Heading for Home

Submission to the Residential Tenancies Act Review

24 February 2017

Civil Justice Program – Victoria Legal Aid

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

About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and psychiatric hospitals as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and take more than 120,000 calls each year through Legal Help, our free telephone advice service.

VLA lawyers provide phone advice, in person advice and duty lawyer representation to tenants. In the 2015/2016 financial year we appeared for tenants and residents in 323 VCAT hearings and gave advice on 4676 occasions. 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.

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1. Executive summary

VLA lawyers provide phone advice, in person advice and duty lawyer representation to tenants. In the 2015/2016 financial year we appeared for tenants and residents in 323 VCAT hearings and gave advice on 4676 occasions. 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. VLA supports reforms to the *Residential Tenancies Act 1997* (RTA) to ensure more sustainable, secure and safer housing for Victorians.

VLA welcomes many of the changes aimed at increasing security of tenure contained in the Discussion Paper. However, we are concerned that strengthening protections for no-fault terminations come with the prospect of radical changes to at-fault notices to vacate or termination orders. Many of the changes would alter the purpose of the consumer protection nature of the RTA to one that is punitive. This would fundamentally decrease security of tenure for society's most disadvantaged people.

This submission is structured in accordance with the questions asked in the options paper. VLA submits that the options which should be adopted are those that assist with:

- maintaining tenancies;
- preventing arbitrary and unreasonable evictions; and
- improving VCAT decision making.

By contrast, any proposal to broaden the reach, application or severity of the existing notices to vacate will cause harm to individuals and the communities in which they find their homes.

We reiterate our recommendation that a new internal rehearing process is introduced into the Residential Tenancies List at VCAT, and highlight the unanimous support such a scheme has by all peak bodies representing the vast majority of users of that List. As outlined in recommendation 15 in response to the Dispute Resolution Issues Paper, introduction of an accessible rehearing mechanism is the only method of ensuring consistency and accountability of decisions made in the Residential Tenancies List at VCAT. An absence of confidence that rights will be enforced consistently and correctly by VCAT undermines the positive changes suggested to the RTA, and impacts the credibility of the regulatory framework.

2. Summary of recommendations

In addition to the recommendations made by VLA in its previous submissions to the Laying the Groundwork and subsequent six issues papers, VLA makes the following recommendations in response to the questions in the options paper:

Rights and responsibilities before a tenancy

Recommendation 1: Prohibit the inclusion of invalid or blacklisted terms into a tenancy agreement. Make it an offence to include such terms.

Recommendation 2: Maintain compensation as the sole remedy for breach of a non-core obligation in the RTA. Retain the breach of duty process to ensure compliance with fundamental duties in the RTA.

Rights and responsibilities during a tenancy

Recommendation 3: Retain the current period of 14 days in which to rectify a breach, before further enforcement action is available.

Recommendation 4: Retain multiple warnings to address breaching behaviour before permitting eviction as a consequence.

Recommendation 5: Retain the breach of duty notice process for core obligations in the RTA without extending to additional contractual terms.

Dispute resolution and ending a tenancy

Recommendation 6: VLA is opposed to the creation of a specialist administrative dispute resolution service, in its current form, as it fails to enforce rights in the RTA and is likely to further disadvantage many tenants. If an ADR scheme is introduced, it must be mandatory

for all applications, with orders made by consent only, and with no costs consequences for parties seeking enforcement of their rights at VCAT.

Recommendation 7: Introduce a re-hearing process in the Residential Tenancies List at VCAT**.**

Introducing a termination order process into the RTA

Recommendation 8: Ensure a standardised termination order process to consider whether eviction is appropriate in circumstances where a tenant is not at fault or at fault.

Recommendation 9: Retain the fundamental procedural fairness safeguards that currently exist. An application for a termination order must be sufficiently particularised, include all documents on which the applicant intends to rely, and be served by registered post or by hand. It must be exempt from amendment during a hearing. The process must retain adequate time between breach and hearing to enable a tenant to rectify the breach, seek advice and prepare for the hearing.

Recommendation 10: The termination order process must retain the ability for a tenant to seek a postponement of the issuing of a warrant when failure to do so would cause hardship.

VCAT decision-making process in granting termination and possession orders

Recommendation 11: VLA strongly supports the introduction of a proportionality assessment and discretion to ensure evictions only occur when it is reasonable, following consideration of all of the circumstances.

Recommendation 12: Require landlords to complete a pre-eviction checklist addressing the factors at Option 11.2, and require all documents in support of eviction to be provided at the time the application is made.

Damage and Danger notices

Recommendation 13: Eviction for damaging property ought to be restricted to circumstances where removal of a tenant is necessary to protect property. VLA is strongly

opposed to broadening the scope to include allegations of serious injury to a person, as such behaviour is proscribed by the ‘danger’ notice to vacate.

Recommendation 14: Ensure tenants are only evicted for causing a danger when the Tribunal is satisfied that is necessary due to remove an ongoing endangerment.

Recommendation 15: Extend the duty on tenants not to cause nuisance or interference with neighbours to proscribe similar behaviour directed at a landlord, their agent, employees and contractors. VLA is opposed to extending the danger notice to actions against a landlord, their agent, employee or contractor in the absence of the more suitable breach of duty process that will address behaviour without decreasing security of tenure.

Notice to leave

Recommendation 16: VLA urges repeal of notices to leave as they are widely used inappropriately and are unnecessary given the protections provided by danger notices.

Recommendation 17: If notices to leave are retained, it is important that:

- the Tribunal continues to have power to order resumption of the residency right.
- The notice itself advises residents of where they can seek legal advice, that it is an offence to receive a notice without justification, and referral details to transitional housing services.
- A resident is permitted to return during the suspension period to collect necessary personal items.

Disruption

Recommendation 18: Repeal notices to vacate for disruption, and address problematic behaviour through the breach of duty process.

Recommendation 19: Retain and strengthen VCAT’s discretion to avoid eviction when satisfied behaviour has ceased and will not be repeated.

Non-payment of rent

Recommendation 20: Require that a landlord contacts a tenant if they are 7 days behind in rent to refer the tenant to financial counselling, and to provide them with 7 days for repayment of the arrears. Failure to do so ought to invalidate an application for possession.

Recommendation 21: Provide that repayment of all outstanding rent within 14 days of falling behind invalidates any attempt to evict a tenant on that basis.

Recommendation 22: Align the protections for rooming house residents to those provide to residential tenants by providing that no action can be taken to evict a resident until they are 14 days behind in rent.

Failure to comply with a VCAT order

Recommendation 23: Remove the requirement that a tenant must demonstrate that a breach is not a recurrence when seeking to avoid eviction for non-compliance with a compliance order.

Recommendation 24: Require that compliance orders contain an expiry date when prohibiting future breaches. We recommend that maximum, rather than minimum, time limits are prescribed by the RTA.

Use of premises for an illegal purpose

Recommendation 25: Require a conviction to be a condition precedent to issuing a notice to vacate for illegal use of the premises.

Recommendation 26: Strengthen the nexus between the use of the property, and the commission of the offence, by requiring a landlord to demonstrate that the property was integral to the commission of the offence.

Parting with possession for consideration without consent

Recommendation 27: Limit the prohibition on parting with possession to a tenant parting with the possession of the entire, and not part of, the premises.

Recommendation 28: Redraft the provision to ensure a tenant does not face eviction for having friends or family stay for short periods. One option may be to proscribe parting with

possession on a commercial basis, with advertising to the world at large being a relevant factor.

Antisocial behaviour

Recommendation 29: VLA opposes the introduction of a new notice to vacate (or termination order) for anti-social behaviour. Neighbours, landlords, agents, employees and contractors will be adequality protected the escalating remedies available to a broadened duty provision, with danger notices available when urgent eviction is essential to protect the safety of people living in close proximity.

End of fixed term notice to vacate

Recommendation 30: Repeal the end of fixed term notice to vacate. VLA considers this notice to be an unnecessary impediment to security of tenure in light of the existing tenant-fault and landlord change of use notices to vacate.

Recommendation 31: In the alternative, VLA welcomes increased discretion for VCAT to avoid making a possession order in appropriate circumstances, and providing that a tenant may give 14 days notice of intention to vacate during the notice period.

Recommendation 32: VLA cautions against extending the termination date beyond the date a fixed term lease ends, as it would create greater uncertainty for tenants and is unnecessary in light of existing reasons for ending a tenancy.

Notice to vacate for no specified reason

Recommendation 33: VLA recommends repeal of the notice to vacate for no specific reason on the basis that it significantly diminishes tenants' exercise of all other rights in the RTA.

Notice to vacate for change of use

Recommendation 34: Require that a notice to vacate for change of use must be accompanied by evidence supporting the proposes change of use, and advising a tenant of their ability to challenge the notice.

Recommendation 35: Provide the Tribunal with discretion to avoid evicting a tenant if the notice was not served in good faith, attaches incorrect or insufficient evidence, or it is possible for a tenant to remain at the premises for other reasons.

Recommendation 36: Provide that a tenant may give 14 days notice of intention to vacate in response to received a change of use notice, despite the existence of a fixed term lease.

Recommendation 37: Clarify that a building owner must give 45 days notice to rooming houses residents upon the head lease terminating, in order to evict residents, irrespective of whether they were aware that a rooming house was being operated.

