Fairer, Safer Housing:
Residential Tenancies Act Review
Dispute Resolution Issues Paper

A Submission from the Community Housing Federation of Victoria

The Community Housing Federation of Victoria (CHFV) welcomes this opportunity to make a submission in response to the Dispute Resolution Issues Paper, released by the Victorian Government as a part of its review of the Residential Tenancies Act 1997 (Vic) (RTA).

CHFV is the peak body that represents the not-for-profit community housing sector in Victoria. CHFV's member community housing organisations (CHOs) are committed to providing secure, affordable and decent housing for people on low to middle incomes. Members include the CHOs registered as housing associations or housing providers under the Victorian regulatory framework for non-profit housing providers plus other organisations and individuals interested in housing.

In this response to the Issues Paper on Dispute Resolution, CHFV builds upon its earlier submission to the Consultation Paper published in August 2015.

Background

Why the RTA matters

As social housing landlords, CHOs use the RTA on a daily basis. The RTA provides the principal formal framework under which CHOs relate to their tenants and residents. CHOs are required by regulation to seek to sustain social housing tenancies wherever possible. The RTA is used as a tool by CHOs to sustain tenancies by:

- providing a frame of reference for the rights and responsibilities of tenants; and
- the utilisation of enforcement mechanisms through the Victorian Civil and Administrative Tribunal (VCAT) – not as a method of ending tenancies but principally as a means to ensure tenants comply with their obligations and fully appreciate the consequences of not doing so.

Evictions for non-payment of rent or repeated breaches of duty provisions of the RTA are required by regulation and by CHOs' policies to be used as a last resort only. This approach, coupled with a rent-setting approach that keeps rent at or below affordability benchmarks and a greater ability to link tenants with support offers tenants a measure of security of tenure not seen in the private rental market.

Why dispute resolution matters

Residential tenancies all have the potential for disputes to arise between tenants and landlords. The rights and responsibilities of both parties are set out in the Residential Tenancies Act. It is inevitable that sometimes disputes will arise when parties to a tenancy or residency arrangement have

opposing positions about a right or obligation, and seek to exercise or enforce that right or obligation.

It is important that dispute resolution mechanisms are in place that are able to resolve these problems quickly, affordably and fairly. It is also important that compliance and enforcement tools are available to ensure these decisions can be implemented.

CHFV's response to the Issues Paper

In the following sections, CHFV addresses:

- Desired features of residential tenancies dispute resolution mechanisms – CHFV agrees with the desired features outlined in the paper
- The Community Housing Sector's Approach to Dispute Resolution – CHOs already try to solve disputes with their tenants in a cooperative manner before taking formal options
- Alternative Dispute Resolution – ADR is used only rarely by CHOs and often does not lend itself to use in most tenancy disputes. ADR may be a useful approach in some cases.
- CAV Inspections – rent and non-urgent repair inspections seem to be working well but delays in inspections for goods left behind are a major problem.
- VCAT – the current operations of VCAT are not meeting a number of the desired features outlined in the paper
- Alternative models and mechanisms – CHFV considers the New Zealand model of FastTrack Resolution is an option that would be well worth exploring.

Summary of Recommendations

1. Section 385 of the RTA should be amended so that the inspection of left goods must take place within 7 business days of the request, and that, if this has not occurred, the landlord can dispose of the goods as they see fit.
2. CAV should be resourced so that they can meet this statutory obligation in regard to left goods inspections.
3. Victoria Legal Aid should be funded to provide more ready access to advice for tenants at VCAT hearing venues.
4. Publically-funded tenant advocacy services should be directed (and funded) to provide representation to victims as well as perpetrators in possession cases involving danger, violence and persistent disturbing behaviour.
5. The discretion of VCAT members to not make an order of possession in cases where danger, violence or persistent disturbing behaviour has been proved should be removed.
6. A review hearing should only be granted by leave of the Tribunal. The Tribunal should not allow for the matter to be re-opened if the respondent is not able to provide an adequate explanation for missing the first hearing, with documentary evidence if appropriate.
7. An application for leave to request a review under section 120 of the Act should be made within 3 days after the applicant becomes aware of the order (not 14 days as currently specified in VCAT Rule 4.19).

