


It starts with a home: Making evictions the option of last resort in Victoria

**Submission to the Social Housing Regulation Review
(September 2021)**



Acknowledgement of Country

This submission was written on the land of the Wurundjeri and Boon Wurrung people of the Kulin Nation.

We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present.

We also acknowledge the strength and resilience of all First Nations people, their ongoing culture and connection to the land and sea that makes up this country, their more than 50,000 years of custodianship, and the injustice that continues to flow from their dispossession through the legal fiction of *terra nullius*.

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Executive summary

“I need this roof over my head to stay well and on top of my condition... I needed help, not to be evicted and homeless” (Victoria Legal Aid client, Reginald).

Victoria Legal Aid’s work in residential tenancy is focussed on tenants facing disadvantage, marginalisation and risk of homelessness. Many of the tenants we assist live in social housing, and for many, the protection of their tenancy rights enables better life outcomes in terms of housing, health and wellbeing. Victoria Legal Aid (VLA) commends the focus of the second paper of the Social Housing Regulation Review on service delivery and the tenant experience.

VLA’s work in residential tenancy is aimed at helping tenants avoid eviction. There are four main ways VLA assists Victorians who are at risk of eviction: through the provision of legal information online, in brochures and over the telephone; through general and specialist telephone advice; through duty lawyer services at the Victorian Civil and Administrative Tribunal (VCAT); and through case work at VCAT and in the Supreme Court.

In 2020/21, in the context of the enormous disruptions caused by the pandemic, VLA provided 5,243 information services and 1,724 legal advice services; opened 38 files for ongoing assistance; and made 228 appearances in VCAT hearings. In the same year, across our practice areas, VLA assisted 6,436 clients who identified as being homeless or at risk of homelessness.

Through our work with Victorians experiencing or at risk of homelessness, we see the impact of housing instability and homelessness on people’s health and wellbeing; the risks of preventable evictions; and the barriers to getting safe, affordable housing, including because of low incomes, discrimination, and an acute shortage of affordable housing.

Through our work we also see the two-way relationship between homelessness and legal issues in Victoria:

- Homelessness can cause or contribute to a person or family’s legal issues; and
- Legal issues can cause or contribute to a person or family becoming homeless.¹

In this submission we share the stories of Bianca and her son Ryan, Lydia, Reginald and Tyrone.² All four people had experienced the benefits of social housing but also the fear of losing it. They explain the impact this would have on their health and wellbeing. Their stories remind us that, as a community, we need a system – underpinned by regulation and resourcing – that is deeply committed to preventing evictions and sustaining people’s housing.

Informed by our practice experience, and the lived experiences of our clients, we propose measures to protect the rights of social housing tenants and to reduce the risk of eviction into homelessness.

¹ See, eg, *It Starts with a Home: Ten legal issues that cause – or are caused by – homelessness in Victoria*, submission to the Victorian Homelessness Inquiry (March 2020) (available at: <https://www.legalaid.vic.gov.au/about-us/news/urgent-changes-needed-to-break-cycle-of-homelessness-in-victoria>).

² The names of clients have been changed. Clients have given consent to their stories being used in this submission.

Our submission is focussed on:

1. The need for measures to ensure that evictions are a last resort for social housing landlords, and the need for supports to reduce reliance on eviction wherever possible.
2. The degree to which social housing tenants enjoy meaningful protection of their rights under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**Human Rights Charter**), and what measures might be taken to embed Victoria's human rights framework in a housing context.
3. Review and dispute resolution processes that are accessible, support early resolution, encourage proper contemplation of alternatives to eviction and promote accountability.

As the independent Review Panel (**Panel**) has recognised, the focus of social housing regulation should be to 'serve the interests of tenants'.³ A regulatory system which reduces the need for eviction, which is underpinned by human rights (and accessible ways of enforcing them), and which provides effective means of resolving disputes, will support a system responsive to the needs of Victoria's social housing tenants.