3. Rights and responsibilities before a tenancy

Terms of tenancy agreement

VLA endorses option 4.11

VLA endorses the option to create an offence under the RTA in respect of preparing or authorising a written tenancy that includes an invalid or prohibited term. In the current residential tenancies market tenants have little choice, and rarely any bargaining power, in relation to terms of the tenancy agreement. This is particularly so for economically and socially disadvantaged tenants. It is VLA's experience that very few tenants read through the detail of their tenancy agreement, and that negotiation of terms does not occur. In this context, it is imperative that the RTA is effective in prohibiting terms that seek to deviate, restrict or modify the fundamental protections provided by the Act.

Under the current legislative scheme (ie, without an offence provision) invalid terms continue to appear in standard form leases prepared by estate agencies. Typical examples include an obligation to steam clean carpets, and to pay a fixed penalty in the event of lease breaking. While, strictly speaking, such terms are unenforceable, it is our experience that many tenants nevertheless comply with them because (a) they exist in the agreement, and (b) on the insistence of landlords and estate agents that because they are in the agreement they must be complied with.

In this operating context, we consider that a penalty provision is a reasonable and justified mechanism to effectively discourage inclusion of prohibited or invalid terms in a lease. While generally offence provisions do not have the deterrent impact they are aimed at, it is likely that introducing a penalty for including an invalid term on a lease would have a normative impact on large estate agencies. For this reason we endorse option 4.11.

Option 4.12A is preferable to option 4.12B

VLA supports the preservation of the current arrangements for enforcing additional terms. We have previously expressed our significant concern with expanding the range of circumstances under which a breach of a non-duty provision or term can lead to eviction. Despite s 26 of the RTA, most written tenancy agreements are not in the prescribed standard form, but are produced by individual estate agencies. Many of the least rights-respecting landlords write out their own versions. Each of these non-standard forms often contain a range of additional (including invalid) terms.

In light of the power imbalance tenants face, and their often genuinely vulnerable circumstances when accepting a new property, it is our view that option 4.12A is to be preferred over option 4.12B. The breach of duty process, which places tenants on the path to eviction if a problem is not remedied, ought to be reserved for core duties under the RTA. Tenants are unlikely to appreciate the consequences of additional terms in the lease that, although not invalid, may place them at a

significant disadvantage. Permitting eviction for non-compliance with such terms is disproportionate: it places tenants at risk of losing their home through failing to comply with an obligation not sufficiently important to be included in the RTA. Freedom of contract works only for parties that have choice. Even the most disadvantaged people in society must live somewhere, and they will not have freedom to negotiate out of unfair terms.

In our view, given the consequences of eviction, fundamental duty provisions should be:

- limited to essential protections;
- universal;
- designed as a matter of public policy rather than through freedom of contract; and
- certain.

Accordingly, support the current distinction in remedies between the fundamental terms captured in the duty provisions and those available for breaches of other additional provisions or terms. There will continue to be methods of enforcing non-core terms: VCAT's orders are enforceable; it is an offence to fail to comply with them; and compensation is an appropriate remedy.

Recommendation 1: Prohibit the inclusion of invalid or blacklisted terms into a tenancy agreement. Make it an offence to include such terms.

Recommendation 2: Maintain compensation as the sole remedy for breach of a non-core obligation in the RTA. Retain the breach of duty process to ensure compliance with fundamental duties in the RTA.

4. Rights and responsibilities during a tenancy

Process for breach

Many of VLA's clients live with mental illness and battle serious substance abuse, and accordingly will often breach duty provision under the Act at times where their conditions are more acute. Policy settings within the RTA ought to be aimed at addressing and changing problematic behaviour rather than simply providing for eviction. This policy emphasis is especially important given the consequences of eviction on an individual and their family, and cost to the State, including the real prospect of homelessness.

Against this background, we provide the following comments in response to CQs 27 to 32.

The required time within which a breach of a duty must be remedied should be maintained

First, in our view it is appropriate to continue to provide 14 days in which a tenant must either take action, or cease inappropriate behaviour. Many tenants will require protective factors to be put in

place to control the breaching behaviour. Often this involves connecting a tenant with appropriate social supports, developing insight into the cause of the behaviour and cultivating motivation to change. Permitting immediate action following the issue of a breach of duty notice assumes that a tenant is choosing to undertake the behaviour and can simply choose to stop. This assumption is disconnected from the reality of many disadvantaged tenants. Accordingly, we are concerned by any amendments that would shorten the time for compliance with the notice before further action can be taken (such as issuing a further breach notice or seeking a compliance order).

VLA cautions strongly against option 5.2B

Second, we strongly urge against adoption of option 5.2B in permitting a landlord to immediately seek a termination order after serving one breach of duty notice that is not complied with. In our view, this option is ill-adapted to the recognised challenges of many tenants. The proposal also bluntens what is in our view an astute distinction in the Act between the regulation of conduct which permits a chance to rectify; and other conduct which cannot justifiably be permitted the same flexibility. To that end, tenant behaviour that is causing a risk to other people or property is already addressed through relevant notices to vacate. On the other hand, less serious matters are appropriately addressed through the current breach of duty process.

Our practice experience is that the most common breach of duty notice received by tenants relate to social housing tenants causing a disruption to neighbours. The problem will continue to be common in crowded urban environments. The situation is exacerbated through concentration of people experiencing disadvantage. The current breach of duty process provides for multiple warnings, and provides a chance for tenants to rectify their behaviour. Permitting a landlord to seek termination following one unrectified breach would, in our view, radically reduce security of tenure for the most vulnerable tenants. It would cause homelessness, greater strain on crisis and transitional housing, and simply transfer the problem to another property (and into public space) without providing an opportunity to address the causes of the behaviour. This is a bad outcome for the individual and society more broadly, and is a disproportionate response to the objective of protecting the quiet enjoyment of a neighbour in circumstances where they are not at risk of harm.

Considering the history of a tenancy will not remedy the risk created by option 5.2B

It is our view that reposing VCAT with discretion and an obligation to consider the history of the tenancy will not address the concerns raised above. We anticipate, based on our practice experience, that social housing landlords will seek termination as an answer to the problem of a tenant exhibiting poor behaviour. However, this fails to recognise that such publicly funded organisations have an obligation to provide a home to even people experiencing distress and difficulty. The history of VCAT decisions demonstrate that it too will take a conservative view when assessing the behaviour of a tenant. As a result, the RTA must provide minimum safeguards by

ensuring eviction cannot occur before a tenant has been given the opportunity to address their behaviour.

The RTA will properly balance security of tenure with an obligation to behave appropriately when it allocates proportionate consequences to behaviour. The current tenant-fault notices to vacate recognise the need to evict tenants in some circumstances. Similarly, the breach of duty notice process puts tenants on a path to eviction if they do not cease the offending behaviour. The process should be reserved for core obligations in the RTA, where warnings are appropriate but eviction may ultimately result if that behaviour is not modified.

Recommendation 3: Retain the current period of 14 days in which to rectify a breach, before further enforcement action is available.

Recommendation 4: Retain multiple warnings to address breaching behaviour before permitting eviction as a consequence.

Recommendation 5: Retain the breach of duty notice process for core obligations in the RTA without extending to additional contractual terms.

5. Dispute resolution and ending a tenancy

Proposal to establish a specialist administrative dispute resolution service

VLA endorses the integration of appropriate alternative dispute resolution service into some aspects of the tenancy system. We refer to recommendation 5 in our response to the Dispute Resolution Issues Paper, in which we indicated our support for the appropriate use of alternative dispute resolution (ADR). When used appropriately, ADR can be a quicker, more flexible and more cost-effective alternative to adversarial tribunal hearings. It also encourages mutually beneficial outcomes, and may be more likely to preserve cooperative relationships between the parties.

However, VLA does not support the proposed specialist administrative dispute resolution service (SADRS) in its current form. In our view, as proposed, it fails to provide adequate safeguards in respect of making binding orders, and is likely to further disempower tenants.

Matters that are suitable for ADR

It is proposed that the SADRS would be mandatory only for matters that are not termination or possession matters. In 2015-16 ‘possession and rent’ matters made up the largest identified

category of cases before the Tribunal.[1] This means that a large portion of the Tribunal's current workload will not be able to be first referred for ADR at the SADRS.

It also means that the cases in which there is arguably the greatest need for preservation or improvement of the relationship – those in which the tenancy itself is at risk – may not have the benefit of being referred to ADR.

The effect is that while all tenant-initiated applications will mandatorily be referred to ADR, matters in which landlords are the initiating party will most often proceed straight to VCAT. This means that while tenants will access a less formal form of justice, with further steps required to have decisions enforced or reviewed, landlords will proceed straight to final determination. Such an inequality of access to redress and determination is not justified.

The imposition of costs orders for parties who opt to go to VCAT also presents a further barrier to tenants accessing VCAT, in a context where they already fail to exercise their rights.[2] This is particularly worrying given that all tenant-initiated – but not all landlord-initiated - applications will be mandatorily sent to ADR. Under the current proposals, therefore, tenant initiated applications will always be subject to the threat of costs orders if they want to have their matter heard in VCAT.

If mandatory ADR is introduced, it is VLA's view that it ought to accommodate all non-urgent matters, including termination and possession matters, which should be referred for ADR before they proceed to VCAT, subject to appropriate safeguards as discussed below.

Ability to make binding orders should only be provided in the case of agreement

VLA's view is that it is preferable that binding orders are only made where the parties genuinely agree on an outcome. Where agreement cannot be reached, it is appropriate that matters be referred to VCAT for formal determination in accordance with its existing safeguards.

