

## Residential Tenancies Act Review

### Security of Tenure Submission

31 December 2015

## Civil Justice Program – Victoria Legal Aid

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



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## About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist 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 per cent of these occasions, the person we assisted had arrived in Australia within the last five years. On 390 occasions we provided representation to tenants, and in just over 33 per cent of these occasions the person we represented disclosed having a disability.

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## Executive Summary

Access to safe, secure and affordable housing can be central to individual and family wellbeing. Stable housing can minimise the challenges of poverty, enable people to develop their capabilities, achieve their full potential and gain a sense of social connection. As noted in the Issues Paper, stable housing can also support better social, economic and health outcomes. The legal framework relating to tenancy terminations, managing tenancies and removing obstacles to securing housing, can directly influence security of tenure outcomes.

VLA supports reforms to the *Residential Tenancies Act 1997* (RTA) and the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) to ensure that tenancies are managed sustainably and evictions occur only as a last resort. This submission outlines specific reforms aimed at preventing arbitrary and unreasonable evictions, ensuring that tenancies are managed sustainably, enabling people to exercise their legal rights and removing barriers that prevent people from securing housing. These reforms are central to achieving security of tenure, particularly for people facing social and economic disadvantage and marginalisation.

Our submission relates primarily to section three of the issues paper. We draw on and refer the Review team to our previous submission made in response to the *Laying the Groundwork Consultation Paper*.

## Summary of recommendations

<b>Prevent arbitrary and unreasonable evictions by amending termination provisions</b>	<b>Recommendation 1 – Repeal ‘no reason’ notices to vacate</b> 1.1 Abolish no reason notices to vacate. 1.2 In the alternative, amend section 263 of the RTA to prohibit the use of no reason notices to vacate by public and community housing providers and extend the notice period required to 12 months for private landlords.
	<b>Recommendation 2 – Introduce a “reasonableness” test in possession order hearings</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.
	<b>Recommendation 3 – Fairer process for rent arrears</b> 3.1 Amend sections 246, 281, 305, 306 and 317ZB of the RTA to make notices to vacate issued for rent arrears invalid if the tenant pays the amount due and is no longer in arrears at the end of the notice period. 3.2 Insert a requirement for landlords to attempt to negotiate a payment plan prior to making an application for possession. Amend section 331 of the RTA to require VCAT to dismiss an application for possession where no attempt to negotiate a payment plan has been made. Require evidence of such attempts to be a condition for the making a possession order, to be satisfied even in situations where the tenant does not attend their VCAT hearing.

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	<p>3.3 Amend the <i>Residential Tenancies Regulations 2008</i> (Vic) to require the standard form notice to vacate for rent arrears to include a statement advising the tenant of:</p> <p>3.3.1 Their right to request a payment plan under section 331 where satisfactory arrangements can be made to ensure the landlord does not incur further hardship.</p> <p>3.3.2 The landlord's obligation to attempt to negotiate a payment plan with the tenant before making an application to VCAT and the Tribunal's obligation to dismiss an application where attempts have not been made; and</p> <p>3.3.3 The invalidity of the notice to vacate if the arrears are paid before the termination date.</p> <p><b>Recommendation 4 – Repeal notices to leave</b></p> <p>4.1 Repeal notices to leave.</p> <p>4.2 Have Consumer Affairs make available training and education material for rooming house owners and caravan park owners. This material would educate operators as to the existing powers of Victoria Police to remove violent persons and of the notices to vacate that can already be issued when residents engage in serious acts of violence.</p> <p><b>Recommendation 5 – Enable challenges to all retaliatory notices to vacate</b></p> <p>Amend sections 266, 289, 315 and 317ZH of the RTA to enable a challenge to all types of notices to vacate which are given in retaliation to an exercise or proposed exercise of rights, application or proposed application to VCAT or any current VCAT orders.</p>
<p><b>Ensure tenancies are managed sustainably</b></p>	<p><b>Recommendation 6 – Limit the use of compliance orders</b></p> <p>6.1 Amend compliance order provisions to limit initial compliance orders to six months. Enable VCAT to extend compliance orders up to a maximum of 12 months but only where VCAT is satisfied that the extension is necessary.</p> <p>6.2 Amend section 332(1)(b) of the RTA so that each of the subsections is an alternative basis upon which a possession order can be refused. Change the word “and” in sections 332(1)(b)(i) and (ii) to “or”.</p> <p><b>Recommendation 7 – Extend the coverage of the RTA to licensees</b></p> <p>7.1 Extend the coverage of the RTA to include licensees.</p> <p>7.2 Preserve the reverse onus jurisdiction contained in section 507 of the RTA.</p> <p><b>Recommendation 8 – Improve the enforceability of restraining orders</b></p> <p>8.1 Amend schedule 2 of the <i>Residential Tenancies Regulations 2008</i> (Vic) to make failure by a landlord to comply with a restraining order an infringeable offence.</p>

	<p>8.2 Update the Police Manual to include a chapter on residential tenancies to advise police of their powers to issue infringements and prosecute persons who fail to comply with a determination of the Tribunal.</p> <p>8.3 Provide more training for Police to emphasise the importance of enforcing orders of the Tribunal.</p> <p>8.4 Amend section 472 to require VCAT to include in its order a sentence that reads <i>“this is a civil order however failure to comply with it is a criminal offence for which Victoria Police can prosecute”</i>.</p>
<p><b>Make legal recourse accessible for people to exercise their rights</b></p>	<p><b>Recommendation 9 – make human rights accessible</b></p> <p>9.1 Implement the recommendations of the Charter Review 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.</p> <p>9.2 Amend the Charter to expressly state that an incorporated body that receives financial assistance from the Director of Housing for the purposes of providing non-profit housing constitutes a public authority for the purposes of the Charter.</p> <p>9.3 Amend the <i>Housing Act 1983</i> (Vic) to require community housing providers to have clearly articulated policies in relation to evictions and require them to publish those policies and make them available on request.</p> <hr/> <p><b>Recommendation 10 – Introduce internal appeal rights at VCAT</b></p> <p>Amend the <i>Victorian Civil and Administrative Tribunal Act 1998</i> to enable internal appeal rights to a Senior Member either as a standalone right or with leave of the Tribunal.</p>
<p><b>Remove barriers to securing housing</b></p>	<p><b>Recommendation 11 – Standardise rental references</b></p> <p>11.1 Have Consumer Affairs produce a standardised form for the giving of rental references.</p> <p>11.2 Introduce amendments to the RTA to mandate the using of the standardised rental reference form when giving rental references.</p> <p>11.3 Introduce amendments to enable enforcement of these changes by either imposing a penalty for non-compliance or including this requirement as a duty provision under the Act for which a tenant could seek compensation if a landlord or agent breaches these provisions.</p> <hr/> <p><b>Recommendation 12 – Create a fund to assist tenants experiencing disadvantage</b></p> <p>Create a fund to assist tenants experiencing disadvantage to cover lease breaking costs, other compensation claims and expenses relating to new tenancies</p> <hr/> <p><b>Recommendation 13 – Simplify reduction of fixed term tenancy applications</b></p> <p>13.1 Amend section 234 of the RTA to allow tenants to elect for reduction matters to be listed for hearing within 48 hours.</p>

- 13.2 Amend section 234 to expressly state that VCAT has the power to reduce the term of a fixed term agreement *and* terminate the periodic tenancy agreement created by the reduction order.
- 13.3 Amend section 234(3) to cap the maximum amount of compensation payable to a landlord to two weeks' rent.
- 13.4 Introduce a similar provision to section 100 of the NSW RTA to enable a tenant with a final family violence intervention order to terminate their fixed term tenancy agreement (without paying compensation to the landlord or without the need for a hearing) by issuing a 14 day notice of intention to vacate. Retain section 234 to provide remedies for people experiencing family violence who choose not to obtain a final intervention order.

