b>Preventing unreasonable and arbitrary evictions</b></p>	<p><b>Recommendation 10:</b> Abolish notices to vacate for no specified reason. Alternatively, abolish these notices for social housing providers and amend the notice period to 12 months for private rentals.</p>
	<p><b>Recommendation 11:</b> Initial compliance orders should be limited to 6 months before lapsing. Only where subsequent orders are needed should there be discretion for them to be extended for a period of up to 12 months. Tribunal members should be given more flexibility when determining whether a tenant should be evicted. Section 332 of the RTA does not provide this flexibility. Section 332 (1) (b) should be amended so that each of the subsections are alternative bases on which a possession order can be refused.</p>
	<p><b>Recommendation 12:</b></p> <ul style="list-style-type: none"> <li><b>A)</b> Insert a requirement into the RTA for landlords to attempt to negotiate a repayment plan with tenants prior to making an application for a possession order on the basis of rental arrears.</li> <li><b>B)</b> Insert a provision into the RTA that a notice to vacate is not valid or of no effect if rent is paid within 14 days of it being issued.</li> <li><b>C)</b> Amend the RTA to create a right for tenants to an urgent hearing before VCAT to invalidate an application or warrant for possession if rental arrears are paid in full prior to the application being heard or the warrant being executed.</li> </ul>
	<p><b>Recommendation 13:</b> 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>
<p><b>Improving VCAT decision making</b></p>	<p><b>Recommendation 14:</b> Amend Schedule 2 of the Residential Tenancies Regulations 2008 to include landlord non-compliance with Tribunal orders as an infringeable offence. Update the police manual and provide additional training for police on the need to enforce orders made against landlords under the RTA.</p>
	<p><b>Recommendation 15:</b> Consider introducing, on a trial basis, without prejudice opt-in ADR for arrears and compliance order matters. Evaluate the</p>

	trial to determine whether these are operating to sustain tenancies and increase VCAT efficiency.
	<b>Recommendation 16:</b> Amend the regulations so that the form of a notice to vacate includes VLA's contact details.
	<b>Recommendation 17:</b> Allow for internal appeal from decisions in the Residential Tenancies List to a Senior Member either as a right or with leave where there is materially changed circumstances or a question of law to be considered.
	<b>Recommendation 18:</b> Amend legislation (whether the Charter, VCAT Act or the RTA) to expressly confer VCAT with the power to consider the lawfulness under the Charter of decisions of public authorities in respect of eviction – including decisions to issue notices to vacate, make applications for possession and make applications for warrants of possession.

## The changing housing context

In our view the current RTA could be strengthened to better support a rental market that provides more sustainable, secure and safer housing to Victorians. We submit that the review should examine reforms targeted towards:

- ✓ **Maintaining tenancies** - increasing protections and support for tenants.
- ✓ **Preventing arbitrary and unreasonable evictions** - removing the ability to evict without grounds and introducing a 'reasonableness' requirement in possession order hearings.
- ✓ **Improving VCAT decision-making** – expressly conferring VCAT with jurisdiction to consider the lawfulness under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) of decisions of public authorities to evict, strengthening alternative dispute resolution (ADR) processes and creating internal appeal rights.

These proposed reforms and the evidence to support them are discussed in more detail below.

## Regulatory and policy framework

### Principles and objectives

The principles and objectives underpinning the RTA are inadequate in the current housing context. VLA supports review of these principles and objectives with a view to improving these to more adequately reflect the importance of home as the foundation of financial, social and emotional security for tenants.

**Recommendation 1:** Review the principles and objectives underpinning the current RTA to more adequately reflect the importance of home for tenants.