The proposal to give the SADRS the power to make binding orders without party agreement poses significant risks. In particular, as proposed, it appears that it may be empowered to finally determine the rights of parties in the absence of long standing procedural and accountability protections. As it is currently described, it is not clear (a) whether the service would be required to apply principles of procedural fairness, (b) whether decisions would be reviewable on the basis of legal error, or (c) whether sessions would be recorded and reasons for decision provided and published. Further, the ability of ADR facilitators to make binding orders raises questions about the availability of legal advice and representation for tenants in such a forum who, unlike landlords, are not usually expert or regular users of the system.

[1] VCAT annual report 2015-16, p 45. Possession and rent represented 11,824 of 56,412 cases in the Residential Tenancies list of VCAT

[2] Options paper, Part C, p 8 of 80.

Tenants' consent and agreement to a binding order must be informed and genuine

In our experience, any ADR scheme must also be sensitive and responsive to the reality that landlords and tenants are very likely to attend any ADR with an unequal working knowledge of their rights under the scheme and vulnerability to an adverse outcome.

We reiterate the concerns we outlined in our response to the Dispute Resolution Issues Paper that, faced with the prospect of losing their home, many tenants will agree to things that are not in their long-term interests. Without a sophisticated ADR apparatus, and specialist facilitators, even a consent-based ADR process carries the risk that it will entrench and replicate the power imbalance that exists between landlords and tenants. The power imbalance is likely to produce unjust settlements as landlords (and estate agents) are likely to be repeat users of the process and accordingly possess greater knowledge of the law and skills in negotiating. Lack of knowledge of the alternatives available to tenants is likely to increase their perceived incentive to settle.

Accordingly, in our view, any ADR model to resolve disputes in the Victorian tenancy context should only include a power to make binding orders when the parties reach agreement, in the context of proper safeguards to ensure that tenants fully understand they have the option of proceeding to VCAT.

VCAT may be an appropriate and efficient ADR facilitator

We anticipate that a broader issue raised by the introduction of an ADR scheme may be that failed mediations could cause a delay in resolving the dispute. It may therefore be appropriate to increase the capacity of VCAT Members, so that VCAT itself could conduct appropriate ADR, but remain an easily accessible forum to continue the matter as a hearing on the same day, if such a hearing was required.

Recommendation 6: VLA is opposed to the creation of a specialist administrative dispute resolution service, in its current form, as it fails to enforce rights in the RTA and is likely to further disadvantage many tenants. If an ADR scheme is introduced, it must be mandatory for all applications, with orders made by consent only, and with no costs consequences for parties seeking enforcement of their rights at VCAT.

Quality of decision-making by VCAT

VLAs strongly endorses the introduction of a re-hearing process for residential tenancies cases at VCAT. We also broadly support the key features of the particular re-hearing process outlined at Option 10.4A, subject to the inclusion of an express provision for a party to seek a stay of the order under review. In our view, as is the case in the majority of re-hearing settings, a party's ability to seek a stay is essential in order to protect their rights while awaiting the re-determination of the matter.

We refer you to the joint submission made by all peak bodies representing the users of the Residential Tenancies List that unanimously supports the implementation of a rehearing process for

residential tenancies cases at VCAT. A copy of that joint submission, signed by the Chief Executive Officer or Managing Director of the six organisations representing the majority of users of the Residential Tenancies List, is attached.

We stress the importance of the peak bodies reaching agreement on this fundamental topic. We consider our cooperation on this topic to be unprecedented and submit that it ought to carry significant weight in light of representing the experience and interests of the vast majority of users of the Residential Tenancies List, from a group of organisations with commonly opposing policy positions.

Recommendation 7: Introduce a re-hearing process in the Residential Tenancies List at VCAT**.**

Introducing a termination order process into the RTA

VLA supports the introduction of termination orders, in principle

In principle VLA supports the introduction of termination orders, however we hold a number of concerns in relation to the proposed scheme. In particular, if introduced, the scheme would need to ensure that fundamental safeguards are retained. We discuss key issues in ensuring that the termination order regime will operate in a fair and just way, below. Further, we note that in considering our support for the introduction of termination orders, we have assumed that termination orders would provide for the current notice periods, following the making of the order, before a tenant must vacate. If, however, it is proposed that there be any change to the minimum notice periods as a result of termination orders, we would seek to provide a response on the effect of those changes.

At the outset, we highlight that scrutinising the reasons alleged to support an eviction is good public policy. While we do not know the number of tenants who vacate in response to receiving a notice to vacate, we know that the current wording on the notices is misleading (in requiring that a tenant vacate on or before a certain date) and that tenants rarely challenge the reasons for eviction. In addition to providing necessary scrutiny, termination orders would provide certainty for tenants, who will know earlier than the current possession order hearing that they are required to vacate, and when that will occur.

Duplication of eviction processes

In our view, if termination orders are adopted, they ought to apply to all reasons for eviction. Tenants already find the processes for eviction complicated. Introducing a termination order process when tenants are at fault, while retaining possession orders for no fault evictions, is very likely to increase that confusion. Instead, if the termination order process is applicable to all parties, this process would ensure the landlord's grounds are also made out, as well as provide a tenant with

the certainty required to prepare to relocate. While we anticipate this may increase the number of hearings at VCAT, it is, in our view, an appropriate screening process which will better support the more vulnerable party to the agreement, and ensure evictions are actually warranted.

Ensuring the preservation of procedural safeguards is essential

A fundamental protection in the RTA is the obligation to provide proper reasons on the notice to vacate,[3] and the Supreme Court's strict interpretation of that provision in *Smith v Director of Housing.*[4] Section 319 of the RTA, as interpreted by *Smith*, provides a fundamental procedural safeguard in the eviction system, by ensuring a tenant understands the reasons a landlord asserts entitle them to evict that tenant. It ensures that a tenant knows the case they must answer, are able to seek legal advice, and can either agree to vacate or arrange evidence to defend the application. It is imperative that an application for a termination order conveys the same level of detail, with attached supporting evidence.

As Bongiorno J held in *Smith*, the notice to vacate is currently the source of the Tribunal's jurisdiction. As a result, the Tribunal's first task is to determine if an adequate level of detail has been provided to be satisfied the notice is valid on its face. It is only then, in the context of a possession order hearing, that Tribunal will determine if the evidence satisfies the Tribunal that the alleged grounds are made out, such that the landlord was 'entitled' to have issued the notice. The Tribunal may not amend the application, nor consider evidence about matters not detailed on the notice, in determining if the landlord has made out the grounds.

By contrast, there is currently no such requirement on other types of applications to the Tribunal. While the VCAT Act and Rules set out matters to be contained in an application,[5] failure to comply with those rules can lead to an adjournment at most, and not a dismissal of proceedings. The Tribunal is also permitted by s 127 of the VCAT Act to amend applications on its own motion or at the request of a party.

If the RTA is to be amended to provide for VCAT to receive termination applications, the existing procedural safeguards applicable to a notice to vacate must be replicated in respect of termination applications. Further, an application for a termination order must be exempt from the general flexibility which is accorded to VCAT in other contexts to amend the document that confers the Tribunal's jurisdiction.

If the termination order application process is to be implemented, key practical steps should also be taken to ensure that tenant's rights are safeguarded. This is because adoption of termination orders would remove the need for a landlord to serve a notice to vacate by hand or registered post. One

[3] Section 319 of the RTA.
[4] [2005] VSC 46.
[5] Section 67 of the VCAT Act 199, Orders 4 and 7A of the VCAT Rules 2008

critical consequence of this change would be that a tenant will receive fewer documents warning of of the risk of eviction.

As the Discussion Paper details, there is a recognised low tenant attendance rate at VCAT hearings. We are concerned that the removal of the notice to vacate could worsen this problem. Many tenants inform us that they were unaware of eviction proceedings until late in the process, often when a police officer attends with notice that a warrant will be executed. This causes a high volume of rehearing applications,[6] which recent amendments have made more difficult to utilise[7].

Whereas at present a tenant facing eviction receive three separate documents: the notice to vacate (served by hand or registered post)[8], a copy of the landlord's application, and a notice of hearing from the Tribunal, adoption of termination orders would reduce this to a two-step process (copy of the termination order and notice of hearing). In our view, this practical issue could be overcome by an amendment requiring that the copy of a termination application be served by hand or registered post, and that tenants are made aware of their hearing.

Moreover, we reiterate recommendation 9 to the Dispute Resolution issues paper that non-attendance by tenants is a fundamental concern, and encourage VCAT to adopt the practices in other jurisdictions of contacting a tenant by telephone and all other available means to advise of the hearing. To facilitate VCAT's contact with a tenant, landlords making applications should be required to provide alternative contact points for a tenant on that application, such as a mobile telephone number and email address.

Truncation of time from incident to decision

Tenants in receipt of a notice to vacate for rent arrears or failing to comply with a duty currently have a 14-day notice period to address the concerns and prepare to demonstrate at a hearing that the situation has been remedied. This time is invaluable, and any reduction by the termination order process would greatly increase the rate of eviction in circumstances where more time would have resolved the problem. Tenants in rent arrears are frequently pursuing other funds, seeking financial assistance or working with financial counsellors to address their financial concerns. Currently applications to the Tribunal are listed as soon as possible, with delays only being caused by the business of the Tribunal.