**Recommendation 14 – Enforce provision of information to tenants subject to family violence**

- 14.1 Introduce a new offence provision for situations where landlords fail to provide particular information to tenants when tenants advise their landlords of their need to break their lease. Have Consumer Affairs produce a detailed information factsheet on all the options available to a tenant when they need to break their lease. Have this factsheet include specific information and tailored content for situations where there is family violence including the availability of support services and services which can give free legal advice.
- 14.2 Require landlords and agents to provide this factsheet to tenants whenever a tenant advises them of their need to break their lease or the existence of family violence.

**Recommendation 15 – Amend tenancy databases**

- 15.1 Amend section 439A of the RTA to redefine the words “inaccurate” and “out of date” so that the words “or the tenant becomes aware of the debt” follow the words “three months after the amount became due” in each of the definitions.
- 15.2 Introduce a new section 439LA enabling a tenant to apply for early removal from a database on hardship grounds.
- 15.3 Amend section 439K of the RTA to reduce the period of time in which a tenant can be listed on a database from three years to 18 months.
- 15.4 Amend section 439I(4) of the RTA to require a database operator to provide at least one free method of obtaining a copy of their database report. In the alternative, introduce amendments that require a database operator to provide at least one free database report every 12 months upon request, with reports to be provided within seven days of a request being made.

**Recommendation 16 – enable faster access to bonds**

Amend section 417 of the RTA to explicitly state that section 126 of the *Victorian Civil and Administrative Tribunal Act 1998* does not apply to the 10-business day

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	limitation period in section 417(2) for making an application in relation to a tenant's bond.
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## Achieving security of tenure

The Issues Paper identifies particular aspects of the RTA that directly influence security of tenure. In our experience, these provisions are not limited to those relating to lease terms, terminations of tenancies, rent increases, and repairs, maintenance and modifications. Security of tenure is also affected by provisions relating to managing tenancies sustainably, a person's ability to exercise legal rights and barriers to securing housing.

### Preventing arbitrary and unreasonable evictions by amending termination provisions

As noted in the Issues Paper, provisions for terminating a lease or tenancy are central to security of tenure. The recommendations below aim to prevent arbitrary and unreasonable evictions.

#### Repeal no reason notices to vacate

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 section 266(2) of the RTA provides some protection against retaliatory uses of 120 day notices, this protection is often inadequate in practice and is inconsistently interpreted and applied by VCAT, creating uncertainty for tenants. Proving retaliation on the balance of probabilities can also be very difficult for a tenant, particularly when a landlord can rebut the argument by providing any other motivating reason.

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 seeks to provide. No reason notices to vacate allow a landlord to circumvent the normal process of providing grounds for possession underpinned by evidence.

Providing a tenant with 120 days to vacate the property does not compensate for the significant inconvenience and financial and social costs of having to relocate. These costs can include removalist and storage costs, utility connection and disconnection fees and the need to dispose of possessions or purchase replacement possessions, as well as disconnection from community including education and health care providers.

#### 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 that 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

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only basis available, arguing that it was issued in retaliation for her asserting her rights as a tenant. At the 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' behaviour including 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.

In VLA's experience, some community housing providers regularly use these notices to evict their tenants. Whilst we acknowledge the challenging task of social housing providers in managing complex tenancies, it is inappropriate to use these notices as a 'catch-all' measure where there are no other valid grounds for possession.

#### **Anna's experience**

Anna is a public housing tenant. Anna suffers from cystic fibrosis. Over a period of months, Anna experienced a progressive decline in her mental health. During this time Anna caused some damage to the rented premises. Her mental health continued to deteriorate over the following months and she was ultimately admitted to hospital as an involuntary patient under the Mental Health Act and diagnosed with a mental illness. Two days into her three-month involuntary admission, the Director of Housing issued Anna with a no reason notice to vacate. By using a no reason notice to vacate the Director does not have to establish a basis for the notice, and unless Anna can show that the notice was issued in retaliation, she has no real capacity to challenge the eviction at VCAT.

Anna's mental health is now markedly better, however she is now facing uncertainty and possible homelessness whilst attempting to sustain her improved mental health and continue her treatment for cystic fibrosis.

Allowing for evictions to proceed for 'no disclosed reason' effectively enables evictions to take place for reasons that can be petty and retaliatory. As noted by the National Association of Tenant Organisations, 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>1</sup> In our experience, tenants who are given advice about their rights regarding issues like repairs and compensation will regularly decide not to enforce them out of fear of receiving a no reason notice to vacate. This is particularly common for renting families whose children may be forced to change schools due to school catchment zones.

As identified in the Issues Paper, such an approach creates uncertainty and stress for tenants and can deter them from exercising their rights to request repairs or make legitimate complaints. This is particularly concerning for low-income and disadvantaged households who already suffer

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<sup>1</sup> National Association of Tenant Organisations, *A Better Lease on Life – Improving Australian Tenancy Law* (2010) 24.

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disproportionately from a lack of security of tenure given the chronic shortage of low cost housing, and the unequal bargaining power this creates.

There are numerous grounds on which a landlord may seek a possession order under the RTA without the need for no reason notices, which represent an arbitrary and unfair method of eviction. To sustain tenancies, remove impediments to tenants exercising their rights, and provide stronger protection against retaliatory evictions, section 263 of the RTA should be repealed. It is our submission that this would strike a fairer balance between a tenant's right to feel secure in their home with a landlord's control over their asset.

### **Recommendation 1 – Repeal no reason notices to vacate**

- 1.1 Repeal notices to vacate for no specified reason.
- 1.2 Alternatively, abolish these notices for social housing providers and amend the notice period to 12 months for private rentals.