8. An application for leave to request a review must be heard by a VCAT member within 3 business days.
9. If the respondent misses both the original hearing and a review hearing, then VCAT should not give leave for an application for a further review without documentary evidence of an adequate reason for missing the first two hearings.
10. Work already done to resolve issues before a matter comes to VCAT should be recognised in the VCAT decision-making process.
11. Establishment of an internal appeals mechanism for VCAT should be investigated.
12. The introduction of a legally-binding endorsed agreement system similar to New Zealand's 'FastTrack Resolution' process should be investigated.

Desired features of residential tenancies dispute resolution mechanisms

The Issues Paper lists the following as desired features of residential tenancies dispute resolution mechanisms:

- Fair
- Fast
- Low-cost
- Accessible
- Fit for purpose
- Certain

CHFV totally agrees that these are the most important features for effective residential tenancies dispute resolution mechanisms. We do not believe that there is much value in ranking the importance of these features – they are all very important.

CHFV is concerned that some of these features are not present in the current dispute resolution system for residential tenancies matters in Victoria. This will be explored later in our submission.

The Community Housing Sector's Approach to Dispute Resolution

CHOs are non-profit community-based organisations dedicated to providing safe affordable housing for people on low incomes. They are interested in preserving these tenancies rather than ending them. When disputes arise during the course of a residency their first response is to contact the tenant and see if the matter can be sorted out by mutual agreement. For instance, if a rent payment is not made the CHO will contact the tenant to discuss why the payment was missed, what they can do to assist the tenant, and organise a generous repayment plan that ensures arrears are slowly caught up without jeopardising the tenant's ability to make ends meet with the other expenses in

their life. If there are behavioural issues, again the CHO will contact the tenant to discuss these and see what both parties can do to remedy the situation. Progression to formal dispute resolution via official notices to the tenant and applications for VCAT hearings only occurs once these other options have been exhausted.

CHOs frequently assist tenants by referring them to services that deal with mental health, general health, financial counselling, drug and alcohol counselling, family counselling and legal advice. These areas may be the underlying cause of a tenancy dispute, and this is acknowledged by community housing workers.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) procedures are referred to in a number of different places in the Issues Papers. ADR services cited include:

Dispute Settlement Centre Victoria - Free mediation service

Consumer Affairs Victoria - Frontline Resolution

- Conciliation service

Tenancy Advice and Advocacy Program - negotiation services for vulnerable and disadvantaged tenants

VCAT - mediation and compulsory conferences at the Tribunal hearing

CHFV members have used these services only very occasionally and with mixed success. Sometimes an agreement is successfully complied with by both parties, on other occasions an agreement has been broken the day after it was made.

The probable reason for the low take up and limited success of ADR is that resolution of residential tenancy disputes often does not lend itself to techniques like mediation. Three of the basic requirements for mediation are:

- Both parties are willing participants
- There is not a power imbalance
- Both parties have the necessary skills to negotiate and then abide by the terms of an agreement

All three of these are often problematic. Tenants are often unwilling to discuss disputes. There is an inherent power imbalance between a landlord and a tenant. There are also power imbalances in case where violent or abusive tenants have other parties (usually their neighbours) intimidated. Many community housing tenants have complex issues including psychiatric and mental health disabilities, personality disorders and drug and alcohol problems, often in combination. This diminishes the likelihood of successfully negotiating an agreement and having it adhered to.

The other thing to note when looking at ADR for community housing tenancy disputes is that, as outlined previously, the first approach to disputes by CHOs is to try to discuss and solve the matter co-operatively. Negotiations have already taken place or been attempted before any community housing matter is taken to VCAT.

CAV inspections and advice

The Act provides for parties to apply to the Director of CAV to investigate and report on the following:

- rent increases (tenants)
- non-urgent repairs (tenants), and
- goods left behind (landlords).

Rent Increases

CHOs are generally happy with the way CAV conducts inspections to determine market rents to evaluate the legitimacy of rent increases.