However, if a termination order process is adopted, tenants' security of tenure will be protected only if adequate time is provided from the receipt of copy of the application to the Tribunal to determination of those issues. As we have proposed in response to changes to the rent arrears provisions below, the RTA must build in flexibility for tenants in financial hardship in order to give

[6] Section 120 of the VCAT Act.
[7] See section 37 of the Courts Legislation Miscellaneous Amendments Act 2014
[8] Section 506 of the RTA.

effect to security of tenure. This is particularly so as Victoria's housing market continues to contract, with a greater proportion of the community leasing their homes and for longer periods of time.

Preserve postponement safeguard

It is unclear whether termination orders could accommodate the option of the safeguard at s 352 of the RTA for postponement of the issuing of a warrant for possession. This fundamental safeguard is regularly used by Tribunal Members to provide a tenant with more time to relocate, and importantly to bridge the time until another property is available so that the tenant and their family do not need to move into temporary or crisis accommodation while waiting on their new lease to commence.

In our view, to retain the fundamental protection of postponing the issuing of a warrant, any termination order scheme should include a mechanism for a further hearing at the end of the notice period to permit a tenant to raise issues of disproportionate hardship and seek an extension of the issuing of a warrant for possession. In our view, the termination order hearing is not the appropriate point at which issues of hardship are best raised. This is because at the time of that hearing, Tribunal Members are likely to be satisfied that the notice period ought to provide sufficient time to relocate, and it will naturally preclude a tenant from raising their circumstances immediately prior to a warrant otherwise being issued.

Recommendation 8: Ensure a standardised termination order process to consider whether eviction is appropriate in circumstances where a tenant is not at fault or at fault.

Recommendation 9: Retain the fundamental procedural fairness safeguards that currently exist. An application for a termination order must be sufficiently particularised, include all documents on which the applicant intends to rely, and be served by registered post or by hand. It must be exempt from amendment during a hearing. The process must retain adequate time between breach and hearing to enable a tenant to rectify the breach, seek advice and prepare for the hearing.

Recommendation 10: The termination order process must retain the ability for a tenant to seek a postponement of the issuing of a warrant when failure to do so would cause hardship.

VCAT decision-making process in granting termination and possession orders

VLA supports a proportionality test and a pre-eviction checklist

VLA strongly supports the introduction of a discretion for VCAT to consider the reasonableness and proportionality of termination in making possession orders, as outlined in Option 11.2 and our earlier

submission.[9] Currently VCAT lacks this discretion and *must* make a possession order if satisfied that the landlord was 'entitled' to have issued the particular notice to vacate.[10] The hearing is therefore solely focussed on the whether the evidence provided by the landlord supports the assertions made on the notice to vacate issued under a particular section. Depending on whether the notice is concerning allegations of tenant fault, or landlord change of use, the Tribunal's focus will be on one party only.[11]

It is our experience that Tribunal Members often express regret about the absence of a discretion when hearing of a tenant's circumstance, and relay to a tenant that they are jurisdictionally bound to order possession when finding that a landlord was 'entitled' to have issued the notice to vacate. Providing the Tribunal with discretion to consider evidence of both the tenant's and landlord's circumstances (once it is satisfied that the requirements for possession are met) and to order eviction only when it is proportionate after considering all of the circumstances, better aligns with domestic and international human rights protections and would provide increased security of tenure to tenants by ensuring evictions only occur when all the circumstances require it.

The Discussion Paper outlines circumstances under which the Tribunal has discretion not to make a possession order despite finding that the landlord was 'entitled' to have issued the notice to vacate. For example, it states that the Tribunal must dismiss an application if all rent arrears have been paid. For the sake of clarity, we note that this is not correct as the RTA currently stands, and is a recommendation we have made in response to changes for rent arrears, below. Rather, at present, s 331(3)(b) of the RTA requires that the Tribunal must dismiss an application where all arrears that are subject to a payment plan (made earlier pursuant to s 331(1)(b)) have been made during the period of the adjournment, if the matter is renewed.

In our view, it is entirely appropriate for the Tribunal to take into account the nature, frequency and duration of the tenant's conduct, its impact on others and whether less severe alternatives have been considered. In light of the seriousness of the consequences of being evicted, it is appropriate that the Tribunal considers the broader context in which certain incidents occur, and the impact of those incidents, in order to consider whether the complete circumstances require that eviction is necessary. Such an approach gives effect to the purpose of the RTA in balancing the rights and interests of parties to a tenancy agreement, and ensures that the consumer protection legislation does not serve punitive ends.

Require a pre-eviction checklist and supporting evidence

Requiring documentation in support of the eviction would go a long way to address the serious procedural fairness concerns that currently exist in relation to residential tenancies proceedings.

[9] *Security of Tenure Submission,* 31 December 2015, Victoria Legal Aid, Recommendation 2.
[10] Section 330(1).
[11] Subject to the ability to postpone the issuing of a warrant for some notices to vacate per s 352.

Order 7A of the *Victorian Civil and Administrative Tribunal Rules 2008* (VCAT Rules) govern what is required to accompany applications to the Residential Tenancies List, and when that material is to be provided to the Tribunal and the respondent. The introduction of VCAT Online has changed the way landlords apply to that list, and is now used by the vast majority of estate agents. Prior to 2014, the VCAT Rules permitted a landlord applying through VCAT Online to provide accompanying documentation on the day of the hearing. In response to submissions providing evidence of the disadvantage this causes tenants, Rule 7A.05(2) was introduced in 2014 to provide that, despite applying through VCAT Online, a landlord is required to serve documents on a tenant within 7 days of applying to VCAT, in accordance with Rule 4.07. However, despite the introduction of Rule 7A.05(2) it is our experience that the majority of landlords using VCAT Online continue to fail to provide documents accompanying their application until the day of the hearing. This is a breach of procedural fairness and causes significant disadvantage to a respondent tenant as they are unable to know the case they are required to meet, and cannot obtain informed legal advice prior to the hearing.

When these issues are raised during the hearing with the Tribunal, most Members will agree that documents should have been provided earlier, but the general response is for the Tribunal to stand the matter down and provide the tenant with some time to read the documents. Rarely are adjournments ordered when requested. The focus on proceeding with hearings in a manner when tenants are not able to prepare properly causes further disadvantage to tenants.

Requiring a pre-eviction checklist detailing why an eviction is proportionate is a welcome development, however amendments would need to ensure that the material is provided to a tenant with appropriate time to consider their response and seek advice if needed.

Recommendation 11: VLA strongly supports the introduction of a proportionality assessment and discretion to ensure evictions only occur when it is reasonable, following consideration of all of the circumstances.

Recommendation 12: Require landlords to complete a pre-eviction checklist addressing the factors at Option 11.2, and require all documents in support of eviction to be provided at the time the application is made.

Principles for tenant fault evictions

The Discussion Paper proposes a number of changes to the way in which tenancies can be terminated where tenants are at fault. While we address particular questions raised in the options paper, below, we set out immediately below the broad principles which inform our submission and answer to each question.

1. It is a significant shift in public policy to use residential tenancies legislation to enforce standards of conduct for tenants as members of their community, particularly where those standards do not apply or are not enforceable against homeowners. The RTA has previously only sought to limit the conduct of tenants to the extent that it may have legal consequences for the landlord, which is appropriate for legislation that governs the relationship between landlords and tenants. Many of the proposed changes go further than what is necessary to protect a landlord's interests or to protect neighbours from ongoing danger. The rules that apply to a person's conduct in the community should not depend on whether they are a tenant or a landlord. The remedies available to the community at large – voluntary dispute resolution schemes, intervention orders and the criminal law – should be sufficient, and the scope of any additional obligations should not depend on whether a person has sufficient finances to own their own home.
2. Single incidents that are unlikely to recur should not be a basis for eviction where there is no threat to ongoing safety.
3. Assessment of risk of recurrence is a function that the Tribunal performs well, having regard to the relevant legal principles and evidence. Tenants have a positive obligation to satisfy the Tribunal that a risk has abated, and in our experience the Tribunal takes an appropriately conservative approach to the assessment.
4. Processes for eviction should easily distinguish between fractious neighbourhood disputes and serious risks.
5. The impact of eviction can have significant long-term consequences for the individual and the community. It should not be used punitively, but only where it is necessary to protect a landlord's interest.

Damage and Danger notices

Immediate evictions should be preserved for when it is necessary to protect property or ensure safety

'Damage' and 'danger' notices have been described by the Supreme Court as 'blunt and speedy',[12] and ought to be reserved for the most serious of circumstances that requires the immediate removal of a tenant in order to protect property or people from further damage or harm. Smith J in *Director of Housing v Pavletic* [2002] VSC 438 was required to determine whether 'endangers' requires that a landlord prove ongoing endangerment at the time the notice was served. His Honour found that it was (at [18]):

> I am also persuaded that the alternative interpretation would lead to harsh, unfair and absurd results. First, it would not matter how long ago the alleged act or omission endangering the safety of occupiers of neighbouring premises occurred. The landlord could always issue a notice to

[12] *Director of Housing v Pavletic* [2002] VSC 438 at [19] (Smith J).

> vacate if all that was required was that the tenant or the tenant's visitor had by act or omission in the past endangered the safety of such people. It is true that, at any hearing, there might be an issue raised as to whether the landlord was entitled to give the notice; for an argument might be raised that it was not a bona fide exercise of power. But unless the tenant could identify some other reason, it would be very difficult to establish a lack of entitlement on that interpretation. In addition, the intention of the Parliament was to impose a mandatory obligation on the Tribunal to make a possession order where the landlord was entitled to give the notice and it had not been withdrawn. Bearing in mind the serious consequences that could flow from eviction for the tenant, and for any family the tenant might have, and the absence of any form of discretion or any opportunity to postpone the operation of the order which might ameliorate any harshness of the result, such an interpretation could produce unfair and harsh results.