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

The current RTA does not provide a requirement that evictions be 'reasonable'. Justice Connect 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>2</sup> We support this approach. The *Housing (Scotland) Act 2001* is an example of legislation that provides a mechanism to achieve increased fairness. That Act provides that, for certain types of tenancy agreements, the court must be satisfied that the landlord has a statutory ground for recovery of possession and that 'it is reasonable to make the order' for possession. The reasonableness test incorporates consideration of the nature, frequency and duration of action by the tenant leading to the application to evict, the degree to which the tenant is responsible for the eviction proceedings, the effect of the tenant's conduct on others and whether the landlord has considered other possible courses of conduct.<sup>3</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. This provides for an additional 30 days and does not empower the Tribunal to prevent the eviction, even in circumstances where a Member considers it reasonable to do so. Amending the RTA to provide for a similar provision for possession order hearings would allow a Member to consider whether the making of a possession order is appropriate, reasonable and proportionate and would provide Tribunal Members with greater discretion to sustain the tenancy.

### **Recommendation 2 – Introduce a "reasonableness" test in possession order hearings**

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.

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<sup>2</sup> Justice Connect Homeless Law, *Home Safe: Submission to the Royal Commission into Family Violence* (May 2015) 17.

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

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## Fairer process for rent 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>4</sup> A large number of tenants face eviction every year for arrears matters, and it is our view that many of these evictions can and should be prevented.

Where a tenant is able to pay off the arrears, it is preferable for both landlords and tenants to sustain the tenancy; this benefits landlords by increasing their chance of recovering rental losses (particularly where the arrears exceeds the bond paid or where a tenant is 'judgment proof') and benefits tenants by preventing evictions. Despite this, we regularly see cases proceed to VCAT in which a tenant is willing and able to repay the arrears, but in which no attempt has been made to negotiate a payment plan by landlords.

Under section 331 of the RTA, VCAT has the power 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 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 order to decrease the likelihood of the matter reaching VCAT, however, it is our view that landlords should be required to attempt to negotiate a payment plan before they are able to obtain a possession order.

### **Belle's experience**

Belle was a retail worker who lived in private rental with her sister and two children. The family had always paid rent on time and had lived at their current property for over three years. Belle was retrenched from her position and quickly set about finding new employment. She spoke with her property manager to explain that rent would be a bit late for the month, but that she had secured new employment and would be back on track shortly. The agent responded that, as the landlord had a mortgage, she had been instructed to issue a notice to vacate and seek eviction. The agent mentioned that this would enable the landlord to claim on their insurance. Belle had paid the rent up to date and was starting to get back in advance by the time the possession order hearing was listed. Despite Belle's attempt to negotiate, the property manager continued to seek possession. The Tribunal Member readily adjourned the possession order pursuant to a payment plan, however Belle was forced to take the day off work to attend the hearing. Belle was incredibly stressed by this as her new employer had warned her that she must not take leave during her probationary period.

In addition to requiring landlords to negotiate, it would be more efficient and effective for VCAT proceedings to automatically discontinue if the tenant pays rental arrears in full. This would reduce the number of applications to VCAT, as well as the number of applications unnecessarily and inefficiently proceeding to hearing at VCAT. Given the significant proportion of the Tribunal's time that is currently taken up with arrears matters, the net effect of this would be a considerable time and cost saving for the Tribunal.

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<sup>4</sup> VCAT Annual Report (2013-2014) 20.

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### **Recommendation 3 – Fairer notices to vacate for rent arrears**

- 3.1 Amend sections 246, 281, 305, 306 and 317ZB of the RTA to make notices to vacate issued for rent arrears invalid if the tenant pays the amount due and is no longer in arrears at the end of the notice period.
- 3.2 Insert a requirement for landlords to attempt to negotiate a payment plan prior to making an application for possession. Amend section 331 of the RTA to require VCAT to dismiss an application for possession where no attempt to negotiate a payment plan has been made. Require evidence of such attempts to be a condition for the making a possession order, to be satisfied even in situations where the tenant does not attend their VCAT hearing.
- 3.3 Amend the *Residential Tenancies Regulations 2008 (Vic)* to require the standard form notice to vacate for rent arrears to include a statement advising the tenant of:
  - 3.3.1 Their right to request a payment plan under section 331 where satisfactory arrangements can be made to ensure the landlord does not incur further hardship;
  - 3.3.2 The landlord's obligation to attempt to negotiate a payment plan with the tenant before making an application to VCAT and the Tribunal's obligation to dismiss an application where attempts have not been made; and
  - 3.3.3 The invalidity of the notice to vacate if the arrears are paid before the termination date.

### **Repeal notices to leave**

Section 368 of the RTA enables a manager of certain premises such as rooming houses and caravan parks to issue a resident with a notice to leave for 'serious acts of violence'. These notices require the resident to leave the property for 48 hours and make it an offence for them to return during this period. These notices suspend the residency, and during the 48 hour period the manager has the ability to apply to VCAT for an urgent order terminating the residency. The result is that residents can be made homeless for 48 hours at the discretion of operators, because of untested or unsubstantiated allegations.

In our experience, these notices can be misused by operators and are sometimes issued to residents who raise legitimate issues about repairs or unfair house rules. It is also noteworthy that the power to issue a notice to leave is given to rooming house managers who are not independent, formally trained or professionally supported to fairly determine whether a serious act of violence has occurred or whether the safety of any person is in danger. Whilst section 368A of the Act makes it an offence for an operator to issue a notice to leave without reasonable grounds, we are unaware of this penalty ever being applied, making this protection illusory for many residents. In practice, it will be very difficult for a tenant to prove beyond reasonable doubt that the operator had no reasonable grounds for believing that serious violence had occurred and had therefore committed an offence under the RTA.

Many rooming house residents experience multiple and overlapping disadvantage, and it is our surmise that many will not make use of complaints mechanisms to bring instances of the misuse of notices to leave to the attention of Consumer Affairs. It is also our experience that Consumer Affairs is unlikely to investigate or commence proceedings for section 368A offences unless there is a systemic pattern of conduct by a large operator. In any event, subsequent proceedings do not address the significant inconvenience a resident faces by being removed from their home for 48 hours without any of the allegations being proven or tested by a Court or Tribunal.

Importantly, in the absence of Part 8, the law provides sufficient protection to rooming house operators who have a reasonable belief that a resident has committed a serious act of violence or

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poses a danger to other residents. Such operators can make use of personal safety intervention orders, and may call the police, who have powers to remove or arrest the resident.

Further, if an operator believes that a resident has caused danger, they may issue a notice to vacate under section 279 and obtain an urgent VCAT hearing. It is our submission that Part 8 adds an unnecessarily method of immediate eviction that carries significant risk the rights of residents.

### **Jenny's experience**

Jenny was a resident in a privately operated rooming house. The rooming house operator had a history of breaching the RTA, such as demanding rent increases improperly and entering the rooms of residents without notice. The rooming house operator owned many properties and, in light of their very real risk of homelessness, many of the residents did not complain about the behaviour of the operator. Jenny recognised this as unfair and attempted to assert her rights and inform other residents that they should also take action. On a Thursday afternoon the operator attended the property to demand increased rent from residents. Jenny confronted the operator over the invalid rent increases and an argument took place in the common area of the property. There was no physical contact or threats made, and the argument was witnessed by other residents. The rooming house operator left the property to go to their car, and returned with a signed 'notice to leave' that required Jenny to leave the property immediately. Jenny attended VCAT the next day seeking advice on what her rights were and was advised that she must not return to the property for two business days. Whether she could then return depended on whether the rooming house operator applied for permanent termination of her rights. The notice period terminated two business days later on a Tuesday without the rooming house operator applying to VCAT and Jenny returned home. As Jenny did not have a network of friends or family in Melbourne, nor money to stay in temporary accommodation, she was forced to sleep rough for five nights in the clothes that she left the property in.