Recommendations for a regulatory framework that makes social housing evictions a last resort in Victoria

Eviction as a last resort and a focus on sustaining tenancies

1. **Access to the right supports, geared to help sustain tenancies.** Ensure people at risk of homelessness and eviction have access to the full range of supports they need to sustain their tenancy. These services should be resourced to focus on early intervention, before there is an immediate risk of eviction, when it is easier for the tenant to engage and there are greater prospects of the tenancy being sustained. For some tenants, this support will need to be long-term.
2. **A clear, publicly available eviction prevention framework co-designed with tenants.** A clear framework should be developed and published setting out how all social housing providers will make and progress decisions to evict. This framework should:
 - Require timely referrals to services, including legal assistance;
 - Provide practical guidance on compliance with the Human Rights Charter;
 - Be co-designed with social landlords, tenants and service providers;
 - Be responsive to the needs of First Nations and culturally diverse communities, as identified by those communities;
 - Ensure eviction is a last resort at all stages of the eviction process; and
 - Inform VCAT's task of considering whether all alternatives to eviction have been explored.
3. **Stable housing with support for people experiencing mental health issues.** In addition to the prioritisation of access to social housing for people experiencing mental health issues, there must be clear requirements and guidance for social housing providers that prioritise

³ Social Housing Regulation Review, Social Housing in Victoria, consultation paper 2 – service delivery and the tenant experience (2021) 7 (consultation paper).

- and support eviction prevention. This includes providing information and, with people's consent, support for tenants experiencing mental health issues to sustain tenancies.
4. **Data analysis and a review to understand and prevent evictions.** Data should be regularly collected, analysed and (where appropriate) publicly reported to help build an in depth understanding of why people's social housing tenancies are ending. A comprehensive review should be undertaken, which analyses this data and undertakes interviews with tenants whose social housing tenancies have ended in the last three years to better understand why their tenancy ended and what could have helped sustain their housing. The findings of this review should inform future regulation, training and supports.
 5. **Regulate conduct that makes tenancies precarious.** Incorporate into the eviction prevention framework guidance that compliance orders should be limited to six months and possession orders should only be applied for as a last resort, after negotiated alternatives have been properly considered. Compliance orders and possession orders should not be used in a way that leaves tenants with prolonged uncertainty, risk and stress.
 6. **Avoid a 'social tenant' model and instead strengthen the social housing model.** Rather than focus on individual tenants, the regulatory model should focus on building an effective social housing sector that prioritises sustaining tenancies and eviction as a last resort. This requires a commitment to services and policy settings for providers that are properly funded to deliver those services and outcomes, and who are regulated in a way that ensures accountability. To build on the strengths of the social housing sector and foster positive cultural change, regulatory change should include consumer leadership and engagement (i.e. with people with lived experience as social housing tenants), improved resourcing and training focused on sustaining tenancies and human rights, and increased accountability measures.
 7. **Proactive referrals for legal assistance.** Implement a process requiring that there is both a notification given and a referral made for legal assistance as soon as a notice to vacate is issued in social housing. Consultation, including with VLA, specialist CLCs and CLCs providing tenancy assistance, should be undertaken to determine the best model for notification and referral.

Meaningful human rights protections

8. **Provide certainty that community housing providers have human rights obligations.** Provide that an incorporated body that receives financial assistance from the government for the purposes of providing non-profit housing constitutes a public authority for the purposes of the Human Rights Charter.
9. **Make human rights protections meaningful and accessible through giving VCAT powers to consider human rights compliance in eviction decisions.** Expressly confer on VCAT the power to consider the lawfulness under the Human Rights Charter of decisions of public authorities in respect of eviction, including decisions to issue notices to vacate, make applications for possession and make applications for warrants of possession.
10. **Publicly available policies on eviction.** Amend the *Housing Act 1983* (Vic) to require community housing providers to have clearly articulated policies in relation to evictions and require them to publish those policies and make them available on request.
11. **Transparent decisions, reasons and information.** Require community housing providers to give written reasons for decisions on request, and consider whether they should be made

subject to disclosure obligations such as those under the *Freedom of Information Act 1982* (Vic).

Effective, accessible review and dispute resolution

12. **Review and oversight of decisions.** Introduce a robust, clear, consistent review process for decisions of social housing providers (including regarding compliance with policies and the Human Rights Charter). An independent body should oversee this review process. Decisions of the independent review body should then be the subject of review by VCAT. These mechanisms will support accountability and help embed compliance with laws, policies and frameworks that make evictions a last resort.
13. **Encouraging alternative resolution of disputes.** Additional training and support should be provided to VCAT members and social housing providers to increase awareness and utilisation of existing alternative dispute resolution (**ADR**) mechanisms in tenancy disputes to help foster negotiation and meaningful contemplation of alternatives to eviction. Further engagement should be undertaken, in conjunction with tenants and relevant sector stakeholders, to determine the desirability and model for a more comprehensive ADR scheme for tenancy disputes.
14. **A re-hearing mechanism at VCAT.** Introduce a re-hearing mechanism at VCAT to improve access to a timely and cost effective review of decisions and the consistency of decision-making in the VCAT Residential Tenancies List.