In considering the policy objective of the immediate notice, His Honour opined (at [19]):

> It is one thing to empower a landlord with the power to give the notice and provide a blunt and speedy procedure where, at the time of the notice, acts or omissions of the tenant's visitor are endangering the safety of occupiers of neighbouring premises. It is another to give such a power and procedure where there is no such present endangerment but there was in the past.

Any amendment to damage or danger notices that removes the requirement that the conduct be urgent, current, imminent or continuing would constitute a significant policy shift, and turn the notices into punitive rather than protective instruments. Such amendment would seriously undermine security of tenure and cause the RTA to stray into the jurisdiction of criminal law. In light of the very real possibility of homelessness causes by an immediate eviction, such notices ought to be reserved for circumstances where eviction is necessary in order to fulfil obligations to protect the safety of other people or prevent serious damage to the property.

Damage

The current interpretation of ‘malicious’ generally adopted by the Tribunal is one that encompasses both intentional and reckless acts. Accordingly, amending the definition as proposed will provide clarity but not materially alter the grounds for eviction.

However, broadening the definition to include serious injury to the landlord or another person is a marked shift in the purpose of the provision, being to protect property against further harm. A risk to personal injury ought to be covered by the ‘danger’ notice to vacate (or termination order), with its associated protections. VLA acts for the most disadvantaged tenants and residents, many of whom struggle with addiction and experience poor mental health. In these circumstances, people require the protection of their home as the consequences of eviction for the individual and the community are significant given they often lack support networks and do not have the financial capacity to quickly relocate. Homelessness is often the result. The behaviour of such tenants can sometimes be considered as problematic. We hold concerns that, if a person can be evicted on the basis that

they were reckless as to the acts of their visitor, who causes injury to another, the bar is set too low and evictions will occur too readily.

Moreover, extending the protection from 'occupiers of neighbouring premises' to include the landlord, their agent, employee or contractor is unnecessary to achieve the protective purpose of the provision. This is discussed further under 'Danger', below.

If the notice is extended to apply to a landlord, their agent, employee or contractor, it is important that the RTA includes an exemption in circumstances where a person is at the property unlawfully or exercising a valid right of entry in an unreasonable manner. To fail to include such an exemption would open the notice to vacate to abuse by unscrupulous landlords who may invite disputes by attending or behaving in an unreasonable manner.

Recommendation 13: Eviction for damaging property ought to be restricted to circumstances where removal of a tenant is necessary to protect property. VLA is strongly opposed to broadening the scope to include allegations of serious injury to a person, as such behaviour is proscribed by the 'danger' notice to vacate.

Danger

The requirement that danger be continuing ought to be retained

In our view, the rights of tenants and landlords will be properly balanced when immediate eviction is permitted only in circumstances necessary to protect the wellbeing of other people living at or close to the property. Removing the need for the danger to be continuing fundamentally alters the purpose of the notice from one that protects to one that punishes. Evicting a tenant following an isolated incident of danger, in circumstances where a Tribunal is satisfied the danger is not continuing, is patently disproportionate. In many instances it would result in an outcome that would be considered excessive under sentencing principles as the removal of a person's home would not be an outcome within range of a court determining criminal charges.

The Tribunal is well placed to assess whether, at the time the notice was issued, there is ongoing endangerment. Determination of risk is commonplace among decision-makers, and necessary in any jurisdiction that has safety elements within its scope. It is the experience of VLA that Tribunal Members make a rational decision on whether risk was continuing at the time of service of the notice based on the nature of the incident(s), history of the tenancy and whether any social supports are now in place that were not previously. This is a rational exercise based on evidence before the Tribunal, necessary to balance the protection of people against the seriousness of removing a person from their home. By contrast, if the requirement for ongoing endangerment is removed, many of our clients who experience episodic mental illness or temporarily relapse into substance use,

resulting in a one-off incident, would be forced to vacate even in circumstances where the Tribunal is satisfied that the situation has stabilised and there is longer any continuing risk.

The notice does not need to be extended to protect landlords and their agents

The RTA currently recognises that in certain urgent circumstances where the safety of a neighbour is at risk, it is appropriate to escalate the entitlement on the part of the landlord from issuing a breach of a duty notice,[13] to an entitlement to issue an immediate notice to vacate. This recognises that the danger is continuing and the person to be protected lives in close proximity. The same urgency does not apply to landlords, their agents, employees or contractors, as they do not reside at or near the premises and therefore the tenant's behaviour can be addressed in a way that is not 'blunt and speedy'. It would be more appropriate to extend the duty at section 60 of the RTA to provide that a tenant must not interfere with a landlord, their agent, employee or contractor who is exercising a lawful power of entry in a reasonable manner.

Addressing problematic behaviour through the breach process would provide for escalating consequences, while preserving security of tenure. This is particularly important for social housing tenants, who are most likely to exhibit difficult behaviour, and for whom the consequences of eviction from secure tenure would be the gravest.

Recommendation 14: Ensure tenants are only evicted for causing a danger when the Tribunal is satisfied that is necessary due to remove an ongoing endangerment.

Recommendation 15: Extend the duty on tenants not to cause nuisance or interference with neighbours to proscribe similar behaviour directed at a landlord, their agent, employees and contractors. VLA is opposed to extending the danger notice to actions against a landlord, their agent, employee or contractor in the absence of the more suitable breach of duty process that will address behaviour without decreasing security of tenure.

Notice to leave

Notice to leave ought to be repealed

We refer to recommendation 4 in our submission to the Security of Tenure Issues Paper where we demonstrated that notices to leave are widely abused and ought to be repealed. As set out in that submission, in our experience, these notices are often misused by operators and are sometimes issued to residents who raise legitimate issues about repairs or unfair house rules. As such they operate in direct contrast to the rationale for the options paper considering termination orders; to provide scrutiny of the reasons alleged as requiring eviction. We typically see residents receive a

[13] Section 60 of the RTA, which proscribes interference with a neighbour.

notice to leave issued late in the week, requiring a resident to leave their home for two business days plus a weekend, without the owner making any application to the Tribunal for termination of the residency rights. It is our experience that once a resident has spent two or more days away from their house, they have moved on; considering themselves to have been practically evicted. The protection of imposing an offence for the issuing of a notice to leave without reasonable grounds fails to provide any practical deterrent. If a resident was to contact Consumer Affairs Victoria (CAV) alleging impropriety in the issuing of the notice, they would be required to prove that there was no reasonable ground, without the matter having been heard by a decision-maker and in the absence of any factual findings. The statistics in the Dispute Resolution issues paper bear out the paucity of investigations and prosecutions by CAV.

In our view, behaviour that is dangerous is best regulated by the danger provisions that provide for an urgent notice to vacate or termination order. In situations where physical safety is at risk in the interim, Police have a range of remedies at their disposal such as issuing safety notices, applying for intervention orders, or taking a person into custody if the conduct is sufficiently dangerous. Fundamentally, in our view, permitting a rooming house owner to effectively wield the power of the decision-maker is an inappropriate balance of rights. It fails to provide meaningful security of tenure for people who are generally the most disadvantaged and lacking in support.

VCAT ought to be empowered to order resumption of residency rights

For the reasons set out above, we consider it is appropriate to permit a resident to resume occupation of the premises if the Tribunal is satisfied that those circumstances will not be repeated. This is, we consider, an appropriate measure to balance risk to other residents, with potential homelessness for the respondent.

If retained, detail on notices to leave should be improved

If notices to leave are retained, it is imperative that the information on the document is improved. We recommend that it includes contact details for legal services, an indication that receiving a notice without reasonable justification is an offence and how to contact CAV, together with information on crisis and transitional housing services.

In our experience, while permitting an authorised representative to attend to collect personal items for a suspended resident is good policy, it is fraught practically. Requiring a resident to contact the owner immediately after a resident has been summarily, if temporarily, evicted will invite further disputes. It is our experience that rooming house owners avoid contact in these circumstances, and are generally unwilling to take any positive steps to assist a resident who they feel poses a threat. A more practical solution would be one that requires an owner to permit a suspended resident to briefly return, with Police supervision if necessary, in order to obtain necessary personal items.

Recommendation 16: VLA urges repeal of notices to leave as they are widely used inappropriately and are unnecessary given the protections provided by danger notices.

Recommendation 17: If notices to leave are retained, it is important that:

- the Tribunal continues to have power to order resumption of the residency right.
- The notice itself advises residents of where they can seek legal advice, that it is an offence to receive a notice without justification, and referral details to transitional housing services.
- A resident is permitted to return during the suspension period to collect necessary personal items.

Disruption

Disruption should be addressed through the breach of duty process

In our view, permitting the eviction of a rooming house resident for causing serious disruption to a neighbour is disproportionate and fails to acknowledge the practical realities of people living in close quarters. Given that the issue is remediable and does not pose a risk to the safety of another occupant, we consider that such conduct is best controlled through the breach of duty notice process. If a resident continues to seriously interfere with the quiet enjoyment of a neighbour after being put on notice, they will be on the path to eviction in any event.

Extending the timeframe from an immediate notice to one that requires a resident to vacate in 7 or 14 days does not address the lack of proportionality in the response. Rooming house residents are generally the most vulnerable, and evicting them from their home in circumstances when they are not posing a risk to others, but merely an inconvenience, is always disproportionate.