### **Recommendation 4 – Repeal notices to leave**

4.1 Repeal notices to leave.

4.2 Have Consumer Affairs make available training and education material for rooming house owners and caravan park owners. This material would educate operators as to the existing powers of Victoria Police to remove violent persons and of the notices to vacate that can already be issued when residents engage in serious acts of violence.

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

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

In jurisdictions including NSW and ACT,<sup>5</sup> equivalent legislation specifically enables a tenant to challenge any notice to vacate given in retaliation for the exercise or proposed exercise of a right, any application or threat of an application to the Tribunal or any existing orders in place from the Tribunal.

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<sup>5</sup> See section 115 of the *Residential Tenancies Act 2010* (NSW) and section 57 of the *Residential Tenancies Act 1997* (ACT) for examples of jurisdictions which have permitted challenges to all types of notices to vacate on the grounds of being retaliatory.

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In Victoria only no reason notices to vacate and end of fixed term notices to vacate can currently be challenged on the grounds of retaliation.

Further, the retaliation provisions are more narrowly construed than the NSW and ACT provisions to include only challenges to notices issued in retaliation to the exercise or proposed exercise of a right.

Amending Victoria's RTA would harmonise Victoria's laws with other comparable jurisdictions and strengthen protections for tenants to minimise arbitrary and unreasonable evictions.

#### **Recommendation 5 – Enable challenges to all retaliatory notices to vacate**

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

### **Ensure tenancies are managed sustainably**

Provisions relating to the management of tenancies can have a real impact on security of tenure. The recommendations below aim to ensure tenancies are managed in a sustainable way.

#### **Limit the use of compliance orders**

The RTA provides VCAT with power to issue compliance orders for a breach of a duty provision. 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. We have also seen a number of cases in which the behaviour that is the subject of the application is the result of a period of acute crisis, such as a relationship breakdown, that is likely to resolve within a short period. Problematically, though, compliance orders can be made for the duration of the tenancy and 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 of these other residents. Given the duration of these orders and the broad range of conduct they can cover, this can impose a large burden on a tenant, particularly where there may be family violence, or mental health or substance abuse problems, 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 often comply with the initial compliance order and remove the goods without issue for several years. However, given the reoccurring nature of hoarding, compliance orders can still be relied on several years later despite the tenant's earlier compliance.

Further, in our experience compliance orders in public and community housing properties are often being sought in relation to behaviours the tenant is unable to control such as behaviours caused by a mental illness or antisocial behaviour stemming from a drug and alcohol addiction. We submit that these tenants are persons particularly in need of safe, stable and secure housing and that increased support should be offered to such tenants prior to the making of any compliance orders.

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In order to reduce the risk of unfair eviction, compliance orders should be worded as narrowly as possible, be very specific in the conduct that they seek to regulate and should be of limited duration. While section 332(1)(b) purports to provide some limited protection against arbitrary or unnecessary eviction where a tenant has failed to comply with a compliance order, we have never been able to successfully use this provision due to the fact that all of the criteria in the section need to be satisfied. We believe each of the considerations in that section should be alternative basis for refusing to evict and the words “and” in sections 332(1)(b)(i) and (ii) changed to “or”.

### **Margaret’s experience**

Margaret had a range of mental health conditions, including severe OCD and symptoms of anxiety and agoraphobia. She had lived in public housing for many years. Because of her mental health issues she had poor nutrition, limited living skills and had not left her house in nearly two years, including to put out the rubbish. Because of these issues she was reliant on support services for a range of assistance, including organising cleaning. As a direct result of her mental health issues she was experiencing extreme financial stress and had 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 (section 63).

For a number of reasons related to her mental health, 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 section 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 arose directly from her significant mental health issues. In this case, as long as the broadly worded compliance order still stood, she remained at significant risk of eviction into the future.

### **Recommendation 6 – Limit the use of compliance orders**

- 6.1 Amend compliance order provisions to limit initial compliance orders to six months. Enable VCAT to extend compliance orders up to a maximum of 12 months but only where VCAT is satisfied that the extension is necessary.
- 6.2 Amend section 332(1)(b) of the RTA so that each of the subsections is an alternative basis upon which a possession order can be refused. Change the word “and” in sections 332(1)(b)(i) and (ii) to “or”.

### **Extend the coverage of the RTA to licensees**

Licensees are currently excluded from the protections of 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

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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. Such clients are afforded little to no consumer protections and are often the victim of sudden and immediate evictions, scams and loss of their bonds which are currently not required to be lodged with the RTBA. Currently VCAT's Residential Tenancies List does not have jurisdiction to assist these individuals.

Informal tenancy agreements are likely to become more common and it is generally the most disadvantaged that will be forced into such arrangements. One way to solve this problem would be to amend the RTA to provide coverage to a situation where a person pays rent to another for a right to occupy a premises, or part of a premises as their principal place of residence. This should specifically include when the agreement is to occupy a room in a multi-roomed dwelling that does not meet the definition of a rooming house, or when the landlord also lives at the same property.

Another way to address this issue might be to undertake similar amendments to the definitions of "tenant" and "residential tenancy agreement" as included in the NSW RTA, which specifically attempt to capture persons without exclusive possession. In particular section 13(3)(a) of the *Residential Tenancies Act 2010* (NSW) specifically states that an agreement may be a residential tenancy agreement even though it does not grant a right of exclusive occupation.

VLA strongly recommends reforms to the RTA to extend coverage to licensees.

#### **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 options were 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 7 – Extend the coverage of the RTA to licensees**

- 7.1 Extend the coverage of the RTA to include licensees.
- 7.2 Preserve the reverse onus jurisdiction contained in section 507 of the RTA.

#### **Improve the enforceability of restraining orders**

Tenants at risk of unlawful eviction will frequently make applications to the Tribunal for restraining orders under section 452. The Tribunal has power to make injunctive orders under section 472 preventing landlords from changing locks, interfering with or disposing of a tenant's possessions or otherwise attempting to obtain possession in a manner not permitted under the RTA. These provisions are particularly important as they protect tenants from the actions of a landlord, rooming house or caravan park operator who either does not understand or is wilfully disregarding their most fundamental obligations. These matters are often very complex and intimidating for tenants whose tenure is at stake and who are being unlawfully deprived access to their home and possessions.

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Unfortunately, in our experience, Victoria Police infrequently enforce restraining orders made by VCAT.