### Maintaining tenancies

***Obligation to provide and maintain premises in good repair***

---

As identified by the National Association of Tenant Organisations (NATO), the condition of rental properties can pose real health and safety risks to tenants.<sup>4</sup> This is particularly concerning for tenants on low incomes who are forced to accept affordable accommodation in properties that are dilapidated and sometimes dangerous.<sup>5</sup>

Surveys of tenant experiences reveal that at the time that tenancies begin, properties often have basic faults that can create health and safety risks, significantly reduce the amenity of the property, increase social isolation and increase utility bills.<sup>6</sup> In our experience assisting tenants these faults can include major leaks, faulty wiring, installed utilities that do not work or work poorly, cracking, gaps and rotting in walls, floors, ceiling and carpets, faulty windows and rotten window frames, mould and faulty doors and locks leading to unsecure premises.

Section 68 of the RTA requires landlords to ensure that rented premises are maintained in good repair. Despite this obligation, in our experience there are many instances where landlords and agents do not address major repairs issues unless tenants pursue the formal processes under the RTA. We find that tenants regularly report seeking repairs through phone and email contact, however are either unaware of the formal repairs process, or reluctant to pursue it due to fear of eviction or conflict. Even where tenants do elect to pursue claims we find that practically they often experience difficulty enforcing landlord compliance with VCAT orders to carry out non-urgent repairs.

Although tenants can make an application for compensation in these circumstances, in practice this can be an ineffective enforcement mechanism. Where compensation is sought it is often nominal, because tenants may not be able to show that they have suffered a financial loss. Additionally, claims are often limited to circumstances where a need for repairs arises during the tenancy, despite the issues being evident from the start of the tenancy. In our experience, tenants struggle to enforce repair requests in relation to faults that were present at the time of moving into the property.

There is no legal obligation on landlords to inform a tenant as to the process for seeking repairs. This contrasts with industries such as insurance, where a service provider has a positive obligation to facilitate the making of an effective complaint, even where it is not initially made in the proper form.

We support reforms to the RTA to ensure that houses are healthier for tenants in order to facilitate long-term tenancies. It is insufficient to impose a burden on tenants to follow repairs processes, when they are vulnerable to eviction, and may not know or understand their rights.

### **Recommendation 2:**

- A)** Introduce minimum standards for all rental properties.
- B)** Consider amending the RTA to:
  - enable the condition report to be considered a request for repairs;
  - provide that non-urgent repairs must be attended to within two weeks; and
  - introduce a mechanism for rent to be paid into the special account from the time a request for repairs is made and not released until any pending compensation claim is heard.

---

<sup>4</sup> National Association of Tenant Organisations, *A Better Lease on Life – Improving Australian Tenancy Law* (2010).

<sup>5</sup> National Association of Tenant Organisations, *A Better Lease on Life – Improving Australian Tenancy Law* (2010) 47.

<sup>6</sup> Jane Berry, Footscray Community Legal Centre Inc, *Home Sweet Home – Act for the House Not the Tenant* (2013); Victorian Council of Social Services, *Decent Not Dodgy. ‘Secret Shopper’ Survey* (2010).

---



---

**C)** Amend the RTA to include a legal obligation that a landlord, or their agent, notify any tenant that contacts them about repairs, about how to go about seeking repairs.

### ***Remove fees for residential tenancy matters***

Tenants seeking to assert their rights under the RTA are currently required to pay an application fee when lodging claims with VCAT. This can be a barrier for low income tenants seeking to enforce their rights. Provisions under Division 8A of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) also create a presumption for the reimbursement of fees to successful parties in certain proceedings, including proceedings under the RTA. These provisions disproportionately affect tenants in the Residential Tenancies List where 92% of applications are brought by landlords.<sup>7</sup> Given that tenants only attend approximately 20% of hearings, orders directing a tenant to pay the fee of the landlord create a substantial burden on a large number of vulnerable people.

Tenants have a right to put a landlord to proof, particularly in possession order application hearings in which the order is sought based on a tenant's breach of the RTA. In these cases, the imposition of fee reimbursement effectively operates as a cost for testing evidence. A tenant is not in breach of the RTA or their tenancy agreement by requiring the landlord to prove the grounds claimed to entitle them to possession, yet a tenant may well be found to be the "substantially unsuccessful" party and consequently be required to pay the landlord's fee.