Non-urgent Repairs

CHOs are generally happy with the way CAV conducts inspections to determine the need for non-urgent repairs requested by tenants.

Goods left behind

CHOs frequently have to deal with properties full of goods left behind after tenants have left in response to a notice to vacate or VCAT order, or simply abandoned the property without notifying the landlord. The landlord must handle these in accordance with the provisions in Part 9 of the Act. Under section 385 of the Act, a landlord can request written advice from the Director of CAV about whether they can remove, destroy or dispose of goods left behind by a tenant. This is an option that virtually all CHOs choose to use. A CAV report provides them with protection if an ex-tenant subsequently makes a spurious claim for compensation for possessions that have been removed, destroyed or disposed of.

Over recent years, the responsiveness of CAV to these requests has varied greatly. There have been periods where the response time has generally been 3 to 5 days. However there have also been periods where this has grown to waiting times of several weeks. Our members report that current waiting times for an inspection are at least 3 weeks. In some areas it is as high as 7 weeks. This is clearly unsatisfactory.

The delays in getting inspections of left goods performed have a number of implications for CHOs. Firstly, there is a critical shortage of affordable housing in Victoria at present. Most CHOs have hundreds of individuals and families on their waiting lists yet properties are remaining vacant because they are waiting for a CAV inspection. Secondly, this is affecting their financial viability because they are not receiving rental income from the property while it is vacant. Thirdly, it affects their performance for turnover of vacant properties which is a key performance indicator measured by the Housing Registrar – the regulator of the registered rental housing sector in Victoria.

As stated in the previous submission on the Rights and Responsibilities of Landlords and Tenants Issue Paper, CHFV believes that there should be a statutory requirement for the Director of Consumer Affairs to complete an inspection within a fixed timeframe. Section 385 of the RTA should be amended so that the inspection must take place within 7 business days of the request, and that, if this has not occurred, the landlord can dispose of the goods as they see fit. CAV will need to be resourced so that they can meet this statutory obligation.

Victorian Civil and Administrative Tribunal (VCAT)

VCAT is far the most important formal dispute resolution system the community housing sector used by the community housing sector. As stated previously, CHOs make every effort to try to resolve disputes co-operatively with tenants, but when this does not succeed they must use VCAT to make judgements on disputes and provide enforcement tools.

The Issues Paper lists the desired features of residential tenancies dispute resolution mechanisms as being:

- Fair
- Fast
- Low-cost
- Accessible
- Fit for purpose
- Certain

VCAT is assessed for performance against each of these features in the following sections:

Fair – Dispute resolution processes and decisions should be fair, and be seen as fair. Steps should be taken to address any significant power imbalances between disputants.

The hearing process itself is generally conducted in a fair manner by VCAT members. However there is an intrinsic power imbalance between a landlord and an unrepresented tenant. It would be good to have a greater availability of duty solicitors to assist tenants.

There is another power imbalance occurring. CHOs are finding that they are increasingly dealing with violent or intimidating tenants who have untreated psychiatric illnesses, personality disorders

or amphetamine and/or alcohol addictions. Their neighbours are usually also community housing tenants, also on low incomes with their own issues to deal with. This makes their lives even more fraught. A number of CHOs are finding that when they are seeking orders of possession for danger or damage, or termination of a residency under the Part 8 provisions for violence, the respondents are being represented by expert lawyers from government-funded tenant advocacy groups. The interests of the victims in these situations are represented by community housing workers with no formal legal training. Our understanding is that the funding guidelines and/or internal policies of these organisations stipulate that tenants can only be represented when their tenancy is under threat. Therefore violent perpetrators are represented but their victims are not eligible to receive representation.

Non-profit community housing providers simply do not have the resources to procure legal representation at these hearings. A far better approach would be for the government to provide an opportunity for free legal representation for the victims as well as the perpetrators in these cases.