When police officers are called to a property to enforce restraining orders they are often confused about what their powers are and will frequently tell tenants (incorrectly) that the matter is civil in nature. Section 508(1)(c) of the RTA makes it clear that this is not correct and that police do have the power to bring proceedings for offences including failing to comply with an order of the Tribunal. The Tribunal in making such an order will, as a matter of process, generally direct the principal registrar to send a copy of any restraining order to the relevant police station further indicating that the Tribunal strongly believes that police play an important role in enforcing restraining orders.

#### ***Dean's experience***

Dean, a professionally employed single person, was privately renting a one-bedroom apartment. The landlord had not engaged a property manager and was managing the property himself. The landlord and Dean became friendly before having a falling out. The landlord attended the property one business day while Dean was at work and changed the locks leaving a note on the door advising Dean that he'd been evicted. Dean was unable to enter his property that evening and was forced to rent temporary accommodation.

Dean attended VCAT the following day and obtained an interim ex parte restraining order that directed the landlord to permit Dean to re-enter the property. Dean texted the landlord to advise him of the order and to request a key. The landlord stated that it was his apartment, and that he would not be permitting Dean to re-enter. Dean called the Police and a locksmith and attended the premises. When Dean arrived at the premises the landlord came to the front door from the inside and stated that he would not be permitting Dean to re-enter. Despite the order explicitly stating that Dean had ongoing tenancy rights, the Police stated that they could not do anything to assist Dean, and suggested he return to VCAT as it was 'a civil matter'.

Dean returned to VCAT and was told by the Member on duty that they could do nothing more than what they had already done in making the order clear, explaining that non-compliance was an offence, and faxing a copy to the Police. Over the following days, Dean contacted the Police on numerous occasions and was met with the same response each time. At the return of the restraining order hearing, at which the landlord was present, the Tribunal confirmed that Dean's tenancy rights had not been terminated and directed a locksmith to assist Dean to re-enter if the landlord failed to provide a key. The landlord gave evidence that he had removed Dean's belongings into storage. Despite the advice from lawyers and the Tribunal that Dean could return to the property, the actions of the Police in failing to protect him when he attended meant that he felt the landlord could ultimately do what he pleased. Ultimately Dean was forced to find alternate accommodation as he worked full time and required a much quicker resolution to his situation.

The inclusion of offences in the RTA recognises the significant power imbalance faced by tenants, and is a marked departure from the historical position that residential tenancies are private contracts between parties. In order to achieve its purpose of establishing rights and obligations between the parties, the RTA must be enforced, with action taken by police when offences are committed.

Non-monetary orders of the Tribunal may be enforced by application to the Supreme Court of Victoria, pursuant to s 122 of the VCAT Act. It is our experience however that most tenants find this process intimidating, complex and time consuming, and that they are therefore unlikely to initiate enforcement action.

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Most disputes between a tenant and landlord breaching the RTA in these serious circumstances can be resolved by VCAT firstly determining the rights of the parties and making orders to protect those rights, and the Police intervening to enforce those orders by explaining to a landlord that non-compliance with a VCAT order is a criminal offence for which they can be prosecuted if they do not desist. The absence of proper enforcement of VCAT orders means that there are landlords who actively choose to disregard their fundamental obligations, and orders of the Tribunal are thus not respected. A failure to enforce orders devalues the protections of the RTA and diminishes the integrity of the Tribunal.

### **Recommendation 8 – Improve the enforceability of restraining orders**

- 8.1 Amend schedule 2 of the *Residential Tenancies Regulations 2008* (Vic) to make failure by a landlord to comply with a restraining order an infringeable offence.
- 8.2 Update the Police Manual to include a chapter on residential tenancies to advise police of their powers to issue infringements and prosecute persons who fail to comply with a determination of the Tribunal.
- 8.3 Provide more training for Police to emphasise the importance of enforcing orders of the Tribunal.
- 8.4 Amend section 472 to require VCAT to include in its order a sentence that reads “*this is a civil order however failure to comply with it is a criminal offence for which Victoria Police can prosecute*”.

### **Making legal recourse accessible for people to exercise their rights**

The law can play a pivotal role in preventing evictions into homelessness and in protecting, promoting and realising human rights for Victorians more generally. However, to achieve these aims people need to be able to exercise their rights in an accessible way.

#### **Make human rights accessible<sup>6</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 people 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 but before the warrant is executed.

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<sup>6</sup> See also Victoria Legal Aid, *Submission to the Charter of Human Rights and Responsibilities Act 2006, Eight-year Review* (June 2015).

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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 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 landlord were consistent with the RTA. This would be consistent with Recommendation 27 of the Attorney General’s Report on ‘*The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*’ (the ‘Charter Review Report’).<sup>7</sup>

Given the shift of resources away from public housing towards community housing providers, it is essential that there be amendments to specifically state that a community housing provider does constitute a public authority for the purposes of the Charter. This would also be consistent with Recommendation 13 of the ‘Charter Review Report’.<sup>8</sup> Tenants of community housing providers frequently find it challenging to know exactly what their landlord’s policies are in relation to evictions, whether they have been followed, or whether there has been compliance with the Charter. We would support amendments to the *Housing Act 1983 (Vic)* that would require a community housing provider to have clearly articulated policies around evictions and have these policies published or made available on request.

### **Recommendation 9 – make human rights accessible**

- 9.1 Implement the recommendations of the Charter Review 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.
- 9.2 Amend the Charter to expressly state that an incorporated body that receives financial assistance from the government for the purposes of providing non-profit housing constitutes a public authority for the purposes of the Charter.
- 9.3 Amend the *Housing Act 1983 (Vic)* to require community housing providers to have clearly articulated policies in relation to evictions and require them to publish those policies and make them available on request.

### **Introduce internal appeal rights at VCAT**

The absence of an internal appeal or review right within the Residential Tenancies List at VCAT has a detrimental impact on the quality and consistency of decision-making. It is our experience that residential tenants consider appealing to the Supreme Court on a question of law to be overwhelmingly expensive, complex and time consuming.

The 2009 President’s Review of VCAT recommended that the Tribunal be given increased powers of reconsideration, subject to sensible limits, and that an appeal Tribunal should be established within VCAT. Then President Justice Bell argued that 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.

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<sup>7</sup> *The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Recommendation 27, Chapter 4, pp.117-122.

<sup>8</sup> *The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Recommendation 13, Chapter 2, pp. 55-56.

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It is noteworthy that internal appeals are available in comparative jurisdictions in the NSW Civil and Administrative Tribunal, the Queensland Civil and Administrative Tribunal and the recently established South Australian Civil and Administrative Tribunal. The Deputy President of the Internal Appeals List at the NSW Civil and Administrative Tribunal, Judge Kevin O'Connor, has written that decisions of the appeal panel provide judicial guidance, leading to consistency in decision-making. His Honour has noted that dispute resolution environments that tend to include more unrepresented litigants are prone to increased levels of basic mistakes or errors at first instance, and that leaving such problems unaddressed results in unfair outcomes and undermines the confidence in the Tribunal as a whole.<sup>9</sup>

The paucity of Supreme Court appeal decisions from the Residential Tenancies List at VCAT reflects the difficulties faced by parties seeking to challenge a VCAT decision. This has a deleterious effect on the development of residential tenancies jurisprudence in Victoria, and risks a culture of reduced accountability among VCAT Members. Permitting VCAT to remain the country's only 'super tribunal' without an internal appeal mechanism means that VCAT is not fulfilling its objective of being an accessible, efficient, accountable 'one stop shop' to resolve residential tenancies disputes.