As VCAT receives funding through interest on tenants' bonds held by the Residential Tenancies Bond Authority, and in order to safeguard accessibility, tenants should not be required to pay fees to access VCAT or be required to reimburse landlord fees.

**Recommendation 3:** Amend the VCAT Act to remove application fees for tenants in RTA matters and to remove the discretion to order tenants to reimburse landlord fees.

### ***Increase support for tenants in social housing***

Tenants in social housing often face multiple disadvantages, which can mean that they require support to maintain their housing. Limited housing availability and scarce affordable rental options mean that vulnerable people can find themselves in and out of transitional housing arrangements. Eviction from their home only exacerbates the issues faced by tenants dealing with multiple disadvantage.

**Recommendation 4:** Provide legislated funding for Social Housing Advocacy and Support Programs.

### ***Extending the application of the RTA***

Licensees are currently excluded from the protections provided by the RTA, even in circumstances where the landlord has purported to create a tenancy agreement. In our experience it is common for landlords to give a written agreement to a person paying for occupancy of a room in the landlord's own home. In these circumstances it is clear that the parties intended to create an enforceable tenancy relationship, however because the tenant arguably does not have exclusive possession of the premises, there is a significant risk that VCAT will find that the tenant is a licensee and the RTA does not apply.

This is a problem that affects many of VLA's clients, particularly international students.

---

<sup>7</sup> VCAT *Annual Report* (2013-2014) 21.

---

---

#### Sujin's experience

Sujin signed a rental agreement before arriving in Australia to study. She paid a bond and rent in advance before she arrived. When she arrived she found that the bedroom was not furnished and there was no access to the internet as expected. After she had moved in she raised her concerns with the landlord who told her that she was a troublemaker and insisted that she leave the property immediately. She was then refused access to the property and the belongings she had left behind. Sujin sought to enforce her right to occupy the property and her room under the RTA, however VCAT found that the RTA did not apply as she did not have exclusive possession. This meant that Sujin did not have access to the consumer protection provisions available to tenants under the RTA. Sujin's only remaining option is to make an application in the Civil Claims List at VCAT or the Magistrates' Court, which are a slower, more complex, and more expensive jurisdictions.

**Recommendation 5:** Amend the RTA to provide that its protections apply where two parties have intended to create a residential tenancy relationship even if the tenant does not have exclusive possession. Preserve the reverse onus contained within the RTA.

#### ***Allowing for the termination of co-tenancies***

As identified by the consultation paper, in 2011 there were more than 50,000 "group households" in Victoria, accounting for 11.8% of the rental sector.<sup>8</sup> It is reasonable to consider that this will increase as housing continues to be less affordable. The current RTA fails to provide a sufficient mechanism to enable tenants to leave a co-tenancy. Issues can arise where one co-tenant wishes to leave the tenancy and other co-tenants do not. Currently, if the tenancy is of a fixed term a co-tenant must either assign their portion of the lease to a new tenant, which is not always possible, or reduce the fixed term of the tenancy under section 234 of the RTA. If the tenancy is periodic it is unclear under the RTA what a co-tenant can do if they want to leave and other tenants wish to remain in the property.

#### Cameron's experience

Cameron recently attended our duty lawyer service seeking to end a fixed term tenancy. His co-tenant, who was a stranger before he moved in, had become unstable and aggressive and Cameron no longer felt safe in the property. Cameron gave notice and moved out. There were no grounds for an intervention order as the interaction with the old co-tenant was not ongoing. Despite genuine attempts to find a new tenant to take over his portion of the lease it was not possible to find someone given there was only 3 months left on the lease.

**Recommendation 6:** Amend the RTA to allow for a co-tenant to be removed from the lease whether it is of a fixed term or periodic.