Discretion for VCAT should be retained and strengthened

If the use of notices for disruption in respect of rooming house residents is to remain then it is essential that VCAT retains the discretion not to evict a resident if satisfied that the behaviour has ceased and will not be repeated. In our view, requiring a resident to further prove the breach is not a recurrence places the threshold too high. Repetitive behaviour ought instead to be considered when assessing the likelihood of the conduct being repeated. Assessment of the risk of recurrence can be made based on evidence of previous conduct and analysis of current measures to address the behaviour.

Should VCAT lose this discretion it will be forced to evict residents upon finding an isolated incident proven. As discussed earlier, the occupants of rooming houses will often be experiencing substance

dependence or mental illness. They are forced to share close habitation as a consequence of a dysfunctional housing market. Evicting such disadvantaged people from the most insecure form of tenure for an isolated incident, in circumstances where safety is not at stake and the incident was isolated, will serve to cause undue harm to the resident in question, place greater strain on crisis and transitional housing, and serve to exacerbate the underlying causes of the behaviour. This is not a justified measure in order to protect the quiet enjoyment of a neighbour when the breach of duty process exists.

Recommendation 18: Repeal notices to vacate for disruption, and address problematic behaviour through the breach of duty process.

Recommendation 19: Retain and strengthen VCAT's discretion to avoid eviction when satisfied behaviour has ceased and will not be repeated.

Non-payment of rent

Tenants and residents facing eviction for rent arrears is by far the most common reason a tenant is forced from their home, with around 17,000 evictions for non-payment of rent being heard in 2015-16.[14] Many of VLA's clients are facing temporary crisis or financial difficulties that will resolve, and it is fundamental to security of tenure that proper safeguards are provided and alternatives are explored before evicting a person in financial difficulty from their home.

In practice, the current protections are less effective than the options paper describes. A tenant bringing the rent up to date after receiving a notice to vacate is a factor only for consideration by the Tribunal if (a) a tenant attends the possession order hearing and (b) argues that satisfactory arrangements have been made to avoid financial loss to the landlord. Improving the scheme to provide that it invalidates the notice to vacate (or termination order) would significantly improve tenants' security of tenure, particularly as tenants attend only 20 per cent of hearings. Most tenants are unaware of the discretion reposed in the Tribunal and believe they must vacate after receiving the notice.

In practice, the Tribunal also does not ordinarily adjourn the possession order pursuant to a payment plan. In our experience, such applications are often rigorously contested by landlords and agents. A tenant bears the burden of proving that it is more likely than not that if a payment plan is ordered that they will meet those payments without exception. This is often difficult for a tenant to do in light of financial difficulties causing the hearing in the first place. The Tribunal generally requires that arrears are brought up to date in no more than three months, with six months being an outer limit exception. If a tenant breaches a payment plan and proceedings are renewed, it is exceptionally

[14] VCAT Annual Report 2015-16

difficult for a tenant to agree to a new payment plan, with a tenant ordinarily required to satisfy the Tribunal that they can make lump sum payments in the short term. When a person is faced with the eviction of themselves and their family they will often go to extreme lengths to find money, causing them further financial disadvantage.

Finally, it is uncommon for the Tribunal to grant an extension of execution of a warrant by 30 days following the making of a possession order for rent arrears. Even if satisfied a tenant would suffer hardship, the Tribunal is generally reluctant to permit them to remain when further rent may not be paid to the landlord. If an extension is granted it is commonly restricted to 7 days.

VLA endorses Option 11.15

VLA supports initiatives aimed at requiring landlords to contact a tenant earlier when arrears are accruing. Time is commonly of the essence in these situations, so contact ought to be via telephone or email. If a tenant is contacted upon falling 7 days behind in rent, they will need time to seek additional resources and respond. It is quite easy for a tenant to miss a rent payment by a few days for reasons that are not systemic. The current time of 14 days before a notice can be sent is invaluable for tenants to obtain financial relief, receive a further wage payment or access funds from other sources. Any change that shortens that timeframe will significantly diminish security of tenure, in a market where rents are continually increasing, out of any proportion with income.

Accordingly, if a tenant is contacted on day 7 regarding late rent payment, they ought to have until day 14 to to bring rent up to date. If that is achieved, the landlord will have recovered their money, and that ought to invalidate any further steps for eviction based on the late payment. Upon contacting a tenant on day 7, a landlord ought to be required to direct tenants to financial counselling assistance. Landlords should be required to demonstrate that this has occurred at any subsequent VCAT proceeding. Directing tenants in financial difficulty to properly funded financial counselling services will reduce the number of evictions for arrears, save public funds and reduce harm to tenants and their families.

For the reasons we set out above, and in response to Consultation Question 172, we oppose the introduction of termination orders for rent arrears if an application may be made immediately upon rent being due. The 14 days following the rent due date are an extremely important time for tenants to seek support. It is the experience of VLA lawyers that tenants do not elect to fall into rent arrears, nor do they misunderstand the fundamental obligation of the need to pay rent. Arrears accrue in temporary circumstances and the flexibility of time is essential in order to avoid unnecessary evictions.

VLA endorses Option 11.16

As mentioned above, currently repayment of rent arrears does not invalidate an application for possession based on that reason. Most tenants do not attend the possession order hearing as they

are unaware of the discretion given to VCAT to order a payment plan in lieu of eviction. We strongly support an amendment to provide that full payment of outstanding rent arrears, at any time before a warrant for possession is executed, prevents eviction on that basis. In light of the volume of evictions for non-payment of rent in Victoria each year, such an amendment would make a marked improvement in security of tenure for the most financially disadvantaged tenants, while increasing the rate of recovery for landlords.

VLA opposes Option 11.17

VLA opposes the introduction of an application mechanism to terminate a tenancy if a tenant has frequently fails to pay rent owing on the day it is due. In our view, this mechanism is unnecessary to protect the financial interests of landlords and fails to appreciate the perspectives of long-term tenants in the existing rental market.

First, without any additional regulation, tenants are already incentivised to pay their rent on time by virtue of the rental market, and seeking to obtain positive references for future rental properties. Only those in secure social housing do not have this concern, and they are commonly the most financially disadvantaged people paying rebated rent. The risk of providing for repeated late payment of rent to constitute a ground for termination is that it fails to recognise that people are renting for longer periods of time, in an increasingly expensive rental market. In circumstances where a tenant brings rent up to date on each occasion, there should be no further consequences.

Second, such a process would be unnecessary to protect a landlord's interest in their investment property in light of the protections afforded to them under the National Credit Code and external dispute resolution schemes such as the Financial Ombudsman Service. Policy that appropriately balances the rights of tenants and landlords is one that permits flexibility in the repayment of rent for the less financially secure party. The National Credit Code prevents a mortgagee from taking action unless the mortgagor owes 25% of the outstanding credit, or $10,000, whichever is lesser, 30 days after payment is due. This flexibility for an investor, together with knowledge that there is some flexibility in rent payments, is sufficient for an investor to plan the business of leasing a home in a way that does not place too great a burden on the more financially disadvantaged tenant.

VLA endorses Option 11.18

For the reasons outlined in the Discussion Paper, we agree that there is no reason to permit a reduced notice period for rent arrears for rooming house residents as exists for tenants. Although it is not common for a rooming house to use the breach of duty provisions to evict a resident for repeated late payment of rent, it is important that the same safeguards discussed above are extended to rooming house residents, particularly as they generally constitute a more disadvantaged cohort.

Recommendation 20: Require that a landlord contacts a tenant if they are 7 days behind in rent to refer the tenant to financial counselling, and to provide them with 7 days for repayment of the arrears. Failure to do so ought to invalidate an application for possession.

Recommendation 21: Provide that repayment of all outstanding rent within 14 days of falling behind invalidates any attempt to evict a tenant on that basis.

Recommendation 22: Align the protections for rooming house residents to those provide to residential tenants by providing that no action can be taken to evict a resident until they are 14 days behind in rent.

Failure to comply with a VCAT order

VLA broadly endorses the proposal to better confine and target the consequences of a person's failure to comply with a compliance order issues by VCAT. As it stands, the current regime operates, in practice, in an unreasonable way (potentially unintentionally). We address two main issues below.

VCAT's discretion not to make a possession order following breach of a compliance order - VLA recommends against adopting Option 11.21

We refer to recommendation 6.2 in our response to the Security of Tenure Issues Paper, in which we proposed that the requirement of demonstrating all of the factors at s 332(1)(b) does not provide an adequate protection against eviction in circumstances where a tenant is able to satisfy the Tribunal that the breaching behaviour will not be repeated. We remain of the view that requiring a tenant to prove that the breach is not a recurrence of an earlier breach fails to provide the protection that s 332(1)(b) is seeking to provide.

As you are aware, upon a Tenant's breach of a compliance order, a landlord is entitled (subject to satisfaction of the statutory prerequisites) to issue a notice to vacate. Under the RTA, unless the tenant can satisfy VCAT of each of the three factors set out in s 332(1), ultimately a possession order will be made. Relevantly, the third factor (see, s 332(1)(b)(iii)) can only be met where a tenant can show that 'the breach of duty is not a recurrence of a previous breach of duty'. In our view, the requirement to demonstrate this third factor effectively undermines the conferral of discretion on the Tribunal. This is because, in effect, every tenant who has been validly issued with a notice to vacate following a breach of a compliance order **will have recurrently breached that duty** (otherwise the notice would not have been entitled to be issued)**.** As a result, we urge the repeal of s 332(1)(b)(iii). Retaining s 332(1)(b)(iii) defeats the purpose the discretion, which is aimed at permitting leniency in circumstances where a tenant can prove, on the balance of probabilities, that the breach has been remedied as far as possible, and is unlikely to be repeated.