### ***Sophia's experience***

Sophia rented a house with her four children in a rural area. After three years of tenancy, she briefly fell into rent arrears and the landlord issued a notice to vacate. Sophia was able to pay off the arrears prior to the hearing, however the landlord continued to seek possession.

At the VCAT hearing Sophia attempted to explain that she had paid off the rental arrears and was again in advance with her rent payments. She accordingly argued that it would be appropriate for the Tribunal to adjourn the possession order pursuant to section 331 of the RTA, on the basis that satisfactory arrangements had been made to avoid financial loss to the landlord. The property manager interjected during this request and provided the Tribunal with a detailed account of the disputes they had had with Sophia, and described the now acrimonious relationship. The Tribunal Member made further inquiries about the nature of the relationship between the tenants and the property manager, and did not seek further information on Sophia's financial circumstances. Ultimately the Member decided that it was "in the best interests of all involved that the parties part ways", and made an unconditional possession order in favour of the landlord.

Sophia obtained legal advice that the Tribunal may have committed an error of law – one that would be very much in the interests of justice to rectify given the prevalence of section 331(1)(b) applications and the importance of sustaining tenancies when rent is paid up to date – by taking into account the irrelevant material as to the nature of the relationship between the parties, and potentially misinterpreting the discretionary power reposed in the Tribunal at section 331.

Sophia did not understand the process of appealing the order to the Supreme Court. She was advised to obtain legal representation and was warned of the potential that costs could be ordered against her if she lost. Sophia felt she had not been given a fair hearing and wanted to set aside the decision in order to stay in her home and ensure the same thing did not happen to other tenants. Sophia was forced to make decisions that had serious consequences very quickly, as the landlord had purchased a warrant of eviction on the same day of the hearing.

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<sup>9</sup> Judge Kevin O'Connor, 'Appeal Panels in Super Tribunals' (2013) 32 University of Queensland Law Journal, 31.

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Ultimately Sophia felt overwhelmed with the risks and task of appealing and focussed her time and energy on moving instead. The experience left her feeling that only people with financial resources obtain justice in our legal system.

### **Recommendation 10 – Introduce internal appeal rights at VCAT**

Amend the *Victorian Civil and Administrative Tribunal Act 1998* to enable internal appeal rights to a Senior Member either as a standalone right or with leave of the Tribunal.

#### **Standardise rental references**

Many clients instruct that they are reluctant to enforce their rights for fear of receiving a negative reference from their property manager or landlord at the end of their lease. The Victorian rental market is highly competitive for tenants when applying for a new rental property. It is our experience that many tenants forego their rights so that they are not described as ‘difficult’ or ‘assertive’ by a former agent, even in circumstances where they are merely asserting their fundamental rights to matters such as repairs or quiet enjoyment.

The RTA does not currently protect tenants from the power imbalance created by market forces. Tenancies by their nature are temporary, and the risk of a negative rental reference is ever present. As such, many of our clients experiencing the most disadvantage (particularly low-income families with children, young people and those from overseas with a limited rental history) report trading off their rights in the hope that they will secure a positive reference when they vacate. Irrespective of how the RTA is strengthened to ensure tenants have secure tenure, if tenants feel they will be punished for enforcing their rights they will continue to put up with substandard housing or breaches committed by the landlord.

The amendments regulating tenancy databases were introduced following a recognition of the detrimental impact that incorrect reporting had on a prospective tenant’s ability to source the fundamental need of housing. However, those provisions provide only for accurate reporting of breaches by a tenant. Our clients report that they are predominantly concerned with receiving a negative oral reference from a former agent as a result of enforcing their rights by responding to a breach by a landlord. It is a perverse outcome that tenants feel they will be punished for responding to a landlord’s breach more so than they will for committing a breach of their own.

In VLA’s experience landlords and agents often refer to irrelevant considerations in the giving of rental references. This could include a tenant’s lawful exercise of a right to request repairs or claim compensation, their refusal to grant certain access to the property because it breaches their right to quiet enjoyment or a tenant’s refusal to agree to sign over bond money for matters they do not accept fault for.

VLA is of the view that amendments to the RTA to increase security of tenure and provide for better laws for tenants will be completely undermined if they are not supported by reforms that give tenants greater confidence and security when deciding whether or not to exercise their rights.

VLA proposes amendments that regulate the giving of rental references. Amendments should be introduced that require the giving of rental references in a standardised form produced by Consumer Affairs Victoria which asks specific questions that include only relevant considerations such as whether the prospective tenant breached their tenancy agreement, caused damage to the property or accrued rent arrears. In seeking the written reference a tenant could be required to consent to an inspection by the agent or landlord.

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Legal protections providing for security of tenure are only useful if they are enforceable. Adopting a standardised reference form that advises prospective landlords of relevant considerations will protect the interests of the home owner while ensuring tenants feel that they are able to properly assert their rights without fear of a market based retribution.

### **Recommendation 11 – Standardise rental references**

- 11.1 Have Consumer Affairs to produce a standardised form for the giving of rental references.
- 11.2 Introduce amendments to the RTA to mandate the using of the standardised rental reference form when giving rental references.
- 11.3 Introduce amendments to enable enforcement of these changes by either imposing a penalty for non-compliance or including this requirement as a duty provision under the Act for which a tenant could seek compensation if a landlord or agent breaches these provisions.

## **Remove barriers to securing housing**

The above recommendations seek to protect security of tenure. In addition to experience in advising and assisting clients seeking to rely on the protections against eviction into homelessness set out in the RTA, VLA staff frequently deal with clients facing homelessness who need assistance to overcome barriers preventing them from finding new, secure housing. In this regard, VLA's clients (like many people experiencing disadvantage) face a complex set of intersecting legal and non-legal problems. VLA recognises that the question of how best to secure access to stable housing is a difficult one to resolve. Various suggestions have been made by public policy thinkers, including advocating for brokerage programs and other measures that increase the ability of tenants who are experiencing disadvantage to access the rental market. The recommendations below do not represent a comprehensive program for removing barriers to securing housing. Rather, they reflect some key insights from VLA's direct experience in assisting clients at risk of homelessness. The following recommendations include amendments to the RTA to assist people affected by family violence, persons listed on residential tenancy databases and amendments to facilitate the faster return of bonds.

### **Funding for costs associated with lease breaking**

In some instances, the burden of the costs associated with breaking a lease has the effect of compounding the difficulties of people experiencing profound disadvantage. There is a strong argument that relief from these costs is just, and avoids over-reliance by these tenants on limited community sources of financial assistance.