#### ***Apportionment of liability in co-tenancies***

The current RTA fails to provide a mechanism for apportionment of liability for loss between co-tenants. At common law co-tenants are jointly and severally liable for rent and all other responsibilities under the tenancy agreement. Under the *Wrongs Act 1958* (Vic) (*Wrongs Act*) a landlord's claim against joint tenants for compensation, caused by a failure to take reasonable care,

---

<sup>8</sup>2015 *Rental Affordability Snapshot*, Anglicare Australia, 18. Cited in *Residential Tenancies Act Review. Laying the Groundwork - Consultation Paper* (2015), 20.

---

---

is an apportionable claim, but only where there are “concurrent wrongdoers”. In practice it is very rare for this provision to enable loss to be apportioned.

#### Billy’s experience

Billy recently attended our duty lawyer service seeking assistance defending a compensation claim. Billy’s co-tenant had accidentally set fire to part of the property during a party. Billy was away for the weekend and did not know or agree to the party; he was not a concurrent wrongdoer. In these circumstances Billy could be held fully responsible for the damage caused. In order for the Tribunal to order that the landlord only pursue the co-tenant responsible for the damage, Billy would have to establish that he was a “concurrent wrongdoer” and convince the Tribunal to apply the Wrongs Act.

It is already accepted that loss can be apportioned where there are “concurrent wrongdoers” however this should be expressly outlined in the RTA to make this clearer to both tenants and landlords. The benefit of this should also be extended to circumstances where one or more of the co-tenants are not wrongdoers.

**Recommendation 7:** Amend the RTA to enable apportionment of liability between co-tenants.

#### ***Blacklisting***

Tenants who take all reasonable steps to pay arrears once they become aware of them can still be blacklisted, making it difficult for them to secure rental properties in the future. This is of particular concern in situations where it has been extremely difficult for a tenant to have their name removed from a tenancy agreement. Situations can then arise where tenants who remain listed on the tenancy agreement, but no longer reside at the property, are unaware that the tenant who remains at the property has allowed arrears to accrue. Where rental arrears remain unpaid for more than three months, personal information about the late payment cannot be removed from the database.

Real estate agents are required to advise a person when they plan to list them on a database, however in many cases this does not occur because there is no contact address following the termination of the tenancy. As the person has left the property, they may not even be aware of the rental arrears. Even if a tenant takes immediate steps to rectify the issue as soon as they become aware of it, the law does not allow them to remove this information from the database.

**Recommendation 8:** Amend blacklisting provisions such as the definition of “inaccurate” and “out of date” in section 439A so that the words “or tenant becomes aware of the debt” follow “3 months after due”.

#### ***Compensation claims***

In our experience tenants can have difficulties meeting the burden of proof in VCAT proceedings when bringing compensation claims against landlords. Consequently, they are unable to recover losses suffered as a result of a landlord’s failure to comply with their duties.

#### Jayne’s experience

Jayne is a single mother of a young child. Jayne was living in a relatively new flat owned by the Department of Health and Human Services and managed by a housing cooperative. After moving in to the property Jayne made complaints about damp and ventilation issues. Mould had developed and destroyed her furniture, clothes and other goods like her daughter’s toys. The landlord disputed that there was an issue and stated that the mould was caused by Jayne’s failure to ventilate properly.

---

---

Jayne served a breach of duty notice and applied to the Tribunal for an order for repairs to be carried out. Jayne had extensive photographs to show the damage the mould was causing her. The Tribunal ordered a mould expert to inspect. The report found that the property was defective and suggested a number of alterations and installation of “de-humidifiers”. The mould expert also told Jayne that it was not safe for her to remain in the property. Even so, the landlord argued that the building was energy efficient and complied with the current building regulations. The Tribunal reserved its decision at the final hearing.