This situation is exacerbated by the attitude of some VCAT members in such hearings. Some members find that a respondent has committed an act of violence, but use their discretion to give the tenant a "second chance". There is also the problem of interpreting the word "endangers" in the Act as meaning that there is an ongoing danger to others from the person receiving the notice. As discussed in CHFV's previous submission on the Rights and Responsibilities of Landlords and Tenants Issue Paper, the VCAT members conduct an exercise in mind-reading and prediction of the future in order to determine whether the respondent "is" a danger to others. This issue could be remedied by changing the word "endangers" to "has endangered" in sections 244 or 279.

We now have a situation where the reputation of some rooming houses and blocks of units is such that some homeless people would prefer to sleep "rough" or live in their cars than move into such accommodation. The RTA Review is titled "Fairer Safer Housing". In order for safer housing to be created there is a need for a serious look at how the rights of victims of violence are protected at VCAT. Violence and intimidation should be "non-negotiables" and members should not have the discretion to allow tenants to stay if these have been proven to have occurred.

Another aspect of VCAT's hearing process that frustrates CHOs is a lack of acknowledgment of work already done to resolve issues before the matter comes to VCAT. As described previously, the first approach to disputes by CHOs is to try to discuss and solve the matter co-operatively. Negotiations have already taken place or been attempted on numerous occasions before any community housing matter is taken to VCAT. It is then considered unfair when VCAT members grant further consent orders or adjournments when tenants are already in arrears and have broken a number of internal agreements. This is also the case in applications for possession following numerous breaches of duty for anti-social behaviour that CHOs have tried to address co-operatively.

CHOs are highly regulated, both internally and externally, compared to real estate agents and private landlords. They work in accordance with Housing Registrar-approved policies and procedures that focus on justice and equity to ensure the welfare of tenants. Their KPI's include eviction rates. This means that, quite rightly, CHOs only seek possession of a property when all other channels have been exhausted, and thus rely on VCAT giving proper weight to work that CHOs have already done prior to making applications for orders.

Fast – Speed of resolution is important given the potential impacts of housing related disputes on the parties, including financial hardship for either, the impact of an unresolved dispute on the tenant-landlord relationship, and the related risks of homelessness for some tenants, and loan defaults for some landlords.

The actual speed of getting a hearing has improved recently. For several years there was a period for the first months where cases would take 4 to 6 weeks from the time of application to be heard. That has not been a problem this year. Hearings generally take 2 to 3 weeks from time of application, which is reasonable.

Problems with speed of resolution do occur, however, when the review system is abused. Our members are noticing an increasing number of tenants being granted second and third reviews following hearings that they have deliberately not attended. This is becoming a financial issue for our small non-profit community housing providers. I have attached an example to illustrate the cost to housing groups.

Case Study – Misuse of Reviews

Rent arrears were $543 when the notice to vacate was sent on 9th June 2015, and had grown to $2,335 by the date the warrant was executed on 1st September. During that time:

- Original hearing was held and not attended by respondent
- A review hearing was held and not attended by respondent
- A second review hearing was granted and again not attended by respondent

Each of these 3 hearings involved a tenancy worker travelling from Richmond to Dandenong to attend. VCAT staff from Dandenong even rang and asked if the housing provider would be agreeable to a third review hearing. As you can imagine, this was met with a negative response.

This example is not unusual. It is hardly an example of a "fast" process – one of the essential features the Issues Paper suggests for dispute resolution processes.

Under section 120 of the VCAT Act, members should only allow a review hearing if they are satisfied that "the applicant had a reasonable excuse for not attending or being represented at the hearing" and "the applicant has a reasonable case to argue in relation to the subject-matter of the order" and consider "any prejudice that may be caused to another party if the application is heard and determined". Our experience is that these matters are not considered and reviews are granted as a matter of course. CHFV raised these matters with VCAT last year and they have said they will address this, but we have not seen any evidence of this so far.

CHFV has no issue with parties having the right to a review if they have a genuine reason for missing a hearing, but we believe there needs to be a concerted effort to stop people in the know from "gaming the system". CHFV suggests the following:

- A review hearing should only be granted by leave of the Tribunal. The Tribunal should not allow for the matter to be re-opened if the respondent is not able to provide an adequate explanation for missing the first hearing, with documentary evidence if appropriate.