Further, we do not anticipate that the repeal of s 332(1)(b)(iii) would create conditions where a breach could occur infinitely during a tenancy, with the Tribunal being powerless to give effect to the notice to vacate. This is because the obligation to meet the first two tests (that the breach is trivial or has been remedied as far as possible, and that there will not be a further breach of the duty) is already a high threshold for a tenant to meet. If the process of: (a) a landlord issuing a breach of duty notice, (b) seeking a compliance order and then (c) issuing a notice to vacate results in a hearing at which the tenant is able to persuade the Tribunal that it is more likely than not that they will cease the breaching behaviour, then the breach of duty provisions have fulfilled their function in modifying the behaviour of the tenant. The alternative, evicting a tenant despite being so satisfied, serves no protective function and will lead to unnecessary evictions.[15]

Moreover, while we appreciate that there is authority suggesting that the word 'occurrence' in 332(1)(b) should be read strictly[16] a far more common interpretation applied by VCAT of s 332(1)(b) is summarised by Member Kefford in *Director of Housing v Zimonyi*[17] where it was held:

> In the opinion of the Tribunal the effect of s 332(1) is to permit the Tribunal to excuse one-off breaches (e.g. a New Year's Eve party) or where the cause of the breach has gone from the premises (e.g. the abusive partner removed or barking dog found a new home).

Member Kefford's decision has been referred to recently by a Senior Member[18] and demonstrates that the Tribunal reads the protections at s 332(1)(b) strictly.

We consider that a more appropriate protection for tenants is provided by removing the requirement on a tenant to demonstrate that a breach is not a recurrence, and retaining the focus on whether the Tribunal considers there will be a further breach of the duty.

VLA supports the introductions of time limits on compliance orders

VLA supports the introduction of time limits on a compliance order for the reasons provided in recommendation 6.1 in our response to the Security of Tenure Issues Paper. An expiry date would give greater effect to security of tenure and reflect that tenancies are likely to be of longer duration in future. In the oft-cited decision of *Director of Housing v IF*, Member Nihil (as she then was) opined that '(t)here will be circumstances where a subsequent breach is not sufficiently similar to that described in the notice, or so much time has passed, that the person breaching could not be expected to consider him or herself still bound by the notice of breach.[19] However, this sensible

[15] The impact of s 322(1)(c) is particularly acute in social housing where, in our experience, some Director of Housing representatives and VCAT Members alike are attempting to modify anti-social behaviour of disadvantaged tenants, in full knowledge that evicting such a person is catastrophic for the individual and a poor outcome for society.
[16] *Director of Housing v Drechsel* (Residential Tenancies) [2016] VCAT 128 (29 January 2016).
[17] (Residential Tenancies) [2013] VCAT 742 (16 May 2013), relied upon in the recent decision of Director of Housing v TRB (Residential Tenancies) [2017] VCAT 85 (23 January 2017) in which Senior Member Burden-Smith held the subjective circumstances of a tenant ought not be considered when considering the breaching behaviour.
[18] Director of Housing v TRB (Residential Tenancies) [2017] VCAT 85 (23 January 2017).
[19] *Director of Housing v IF* (Residential Tenancies) [2008] VCAT 2413 (18 November 2008), at [31].

interpretation of an order made under s 248 of the RTA does not accord with the strict reading of orders made under that section, and all parties to the tenancy agreement would benefit from clarity. Rather than provide for minimum expiry periods of six or 12 months, providing a maximum duration for compliance orders would provide greater security of tenure by acknowledging that future unrelated acts of breaching behaviour are not a result of repeated poor behaviour, but are rather a separate and isolated incident.

Recommendation 23: Remove the requirement that a tenant must demonstrate that a breach is not a recurrence when seeking to avoid eviction for non-compliance with a compliance order.

Recommendation 24: Require that compliance orders contain an expiry date when prohibiting future breaches. We recommend that maximum, rather than minimum, time limits are prescribed by the RTA.

Use of premises for an illegal purpose

VLA endorses Option 11.22A

Introduction of the original 1980 RTA codified many common law principles, among them the recognition that certain criminal acts committed by a tenant had the capacity to either taint a building, causing ongoing damage to the owner and landlord, or to potentially lead to liability of the owner for failing to take reasonable steps to prevent the commission of the offence. English common law examples of when tenants were evicted for committing such illegal activity included where a tenant was operating a brothel, an illegal gaming house or unlicensed hotel. Importantly, for a tenant to be evicted from their home for such illegal activity, the common law required that the premises were integral to the commission of the offence. That is, the offence could not have been committed without the premises. It was never enough to show that the premises were merely the site of the offence, such as when an assault or robbery takes place, as such conduct can occur anywhere and in the absence of the premises.

Requiring that a conviction be in place before proceeding with eviction for illegal use is an overdue reform, and one that VLA strongly supports. There is generally no urgency in evicting a tenant for illegal use. The illegal behaviour will have been identified by the Police, and will have ceased. There is no allegation that the safety of any person is at risk. There should therefore be no concern about the time taken for charges to be considered and, if the matter proceeds, prosecution to take place in accordance with the principles and protections of the criminal justice system. Where there are concerns for the safety or quiet enjoyment of neighbours, the RTA provides for avenues for addressing those matters in a timely manner.

For many tenants, eviction of themselves and their family is a worse outcome than a sentence imposed by the criminal courts. This is particularly true for tenants in social housing. If the purpose of the provision is to protect a landlord's interest, then that should only be of concern when criminal courts have been satisfied beyond reasonable doubt of the illegal activity. Evicting a tenant when satisfied of conduct to the lower standard of balance of probabilities, in circumstances where no conviction has been found and there is no threat to the safety or interference with neighbours, is disproportionate in meeting the objectives of the provision. Subject to ensuring a landlord's property is not tarnished, nor liable for failing to act, a tenant ought to be able to confront the consequences of their actions from the safety of their home as would any other person with more secure tenure.

VLA opposes Option 11.22B

VLA is concerned about adopting the approach in New South Wales as it insufficiently describes the nexus of requiring that the premises be *used* for an illegal purpose. The second limb of the suggested guidance at option 11.22B permits the Tribunal to evict a tenant if satisfied that the tenant caused the use of the premises for any other unlawful purpose, and the use is sufficient to justify the termination. This provides the Tribunal with greater discretion, and a broad reading of the provision would permit evictions when the premises are merely the site of the offence, rather than integral to its commission. The nexus could be clarified by requiring eviction only when the premises is used to further commission of the offence, such that an offence could not have taken place but for the premises.

Recommendation 25: Require a conviction to be a condition precedent to issuing a notice to vacate for illegal use of the premises.

Recommendation 26: Strengthen the nexus between the use of the property, and the commission of the offence, by requiring a landlord to demonstrate that the property was integral to the commission of the offence.

Parting with possession for consideration without consent

VLA opposes Option 11.23 in its current form

We do not support Option 11.23 as it is currently proposed. We highlight our two key concerns with the proposed option, below.

First, it is unclear how 'parting with possession' will resolve the long standing uncertainty between determining a lease from a licence that currently exists when assessing allegations of sub-letting without consent. In retaining use of the word 'let', the RTA relies on the common law interpretation of

'exclusive possession'. As *Swan v Uecker*[20] makes clear, it can be very difficult to determine if the grantor has in fact given the grantee the right to exclude all parties, including the grantor, such that exclusive possession has been provided. This is particularly the case when part of the premises, rather than all of the premises, is being provided to a third party.

In VLA's experience, most arrangements are constructed verbally and informally. While the nature of the interest being residential accommodation may indicate the grant of use of a room should be considered 'exclusive', this will not always be so. A tenant may reserve access to storage with the room, or require unencumbered access to the room for another reason. More commonly the parties will simply never have turned their minds to whether the grantor is able to access the room. Determining whether the grantor has 'parted with possession' in these circumstances will continue to be uncertain. The uncertainly could be addressed in part by limiting 'parting with possession' to the entire, rather than part, of the premises.

Second, while the new provision is aimed at preventing tenants from providing short-term commercial accommodation to strangers, it may also capture the situation where a tenant has friends or family staying for a short time. There is no policy justification for limiting a tenant's ability to have friends or family stay for a short time as tenants remain liable for the obligations under the RTA, including any damage to the property. As an increasing percentage of Victorians will rent their home, and for longer periods of time, it is important that the RTA provides the freedom to use the premises to accommodate friends and family from time to time. If the provision is aimed at reducing the wear and tear associated with short-term accommodation, the provision should be redrafted to capture only commercial arrangements.

Recommendation 27: Limit the prohibition on parting with possession to a tenant parting with the possession of the entire, and not part of, the premises.

Recommendation 28: Redraft the provision to ensure a tenant does not face eviction for having friends or family stay for short periods. One option may be to proscribe parting with possession on a commercial basis, with advertising to the world at large being a relevant factor.

Antisocial behaviour

VLA opposes Option 11.24

[20] [2016] VSC 313.

VLA is strongly opposed to the introduction of a new antisocial behaviour notice to vacate (or termination order) in order to protect neighbours, the landlord, their agent, employee or contractor from threats or abuse, or from feeling alarmed, distressed, intimidated or harassed.