At the return hearing, the Tribunal encouraged the parties to reach an agreement and raised concerns about how Jayne would obtain evidence to substantiate her claim for compensation. In the end, the parties reached a confidential settlement however failing this, Jayne may have had real issues in proving her actual loss despite the expert evidence in relation to the mould.

Most tenants do not have resources to commission expert reports. Even when they do, tenants can struggle to prove actual loss suffered as a result of the landlord's failure to carry out the repairs. For tenants to pursue these claims it can take considerable time and personal cost. As VCAT largely operates as a costs-free jurisdiction, an additional category for loss relating to inconvenience to the tenant would serve to mitigate this loss.

**Recommendation 9:** Amend the RTA's compensation provisions to provide clearer categories for loss, with the inclusion of a category for inconvenience.

## Preventing arbitrary and unreasonable evictions

### *Preventing evictions without grounds*

Section 263 of the RTA allows landlords to issue 120 day Notices to Vacate for no specified reason. In our experience these notices are often used inappropriately and punitively by landlords. Whilst the RTA provides some protection against retaliatory uses of 120 day notices, this protection is often inadequate in practice.

In our experience, providing the landlord with a right to evict for any reason can provide a cover for evictions to occur for discriminatory reasons or simply because a landlord may not like the tenant. This seriously undermines the consumer protections that the RTA purports to provide. If a landlord is unhappy with a tenant's conduct, 'no reason' notices to vacate provide an option for circumventing the normal process of needing to provide grounds for possession. Providing a tenant with 120 days to vacate does not compensate them for being forcibly removed on this basis.

### Suzie's experience

Suzie is a young mother of a three year old daughter. Suzie formerly lived in public housing but had to flee due to family violence. She experienced periods of homelessness with her child and could not re-access public housing as her former partner had damaged the premises, leaving her with a large unpaid debt. Suzie lived in different rooming houses, but left as she felt unsafe and was concerned she would lose custody of her child.

Suzie was eventually successful in securing long-term housing with a registered housing association. After less than a year at the premises, Suzie was served with a 'no reason' notice to vacate. Suzie was assisted by a Community Legal Centre who challenged the validity of the notice at VCAT on the only basis available, arguing that it was issued in retaliation for her asserting her rights as a tenant. At the challenge hearing, the Tribunal found that the landlord had issued the

---

---

notice as Suzie had too many guests at times, and that those guests would 'buzz' her apartment excessively when she was not home. The Tribunal found that it was the inability of Suzie to control her visitors, even those who were attempting to attend when she was not home, that caused the community housing landlord to issue the 'no reason' notice to vacate.

The Tribunal stated that failing to control the conduct of visitors, leading to interference with neighbours' quiet enjoyment, constituted a breach of duty. It stated that the landlord could have issued a breach of duty notice, and sought a compliance order, which may have resolved the behaviour. However, as the landlord opted to use a 'no reason' notice, and the Tribunal had found it was not issued in response to any exercise of a right by Suzie, it had no discretion but to order that she and her daughter be evicted from their secure community housing property.

Allowing for evictions to proceed for 'no reason' effectively enables evictions to take place for reasons that can be petty and retaliatory. As noted by NATO, evictions without just cause contribute to a power differential between tenants and landlords and can result in tenants trading off their rights against the fear of eviction.<sup>9</sup> To sustain tenancies, remove impediments to vulnerable tenants exercising their rights, and provide stronger protection against retaliatory eviction, tenants should only have their tenancies terminated on grounds as prescribed by the RTA.

**Recommendation 10:** Abolish notices to vacate for no specified reason. Alternatively, abolish these notices for social housing providers and amend the notice period to 12 months for private rentals.

### ***Limiting use of compliance orders***

The RTA provides VCAT with power to issue compliance orders for breach of duty. In our experience the future conduct prohibited by the order can be very broad and is not always limited to the specific conduct that caused the breach. In many instances the conduct prohibited may be difficult to measure or control, such as not making loud noise between certain hours. In addition, compliance orders can be made for the duration of the tenancy. Given the length of social housing tenancies, such orders can remain a trigger for eviction for years.