One example is where a person who is experiencing family violence wants to bring a tenancy to an end. Notably, family violence is the most common cause of homelessness for women.<sup>10</sup> As such, it is vital that the RTA is amended to ensure that people experiencing violence can more easily extricate themselves from tenancies and subsequently enter into new housing arrangements.

One of the primary barriers to people experiencing family violence being able to access safe housing is the fact that they are often subject to significant compensation claims arising out of fleeing a previous rental property.

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<sup>10</sup> Flinders University Institute for Housing, Urban and Regional Research, *Women, Domestic and Family Violence and Homelessness* (2008), 13.

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In situations of family violence, tenants may need to leave a property urgently notwithstanding that they are subject to a fixed-term lease, giving rise to large lease breaking claims. Vacating urgently may also give rise to compensation claims for failure to clean, failure to remove rubbish, leaving belongings at the property, or for damage caused by a perpetrator. This financial burden often occurs in the context of financial hardship, with people experiencing family violence often also being required to miss significant amounts of work due to injuries and court or tribunal proceedings. In addition to the financial implications of a compensation order, if such tenants are unable to pay the relevant compensation to the landlord, they may be listed on a residential tenancy database, further impacting their ability to access safe housing in the future.

Problematically, landlord compensation claims are inappropriately paid for by community sector organisations, charities and homelessness services, diverting sparse resources away from services to which they might more appropriately be directed.

In light of the importance of ensuring that people experiencing family violence are able to access safe housing, VLA supports the submission of Fitzroy Legal Service relating to the creation of a family violence tenancy fund.

We also note that tenants who are experiencing other forms of severe hardship, such as acute mental health issues, drug and alcohol dependence, or personal trauma such as illness or injury, may be subject to similar compensation claims and that, accordingly, they should be able to access similar protections.

One means of more sustainably resourcing a fund for people experiencing family violence and other forms of hardship would be for landlords to be required to lodge a bond with the RTBA. The interest generated from 'landlord bonds' could be used for this family violence tenancy fund. In 2013-2014, the Residential Tenancies Bond Authority generated \$20,734,607.00 in interest revenue<sup>11</sup>. The introduction of landlord bonds would increase substantially the interest revenue generated by the RTBA and could be sustainably used to fund family violence tenancy fund, the operations of VCAT and potentially tenant/family violence support services.

Insofar as a bond is defined under section 3 of the *Residential Tenancies Act 1997* as money taken to secure performance and observance of a party's legal obligations under a tenancy agreement or the Act, introducing 'landlord bonds' would be an acknowledgement that there are two parties to a tenancy agreement. Landlords, like tenants, might not always perform their obligations under the Act. For example, landlords refuse to do repairs, breach a tenant's right to quiet enjoyment or fail to comply with Tribunal orders relating to compensation.

VLA notes that there is a separate RTA Review issues paper planned on "Affordability, bonds and rent". VLA will further address the issue of 'landlord bonds' at this later stage of the RTA review.

### **Recommendation 12 – Create a fund to assist tenants experiencing disadvantage**

Create a fund to assist tenants experiencing disadvantage to cover lease breaking costs, other compensation claims and expenses relating to new tenancies.

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<sup>11</sup> 2013-14 Residential Tenancies Bond Authority Annual Report, p.17

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## **Simplify reduction of fixed term tenancy applications**

A key barrier for many of VLA's clients in seeking to establish themselves in sustainable housing is the complexity of the process for reducing fixed term tenancies. For example, tenants who are experiencing family violence often need to urgently flee a rented premises and end a fixed term tenancy agreement. Tenants who are able to access legal advice and hold onto their keys will be able to make an application to VCAT under section 234 to reduce the term of the tenancy. Under these provisions, VCAT has the power to reduce the term of the tenancy and may award compensation to the landlord or a co-tenant for the making of the order. This generally results in much better outcomes for tenants experiencing family violence and other forms of profound disadvantage, than lease breaking. Through our casework, however, VLA has identified a number of issues with the way that section 234 operates in practice.

First, applications under section 234 are not usually listed with any degree of urgency by VCAT and it can often be two to three weeks before an application is heard. Where a matter involves a co-tenant who is the perpetrator of family violence and who is not in attendance, VCAT may further adjourn the proceedings to enable all parties to be served. This can prolong the hearing of such applications, exposing the tenant to increased costs of ongoing rent. We support amendments to the RTA and VCAT Act to require VCAT to list such applications for hearing within 48 hours.

Secondly, VLA is of the view that there is legal ambiguity in the power conferred on VCAT under section 234. It is not clear whether section 234 simply functions to reduce the fixed term tenancy, and therefore creates a periodic tenancy that still requires the tenant to give 28 days' notice, or whether the Tribunal has the power to end the tenancy on a specified day. We would support amendments to section 234 to explicitly state that VCAT has the power to reduce and terminate a fixed term tenancy agreement.

Thirdly, it is currently unclear whether the Tribunal will award compensation in applications under section 234 due to the words "if any" in section 243(3). To create greater clarity, we would support amendments to section 234(3) to cap the maximum amount of compensation payable to two weeks rent, but maintain the discretion of VCAT to award no compensation when appropriate by retaining the words "(if any)" in section 234(3) of the RTA.

Finally, in matters involving family violence, the NSW RTA may provide an alternative approach to ensure that vulnerable tenants receive greater protection. Section 100 of the NSW RTA enables tenants who have final intervention orders that exclude a current or former co-tenant or occupant from the rental property to give a 14-day notice of intention to vacate and terminate a fixed term tenancy without compensation to the landlord. This spares the protected person, and VCAT, the unnecessary burden and trauma of needing to attend a VCAT hearing. Importantly, though, it is our submission that this type of provision should be included in addition to an amended section 234 to ensure that tenants who do not have a *final* intervention order are also able to reduce fixed term tenancies.

### **Recommendation 13 – Simplify reduction of fixed term tenancy applications**

- 13.1 Amend section 234 of the RTA to allow tenants to elect for reduction matters to be listed for hearing within 48 hours.
  - 13.2 Amend section 234 to explicitly state that VCAT has the power to reduce the term of a fixed term agreement *and* terminate the periodic tenancy agreement created by the reduction order.
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- 13.3 Amend section 234(3) to cap the maximum amount of compensation payable to a landlord to two weeks rent.
  - 13.4 Introduce a similar provision to section 100 of the NSW RTA to enable a tenant with a final family violence intervention order to terminate their fixed term tenancy agreement (without paying compensation to the landlord or without the need for a hearing) by issuing a 14 day notice of intention to vacate. Retain section 234 to provide remedies for people experiencing family violence who choose not to obtain a final intervention order.