1. Eviction as a last resort and a focus on sustaining tenancies

1.1 Why it's crucial that evictions are genuinely a last resort

As noted in the consultation paper, the *Housing Act 1983* (Vic) has as its objectives security of tenure, and the provision of long term, stable accommodation for people who face barriers to renting privately. We support these objectives, and our submission focuses on how they are best achieved.

Security of tenure is crucial for tenants with complex needs. Not only does it provide stability, but it enables connections within their neighbourhood, including support services and medical services. Stability can also be critical to assist with positive outcomes for other legal issues, such as child protection proceedings, compliance with sentencing outcomes and the ability to make alterations to a property to take into account disability.

On the flipside, evictions of people in crisis, or with complex needs, directly *cause* homelessness. We frequently assist clients who are facing eviction from their social housing provider. Many of the risk-factors for homelessness are also risk-factors for eviction. For example, a person who is experiencing mental health issues may face eviction for reasons that are directly related to their mental health. In our experience eviction compounds consequences for those with complex needs and has flow on effects to other areas of legal need.

The Victorian Government Homelessness Inquiry (**Homelessness Inquiry**) Final Report provides valuable data and recommendations as to how people find themselves at risk of homelessness, and the steps that can be taken to prevent homelessness. 14.2% of those who accessed homelessness services in 2019/2020 did so as a result of a housing crisis, which included eviction.⁴ Importantly, this does not include the figures for those accessing homelessness services due to their mental health, family violence, or substance use.

Evidence to the Homelessness Inquiry showed that homelessness is often recurring and that the incidence of people needing homelessness services multiple times has increased over time.⁵

With all this in mind, it is appropriate that the performance standards for housing providers focus on sustaining tenancies and eviction as a last resort, and we welcome the identification of these objectives as a key focus for regulation in the consultation paper. It has been our experience that the performance standards on their own do not put in place incentives and protections to ensure eviction is a last resort and tenancies are sustained. Given the consequences of eviction, we consider that there is a crucial role for increased and effective regulation of social housing providers to sustain tenancies and avoid eviction and to embed a culture underpinned by these imperatives in engaging with tenants and day-to-day operations.

⁴ Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Homelessness in Victoria*, (2021) 66.

⁵ Ibid. The AIHW's submission to the Committee showed that the number of clients returning to homelessness services has been increasing between 2014–15 and 2018–19 and has been accompanied by a decline in new clients.

1.2 Ensuring key supports and services are available and are focussed on sustaining tenancies

Bianca's story: Appropriate supports to sustain tenancies and keep people in their homes

I am a single mum to Ryan, my 16-year-old son, who lives with lifelong complex disabilities and medical conditions. This includes an intellectual disability and more recently severe behavioural disturbance. Ryan and I have been through periods of homelessness together and were fortunate to find transitional housing in 2019.

Over the past year Ryan's behavioural issues started to worsen. He wasn't the little boy I used to know. There were a series of incidents at the property early this year that caused the housing provider to try to evict us in VCAT. VCAT said that Ryan couldn't attend the property while it was considering my case.

As a result Ryan was shifted between different short-term accommodation facilities and required urgent new NDIS plans to fund this. Ryan couldn't spend his birthday at home. I visited him every night. He would ask me to stay with him until he went to sleep.

Ryan now has a lot more support behind him, including from the NDIS and the Department of Fairness, Families and Housing. A plan is being developed for Ryan to return home safely, so that he can split time between his father and I. The housing provider had agreed to resolve the VCAT case by consent after they became aware of the increased support for Ryan.

The housing provider is now trying to evict me again, even though there haven't been any further issues with Ryan at the property. They have told me I will receive a notice to vacate due to the owner wanting to sell the property. I can't help but think this has something to do with the owner not wanting Ryan at the property.

I would jump at the chance to secure a housing option that could accommodate Ryan and I and keep us together. The option doesn't seem to exist. I don't know what it will mean for our future if Ryan and I are evicted.

The Homelessness Inquiry Final Report reflects the well-established view that effective and timely wrap-around support services delivered in a person's home are the best way to sustain tenancies and prevent eviction for those at risk.⁶ The consultation paper also refers to the increasing focus on the Housing First model, recognising the importance of providing crucial supports to a person in their home to prevent eviction leading to homelessness.