Compliance with the order can depend on a tenant's capacity to control the conduct of their visitors, other residents (including adult children) and the visitors to these other residents. Given the length and breadth of these orders, this can impose a huge burden on a tenant, particularly where there may be family violence at issue.

The law provides protections for disputes between neighbours, including intervention orders and criminal charges. These are sufficient to manage disputes between private owners of property and in our view should also be sufficient to manage disputes between tenants. Any additional control of the conduct of tenants should be limited to what is reasonably necessary in the circumstances.

In our experience compliance orders are also sought in cases where tenants are engaging in hoarding behaviour. In these circumstances, tenants may comply with the compliance order and remove the goods which are the subject of the order. However, given the recurring nature of hoarding behaviour, at some much later date the order can be relied on to evict the tenant, despite their earlier compliance.

---

<sup>9</sup> National Association of Tenant Organisations, *A Better Lease on Life – Improving Australian Tenancy Law* (2010) 24.

---

---

Compliance orders should be worded as narrowly as possible, and should be of limited duration. If a tenant fails to comply with a compliance order, but the circumstances do not warrant eviction, the Tribunal should have discretion not to evict.

#### Margaret's experience

Margaret has a range of mental health conditions, including severe OCD and symptoms of anxiety and agoraphobia. She has lived in public housing for many years. As a result of her mental health issues she has poor nutrition, limited living skills and has not left her house in nearly two years, including to put out the rubbish. Because of these issues she is reliant on support services for a range of assistance, including to organise cleaning. As a direct result of her mental health issues and associated behaviours she is in extreme financial stress, having accumulated substantial debts to utilities companies.

Margaret's financial administrator advised her that there were insufficient funds to pay for cleaning of her property. Despite the support of agencies advocating on her behalf, the Director of Housing applied to VCAT for a compliance order against Margaret for breach of her obligations to keep the property reasonably clean (s 63).

For a number of reasons, some of which are directly related to her various mental health issues, she was unable to attend the VCAT hearing and was not able to be legally represented. At the hearing VCAT found the Director of Housing was entitled to give Margaret the breach of duty notice (for breach of s 63) and that Margaret had failed to comply. In making its compliance order, The tribunal made an explicit order for Margaret "to refrain from committing a similar breach for the duration of the tenancy" (emphasis added).

The central issue impacting Margaret's ability to comply with the breach of duty notices in this case was her extreme financial stress and reliance on other support agencies, both of which arise directly from her significant mental health issues. In this case, whilst the broadly worded compliance order still stands, she will remain at significant risk of eviction into the future.

**Recommendation 11:** Initial compliance orders should be limited to 6 months before lapsing. Only where subsequent orders are needed should there be discretion for them to be extended for a period of up to 12 months. Tribunal members should be given more flexibility when determining whether a tenant should be evicted. Section 332 of the RTA does not provide this flexibility. Section 332 (1) (b) should be amended so that each of the subsections are alternative bases on which a possession order can be refused.

#### ***Possession for rental arrears***

The 2013-2014 VCAT Annual Report states that of the 61,126 applications to the Residential Tenancies List, most were made by a landlord for possession due to the tenant's failure to pay rent.<sup>10</sup> The Tribunal has the power under section 331 of the RTA to adjourn these proceedings to enable arrangements to be made, or where they have already been made, to avoid financial loss to the landlord. In our experience tenants have often repaid the arrears prior to the possession order

---

<sup>10</sup> VCAT Annual Report (2013-2014) 20.

---

---

hearing, or are in a position to repay the arrears in instalments within a short period of time. In these cases the Tribunal is likely to exercise its discretion under section 331 of the RTA.