Neighbours are already protected from serious threats by danger notices. The ANSTAT Annotated RTA states[21] that 'where a tenant or visitor has threatened an occupier of neighbouring premises, the Tribunal must consider whether the threat should be reasonably be regarded as an idle one or whether there is a real likelihood of the threat being carried out so that the tenant could reasonably be said to endanger (that is, manifest a danger) the neighbour'. Eviction of a tenant, and potentially their family, for threatening neighbours ought to only occur when it is necessary to protect the safety of the neighbour. Anything less can by the existing protections under the Act, ie, through issuing a breach of duty notice, and seeking compliance if necessary.

Extending the notice to govern interactions with the landlord, their agent, employee or contractor further distorts the asymmetrical power relationship between a tenant and their landlord and seriously undermines security of tenure. We refer to the reasons addressing the extension of Danger and Damage notices, above, which apply with equal force to the proposed anti-social behaviour notice. It is simply not necessary to evict a tenant, and potentially their family, in circumstances where behaviour can be modified by the less urgent breach of duty process, that still results in eviction if a tenant does not modify their behaviour. Immediate eviction notices should be reserved for instances where it is essential to evict a tenant in order to protect a person living in close proximity.

Finally, the proposed grounds at option 11.24 go much further than the NSW equivalent by incorporating the prohibition on causing 'alarm' and 'distress'. This is an incredibly low threshold. Taking these protections form the Scottish legislation is inappropriate given those provisions extend to social housing only, have a range of protective considerations and endow far greater flexibility in the Tribunal.

Many of VLA's clients experience mental illness, drug or alcohol addiction, or are generally disadvantaged due to under-education and the absence of protective factors. Their home should not be placed at immediate risk by virtue of these circumstances when there is no threat to the safety of other people living nearby, and antisocial behaviour can be addressed by the escalating breach of duty notice process.

Recommendation 29: VLA opposes the introduction of a new notice to vacate (or termination order) for anti-social behaviour. Neighbours, landlords, agents, employees and contractors will be adequality protected the escalating remedies available to a broadened

[21] At [244.04].

duty provision, with danger notices available when urgent eviction is essential to protect the safety of people living in close proximity.

End of fixed term notice to vacate

VLA supports Option 11.25A

VLA supports the option of repealing this notice to vacate as a means of increasing security of tenure. Despite the focus on longer fixed term leases in the review of the RTA, we consider that, if implemented, the market will be very slow to adapt, if at all. We expect that 12 month fixed term leases will continue to be what is generally offered. This continues to create uncertainties for tenants, who require a stable home in order to plan in the short to medium term. Given the range of notices that deal with tenant fault, and the breadth of reasons for which a landlord can evict a tenant upon their circumstances changing, it is our view that tenants ought to be confident in signing an initial fixed term lease that they are likely to be able to remain. In light of the options available, continuing with a further discretionary notice to vacate for no reason is unnecessary to encourage property investment. Further, landlords seeking to let their principal place of residence for a short duration may advise a tenant of that when commencing the lease, and recover the property utilising s 254 of the RTA.

In the alternative, VLA welcomes the reforms at Option 11.25B

Should the notice remain, VLA encourages the introduction of flexibility in enabling a tenant to give 14-days notice of intention to vacate in response, even during the fixed term of the tenancy. It is our experience that many tenants face difficulty finding alternative accommodation within a narrow range of dates, as is currently required by end of fixed term notices to vacate. Most rental properties are advertised as available immediately or in a short period time, meaning tenants are currently forced to wait until near the end of the fixed term until commencing their search. Flexibility during the notice period would ease this stress, with 14 days being a reasonable time for a landlord to advertise and relet in the current market.

We have previously described the difficulty tenants face in attempting to prove a notice has been issued in retaliation, or for discriminatory reasons. We continue to be of the view that they are inadequate safeguards to the use of the end of fixed term (and no specified reason) notices to vacate. While providing VCAT with the power to consider the interests of the parties would bring welcome flexibility, it would also create uncertainty and it is unclear to us at present what principles would guide such discretion.

VLA opposes Option 11.26

Extending the notice to vacate to be operative if issued at any time prior the fixed term lease ending provides greater uncertainty for tenants, many of whom welcome the final three months of a fixed term as indicating they are able to remain on a periodic basis.

Recommendation 30: Repeal the end of fixed term notice to vacate. VLA considers this notice to be an unnecessary impediment to security of tenure in light of the existing tenant-fault and landlord change of use notices to vacate.

Recommendation 31: In the alternative, VLA welcomes increased discretion for VCAT to avoid making a possession order in appropriate circumstances, and providing that a tenant may give 14 days notice of intention to vacate during the notice period.

Recommendation 32: VLA cautions against extending the termination date beyond the date a fixed term lease ends, as it would create greater uncertainty for tenants and is unnecessary in light of existing reasons for ending a tenancy.

Notice to vacate for no specified reason

VLA strongly endorses Option 11.27D

We refer to our recommendation 1.1 in our response to the Security of Tenure Issues Paper in which we detailed the impact that the notices to vacate for no specified reason have on tenants' security of tenure. As the Discussion Paper highlights, the main risk posed by these notices is not seen in the volume of such notices being issued, but rather in the chilling effect on the exercise of rights by a tenant that these notices cause. The possibility of receiving a notice to vacate for 'no specified reason' fundamentally undermines security of tenure and is unnecessary to protect the interests of landlords.

In our view, an argument to retain the 'no specified reason notice' because 'it can be difficult to prove an entitlement to use other notices to vacate' is not justifiable. In its intention, it directly undermines the protections provided by the conditions in those other notices. A landlord unable to make out the existing specified grounds should be prevented from evicting a tenant. Providing extra notice when those grounds cannot be established, by permitting use of the 120-day notice, does not adequately protect tenants as they still face the upheaval of eviction.

VLA opposes Option 11.27A as an insufficient safeguard against misuse

In our view, extending the relevant notice period attaching to a 'no specified reason' notice to 26 weeks is not a sufficient remedy for the negative impact of the notice itself. In our view, requiring reasons will not address tenants' concerns that they should not 'cause trouble' during their tenancy by seeking to assert their rights. Being evicted is a hugely disruptive process, and comes at great

personal and economic cost. Tenants will generally do what is necessary to reduce that risk, including, for example, accepting no maintenance and tolerating poor landlord behaviour.

If the notice is retained, it is essential that it is amended to incorporate all of the protections discussed at options 11.27A and 11.27B in an attempt to minimise the real risk that a landlord while 'hold the notice over' their tenant.

Recommendation 33: VLA recommends repeal of the notice to vacate for no specific reason on the basis that it significantly diminishes tenants' exercise of all other rights in the RTA.

Notice to vacate for change of use

VLA supports Option 11.28

For the reasons articulated in response to the proposed termination order amendments above, we consider that it is a fundamental procedural fairness requirement that proper detail and accompanying documents are attached to a notice to vacate at the time it is served. It would provide a tenant with the minimum material required in order to understand why they are being evicted, and to seek advice on the validity of the eviction. In our experience, VCAT does not consistently apply the decision of *Smith v Director of Housing*[22] to non-urgent notices to vacate. While most members accept that *Smith* clarifies the obligations at s 319 of the RTA, some Members question how providing further detail as to a landlord's changed circumstances provides procedural fairness to a tenant, given they may not be in a position to refute the allegations.

Further, clarifying that the notice must contain sufficient particularity of the reasons for the notice to vacate, such that the tenant knows why they are being evicted, would, we anticipate, lead to fewer disputes. This is because under the existing regime, a tenant is currently required to apply to challenge the validity of the notice in order to obtain the evidence said to support it.

VLA supports Option 11.29

We also support the recommendation that VCAT be given greater power to scrutinise the reasons for the eviction. Currently the Tribunal is limited in assessing whether the landlord was 'entitled' to have issued the notice. Extending the protection to prohibit evictions made in bad faith, or where the evidence indicates a tenant is able to remain, would increase security of tenure while having a negligible impact on landlords seeking a return of their investment property for genuine reasons.

VLA supports Option 11.30B

[22] [2005] VSC 46.

We reiterate our submission on providing tenants with the ability to serve a reduced period of notice of intention to vacate, despite a fixed term, for the reasons set out in response to end of fixed term notices, above.

VLA supports Option 11.31

Finally, we are firmly of the view that amendment is required to s 289A of the RTA in order to confirm that a building owner must always serve a 45-day notice to vacate on rooming house residents, irrespective of their knowledge as to whether the property was being operated as a rooming house. Rooming house residents are a vulnerable cohort, and our experience is that most rooming houses are informal and unregistered, with landlords often unaware of the existence of rooming house residents. Currently if a notice to vacate is issued by the landlord against the rooming house operator, VCAT is required to make a possession order leading to the eviction of all residents.[23] This fails to provide the protection it is designed to provide.

Recommendation 34: Require that a notice to vacate for change of use must be accompanied by evidence supporting the proposes change of use, and advising a tenant of their ability to challenge the notice.

Recommendation 35: Provide the Tribunal with discretion to avoid evicting a tenant if the notice was not served in good faith, attaches incorrect or insufficient evidence, or it is possible for a tenant to remain at the premises for other reasons.

Recommendation 36: Provide that a tenant may give 14 days notice of intention to vacate in response to received a change of use notice, despite the existence of a fixed term lease.

Recommendation 37: Clarify that a building owner must give 45 days notice to rooming houses residents upon the head lease terminating, in order to evict residents, irrespective of whether they were aware that a rooming house was being operated.

[23] See *Balasis v Williams & Ors* (Residential Tenancies) [2012] VCAT 706 (30 May 2012).