- An application for leave to request a review under section 120 of the Act should be made within 3 days after the applicant becomes aware of the order (not 14 days as currently specified in VCAT Rule 4.19).

- An application for leave to request a review must be heard by a VCAT member within 3 business days.

- If the respondent misses both the original hearing and a review hearing, then VCAT should not give leave for an application for a further review without documentary evidence of an adequate reason for missing the first two hearings.

This misuse of reviews is costing small non-profit housing providers a lot of money in terms of lost rent, travel costs and staff time. (In the example above not one cent of rent was paid between the original notice on 9th June and execution of the warrant on 1st September.) This affects their ability to keep rents down and to provide a good quality service to their low-income tenants. It also affects the availability of affordable housing – a very scarce resource in the current market.

Low-cost – Cost should not be a barrier to resolving disputes, particularly in a sector supplying an essential commodity such as housing, and where the parties are predominantly private individuals.

The current fee for a VCAT RTA application is $59.80 and will rise to $61.50 from 1st July. This is not insignificant, considering the number of applications CHOs need to make each year. However, CHFV believes this is reasonable. Low-income tenants are eligible for a fee waiver if they apply, and CHFV believes this should be maintained.

There is no fee for applications relating to disbursement of bonds. CHFV believes this should also continue to be the case.

Accessible – Information about the dispute resolution options should be well publicised, and easy to find and understand. Processes should be informal, easy to understand and accessible to a diverse population. In addition, the tools, services

or mechanisms should be easy for parties to access, in terms of delivery method (telephone, internet, post, on-site/in person).

CHFV believes this is being done well. We are particularly supportive of VCAT's efforts to encourage tenants to attend hearings through innovations like sending text messages to mobile phones. CHOs always try to make sure that their tenants know their legal rights and make sure that they are aware of hearings and encourage them to attend.

Fit for purpose – The method of dispute resolution should be appropriate for the matter in question, and the outcome sought. Processes should be economical and take advantage of technological innovations.

VCAT aims to have a less formal and legalistic approach than the rest of the Victorian court system. It generally succeeds in this.

Certain – Binding decisions made according to legislation should be transparent and consistent, offering certainty such that parties can be confident in the operation of the market generally, and in the outcomes of any dispute resolution processes they pursue.

By far the biggest criticism of VCAT that CHFV hears from CHOs is lack of consistency. This criticism is shared by tenants, tenant advocates, real estate agents and DHHS housing officers.

CHFV believes that this issue could be addressed by VCAT having an internal appeals process.

An internal appeals tribunal was one of Justice Kevin Bell's recommendations in his 2009 review of VCAT. He gave 3 reasons that an internal appeals tribunal would be an improvement:

- to give parties a more accessible and affordable right of appeal
- to increase the consistency, predictability and quality of tribunal decision-making
- to encourage the tribunal to build a bank of jurisprudence

An internal appeal mechanism would save the expense of the current only appeal option - the Supreme Court. Most CHOs (and tenants for that matter) cannot afford this. Effectively this means members currently make decisions with little fear of scrutiny.

The second and third reasons are about creating better consistency and predictability.

CHFV does have a concern that if tenants use the right to appeal, then it could lead to further delays in the process of getting an order of possession (see the discussion about reviews above). There would have to be strict rules creating a short period for appeal and limiting appeals to matters of law (including combinations of law and fact). Leave to appeal should only be granted by a senior

member in chambers, and VCAT would need to be resourced to cover the extra work that would be involved.

CHFV believes that it would be well worth exploring the idea of an internal appeals mechanism for VCAT and would be very willing to participate in the development of such a system.

Alternative models and mechanisms

CHFV is very interested in the New Zealand model described in the Issues Paper where parties can formalise an agreement they have reached independently, via the 'FastTrack Resolution' process. It would be good for our previous co-operative work with tenants to be recognised through being able to reach an agreement about arrears repayment, say, and then being able to apply to the Tribunal for something like FastTrack Resolution. The endorsed agreement would also become legally binding at VCAT. This idea is well worth exploring for Victoria.