In our experience it is often the case that very little negotiation has taken place between the tenant and the landlord in relation to the outstanding rent prior to the possession order hearing. It is preferable to sustain tenancies with arrears repayments where the tenant can repay the arrears. This benefits landlords by increasing their chance of recovering rental losses and benefits tenants by preventing evictions.

In our view it would be more efficient and effective for VCAT proceedings to automatically discontinue if the tenant pays rental arrears in full. Reforming these provisions would reduce the numbers of applications to VCAT, as well as the numbers of applications unnecessarily and inefficiently proceeding to hearing at VCAT, which is likely to result in a cost and time saving for the Tribunal.

#### **Recommendation 12:**

- A)** Insert a requirement into the RTA for landlords to attempt to negotiate a repayment plan with tenants prior to making an application for a possession order on the basis of rental arrears.
- B)** Insert a provision into the RTA that a notice to vacate is not valid or of no effect if rent is paid within 14 days of it being issued.
- C)** Amend the RTA to create a right for tenants to an urgent hearing before VCAT to invalidate an application or warrant for possession if rental arrears are paid in full prior to the application being heard or the warrant being executed.

#### ***Introduce a 'reasonableness' requirement in possession order hearings***

The current RTA does not provide a requirement for evictions to be 'reasonable' in the circumstances. Justice Connect's Homeless Law have advocated for the introduction of a reasonableness requirement in possession order proceedings at VCAT in order to maintain tenancies and 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.<sup>11</sup> We support this approach. Notably, the *Housing (Scotland) Act 2001* 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>12</sup>

Currently VCAT members have discretion under section 352 of the RTA when considering whether to postpone the issuing of a warrant in certain circumstances if the hardship suffered by the tenant would be greater than that to the landlord. Introducing a similar provision in possession order proceedings would provide Tribunal members with added discretion and increase protection for vulnerable tenants.

---

<sup>11</sup> Justice Connect Homeless Law, *Home Safe: Submission to the Royal Commission into Family Violence* (May 2015) 17.

<sup>12</sup> *Housing (Scotland) Act 2001* s16 (3).

---

---

**Recommendation 13:** 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.

## Residential tenancies disputes

### Improving VCAT decision-making

#### *Difficulty enforcing VCAT orders*

In our experience, Victoria Police infrequently enforce restraining orders issued under section 472 of the RTA. Additionally, the process for enforcing non-monetary orders of VCAT, in accordance with section 122 of the VCAT Act, is complex, intimidating to tenants, and not sufficiently timely when tenants are being denied access to their home.

The inclusion of offences underpinning the RTA recognises the significant power imbalance faced by tenants, and is a marked departure from the historical context of residential tenancies being a private contract between parties.

In order to achieve its purpose of establishing rights and obligations between the parties, the RTA must be able to be enforced.

**Recommendation 14:** Amend Schedule 2 of the Residential Tenancies Regulations 2008 to include landlord non-compliance with Tribunal orders as an infringeable offence. Update the police manual and provide additional training for police on the need to enforce orders made against landlords under the RTA.

#### *Increasing alternative dispute resolution at VCAT*

A large proportion of VCAT hearings are for possession based on rental arrears. Tenants that attend may argue for a repayment plan. Section 331(1)(b) of the RTA provides the Tribunal with discretion. In recognition of the impact of being evicted, the Tribunal will often attempt to sustain tenancies, however its power is dependent on being satisfied that satisfactory arrangements have been or can be made to avoid financial loss to the landlord. This could more efficiently be achieved through a without prejudice pre-hearing conciliation, potentially by phone, removing the cost to parties in having to attend an in-person hearing.

The same approach could be adopted for possession applications for breach of a compliance order, although it is likely a face-to-face conciliation would be required in these circumstances. This recognises that most landlords are often attempting to deal with problematic behaviour, rather than necessarily wanting to evict the tenant. A conciliation is more suited to identifying the underlying causes of the breaching behaviour and explore opportunities to address those causes.