### **Enforce the provision of information to tenants**

A key barrier to access to legal remedies that facilitate transition to secure housing is limited understanding of the rights on the part of disadvantaged tenants, such as tenants experiencing family violence who may have to flee a tenancy to protect their personal safety. Such tenants often have limited opportunity to obtain legal advice about the options available to them and are told by agents to return their keys and sign over their bonds to the landlord. This is effectively a lease break and is generally not the best option available to tenants, however the return of keys and communication of abandonment prevents them from subsequently accessing less costly remedies.

Landlords and agents will often tell tenants that they are liable for lease breaking costs and rent until the property is relet and in some cases continue to take rent from the tenant for several months or even until the fixed term expires. Landlords often do not advise tenants of less costly options for ending the tenancy or that the landlord has an obligation to mitigate loss. Tenants can therefore end up with significant debts at a time when they have other expenses such as needing to pool together money for bond and their first month's rent at a new rental property. The financial stress caused by these situations can, for example, force tenants experiencing family violence into crisis accommodation. Many are left with lingering debts or tenant database listings which can affect their ability to get back into the private rental market.

While section 501 already makes it an offence for persons to misrepresent rights and obligations under the Act, often a landlord or agent's statements about a tenant's options will fall short of positive misrepresentations about rights under the Act.

VLA would support the creation of a factsheet or booklet by Consumer Affairs that covers all of the options for ending a fixed term tenancy agreement with specifically tailored information and advice on family violence including the ability to apply to VCAT for a reduction of the fixed term, rights in relation to assignment and a landlord's obligations to mitigate loss. This booklet could also include details of support agencies and services who can give free legal advice.

Similar to the operation of section 66 of the RTA, Victoria Legal Aid would support amendments to the RTA that would impose an obligation on landlords to provide this information to tenants whenever they are told by a tenant that they need to end a fixed term lease early.

### **Recommendation 14 – Enforce provision of information to tenants**

- 14.1 Introduce a new offence provision for situations where landlords fail to provide particular information to tenants when tenants advise their landlords of their need to break their lease. Have Consumer Affairs produce a detailed information booklet on all the options available to a tenant when they need to break their lease. Have this factsheet include specific information and tailored content for situations where there is family violence including the availability of support services and services that can provide free legal advice.
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In the alternative to new offence provision, include this requirement as a duty provision which a tenant could seek compensation for if not complied with.

14.2 Require landlords and agents to provide this factsheet to tenants whenever a tenant advises them of their need to break their lease or the existence of family violence.

### **Amend tenancy databases**

Under Part 10A of the RTA, tenants may be listed on residential tenancy databases for a number of reasons, including tenants who are evicted for rent arrears, or owe who a landlord an amount of compensation that is more than the bond. VLA has a number of concerns about the current operation of residential tenancy databases.

Firstly, there are inadequate remedies for tenants to have listings removed. This is particularly relevant where tenants are unaware that they have been blacklisted. While landlords are required to advise a person when they plan to list them on a database, in many cases the notice will be sent to the property that the tenant has vacated, as it is their last known address. Similarly, a co-tenant may be unable to have their name removed from a tenancy agreement, meaning that they remain listed as a tenant and at risk of database listing despite having vacated the property. Where rent arrears or compensation remain unpaid for more than three months after a Tribunal order is made, even if the amount is subsequently paid in full, the listing cannot be removed from the database. This means that 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.

Secondly, tenants are often listed for issues that arise through a decline in mental health, family violence, drug and alcohol dependence, or a personal trauma such as injury or accident. As listings last for three years, tenants who are listed on a database are often precluded from the private rental market for a significant time, increasing the burden on homelessness services, social housing services, charities and related government funded services. It is concerning that a service that provides a benefit solely to private landlords creates a significant cost that is borne by the community, and it is our view that tenants who have experienced significant disadvantage should not be punished by being barred from the private rental market. As such, we support amendments to allow tenants to apply to VCAT for early removal from a database due to hardship, including where the tenant has experienced reoccurring homelessness, family violence or has acquired or had a worsening of their physical or mental health.

Further, in our view the period allowed for listing tenants is punitive and not justified as a means of helping landlords make informed choices when letting out an investment property, and should be shortened to 18 months.

Finally, the cost for tenants obtaining information about their listing is excessive, with some private database operators charging \$5.45 per minute to speak to a customer service representative, and up to \$33.00 for obtaining a copy of their database report. As a service that solely benefits landlords, we strongly feel the costs of running these databases be passed onto those consumers and not tenants. VLA would welcome amendments that require a database operator to provide tenants with at least one free method of obtaining a copy of their report. This would harmonise laws regulating other big data operators such as credit checks database operators. In the alternative, we would recommend amendments similar to section 20R(5) of the *Privacy Act 1988* (Cth) to require credit check database operators to provide at least one free copy of a credit report every 12 months.

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### **Recommendation 15 – Amend tenancy databases**

- 15.1 Amend section 439A of the RTA to redefine the words “inaccurate” and “out of date” so that the words “or the tenant becomes aware of the debt” follow the words “three months after the amount became due” in each of the definitions.
- 15.2 Introduce a new section 439LA enabling a tenant to apply for early removal from a database on hardship grounds.
- 15.3 Amend section 439K of the RTA to reduce the period of time in which a tenant can be listed on a database from three years to 18 months.
- 15.4 Amend section 439I(4) of the RTA to require a database operator to provide at least one free method of obtaining a copy of their database report. In the alternative, introduce amendments that require a database operator to provide at least one free database report every 12 months upon request, with reports to be provided within seven days of a request being made.

### **Enable faster access to bonds**

VLA clients experiencing insecurity of tenure are often in the process of transferring from one tenancy to another. This often places a need for tenants to come up with substantial sums of money for bond and the first month’s rent for a new rental property while their existing bonds are held up at their old property. Unfortunately, in our experience, VCAT routinely waives landlords’ compliance with the 10 business day limitation period contained in section 417 of the RTA. This means that a tenant’s bond money may be held up for several months, placing tenants under immense financial hardship.

This is more prejudicial if the bond is a DHHS bond loan as DHHS’s policies do not permit the loaning of a second bond while an existing one has not been returned. This poses a significant problem for tenants on the bond loan scheme when landlords are permitted months to make an application over the bond at VCAT. When a DHHS bond is held up in VCAT proceedings a tenant may not have enough money to pay a bond and move into their new private rental property. This is further complicated by the fact that section 247 of the RTA enables their new landlord to issue a 14 day notice to vacate if bond is not paid within 7 days of signing the tenancy agreement.

Comparable jurisdictions such as NSW and Queensland enable faster release of bonds: within 14 days where a tenant makes a unilateral claim. We do not believe that such a system would need to be developed in Victoria, however we would support amendments to section 417 of the RTA to explicitly state that section 126 of the VCAT Act does not apply, thereby removing any discretion of VCAT members to hear applications made out of time.

### **Recommendation 16 – enable faster access to bonds**

Amend section 417 of the RTA to explicitly state that section 126 of the *Victorian Civil and Administrative Tribunal Act 1998* does not apply to the ten business day limitation period in section 417(2) for making an application in relation to a tenant’s bond.

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