Increasing the use of ADR has the capacity to reduce the burden on VCAT, increase arrears recovery rates for landlords and remove the cost incurred by parties in having to attend hearings.

**Recommendation 15:** Consider introducing, on a trial basis, without prejudice opt-in ADR for arrears and compliance order matters. Evaluate the trial to determine whether these are operating to sustain tenancies and increase VCAT efficiency.

#### *Improving tenant attendance at VCAT hearings*

As a result of non-attendance, re-hearings are frequently requested resulting in both tenants and landlords having to attend multiple hearings and incur extra costs in doing so. VLA has previously

---



---

requested that VCAT provide an information sheet to tenants with the notice of hearing providing details of all the legal services available to assist them, including VLA's Legal Help phone line. This would be in line with the current practice of Victoria Police to include VLA's contact details on charge sheets to facilitate the receipt of legal advice at the earliest opportunity. Currently the notice of hearing simply refers both tenants and landlords to Consumer Affairs Victoria.

Informing tenants of the services available to them at an earlier stage has the potential to encourage them to seek assistance prior to the date of the hearing or to approach the duty lawyer service on the hearing date. Tenants who are aware of their rights, how to exercise them and where to seek help in obtaining representation, if required, are more likely to attend their hearings. It may also assist tenants in resolving matters with their landlord prior to the hearing, thereby reducing the time required to be allocated to the hearing at VCAT. Increased tenant attendance would reduce the number of review applications and reduce arbitrary evictions.

**Recommendation 16:** Amend the regulations so that the form of a notice to vacate includes VLA's contact details.

### ***Introducing internal appeal rights at VCAT***

There is currently no access to internal review of decisions made in the Residential Tenancies list at VCAT. Internal appeals would provide a more accessible and affordable right of appeal; increase the consistency, predictability and quality of decision-making and ultimately strengthen jurisprudence.

Internal appeals are available in comparative jurisdictions in both the New South Wales Civil and Administrative Tribunal and the Queensland Civil and Administrative Tribunal.

**Recommendation 17:** Allow for internal appeal from decisions in the Residential Tenancies List to a Senior Member either as a right or with leave where there is materially changed circumstances or a question of law to be considered.

### ***Improving the operation of the Charter in residential tenancy matters at VCAT<sup>13</sup>***

Following the decision in *Director of Housing v Sudi* [2011] VSCA 266 ('Sudi'), VCAT does not have the power to undertake collateral review of applications by public authority landlords to evict tenants by considering the compatibility of these applications with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter). This means that vulnerable individuals and families, who are facing eviction from social housing, must undertake a complex and lengthy legal process to test whether the decision to evict them is a proportionate and reasonable limitation on their human rights. The decision of *Burgess & Anor v Director of Housing & Anor* ('Burgess') has further complicated the process for seeking redress of possible human rights breaches when facing eviction. Following the decision in Burgess, a tenant must either:

- apply to the Supreme Court after the decision is made to issue the notice to vacate but before the VCAT makes the possession order; or
- apply to the Supreme Court very quickly after the decision is made to purchase a warrant order.

In our view VCAT should be expressly conferred with the power to consider the lawfulness under the Charter of decisions of public authorities in respect of eviction – including decisions to issue notices

---

<sup>13</sup> See also Victoria Legal Aid, *Submission to the Charter of Human Rights and Responsibilities Act 2006, Eight-year Review* (June 2015).

---

---

to vacate, make applications for possession and make applications for warrants of possession. Consideration of Charter lawfulness should take place at the same time that VCAT considers whether the actions of the landlords were consistent with the RTA.

**Recommendation 18:** Amend legislation (whether the Charter, VCAT Act or the RTA) to expressly confer VCAT with the power to consider the lawfulness under the Charter of decisions of public authorities in respect of eviction – including decisions to issue notices to vacate, make applications for possession and make applications for warrants of possession.