We commonly see the type of behaviours which might precipitate eviction occur at a time of acute crisis, such as a breakdown in relationship where there is family violence, the escalation of a substance abuse issue, or a deterioration in mental health. This can sometimes be exacerbated by friction with neighbours. This is exactly the time when wrap-around and targeted support services

⁶ Ibid 96.

are essential to sustain a tenancy but is also the time where clients might struggle to engage and where multiple different services might be required. The Homelessness Inquiry noted that the Department of Health and Human Services (**DHHS**) had set out the difficulties with fragmentation of services and clients falling through the gaps in their submission to the Homelessness Inquiry.⁷ This has been our experience too as specialist lawyers exploring appropriate supports when a tenancy is at risk.

Our key reflections about effective supports are that:

- A risk of eviction is often accompanied by a crisis that makes proactive engagement with supports difficult. Recognition of this in any strategy for provision of supports is crucial.
- There is often a need for multiple supports, and communication and collaboration between those providing such supports. Consideration should be given to how best to achieve this for tenants with complex needs, or in crisis.
- Supports should be provided in the home wherever possible, with a focus on sustaining the tenancy. This is far preferable to focusing supports and funding post-eviction.
- Supports need to be responsive to the particular and diverse needs of First Nations and culturally diverse communities. People from these groups can experience barriers when accessing supports, especially where they are not culturally safe.

Recommendation 1: Access to the right supports, geared to help sustain tenancies

Ensure people at risk of homelessness and eviction have access to the full range of supports they need to sustain their tenancy. These services should be resourced to focus on early intervention, before there is an immediate risk of eviction, when it is easier for the tenant to engage and there are greater prospects of the tenancy being sustained. For some tenants, this support will need to be long-term.

1.3 Embedding an eviction prevention framework

Given the importance of sustaining tenancies and avoiding eviction, there should be a clear published eviction prevention framework for all social housing providers outlining how they will make and progress decisions to evict. This framework should be consistent across public housing and community housing, to encourage a standardised and consistent approach to eviction processes, which prioritises the provision of support to sustain tenancies, and eviction as a last resort.

The framework should be co-designed with social landlords, tenants and service providers to encourage providers to take steps early, balance competing priorities, act compatibly with human rights and give tenants the best prospects of keeping their homes.

Subject to the co-design process, in our view, an effective eviction prevention framework should:

- Include clear steps that must be taken at each stage of a decision to evict, including the issuing of a notice to vacate, the decision to apply for a possession order and the decision to purchase a warrant of possession, similar to the Tenancy Management Manual produced by

⁷ Ibid 107.

the Director of Housing, described by the Supreme Court in *Burgess & Anor v Director of Housing*⁸ as “a detailed manual to guide [the Director’s] decision-making (and, of course, that of his staff)”. These steps should be focused on ensuring that the tenant understands and can engage with the reason for decision in relation to eviction, has an opportunity to respond to and address the concerns and that the decision-maker has properly considered relevant Human Rights Charter rights at each stage of the eviction.

- Encourage effective and timely engagement with support services, including legal assistance. For clients in crisis, or with complex needs, this should include offering warm referrals to support services and should include options for referrals to the Victorian Aboriginal Legal Service, Koori Support Officers at VCAT and other appropriate community organisations.
- Be designed in a way that is responsive to the particular and diverse needs of First Nations and culturally diverse communities.
- Include reference to dispute resolution processes that are consistent across the sector, including clear pathways for review and complaints.
- Set out clear steps and processes that can be reported against in order to facilitate collection of data, accountability and opportunities to improve practices.
- Provide for alternative pathways to resolving tenancy issues including:
 - Use of transfers by social housing providers to manage local issues such as the breakdown of relationships between neighbours;
 - Dispute resolution services for disputes between neighbours, or between a provider and a tenant; and
 - Structural alterations to the property, including increased sound proofing.
- Embed accountability through reporting requirements and auditing.
- Provide a basis for training and supporting staff.
- Be a reference point for VCAT in determining whether an application for a possession order is reasonable and proportionate.

Recommendation 2: A clear, publicly available eviction prevention framework co-designed with tenants

A clear framework should be developed and published setting out how all social housing providers will make and progress decisions to evict. This framework should:

- Require timely referrals to services, including legal assistance;
- Provide practical guidance on compliance with the Human Rights Charter;
- Be co-designed with social landlords, tenants and service providers;

⁸ [2014] VSC 648, 165.

- Be responsive to the needs of First Nations and culturally diverse communities, as identified by those communities;
- Ensure eviction is a last resort at all stages of the eviction process; and
- Inform VCAT's task of considering whether all alternatives to eviction have been explored.

1.4 Stable housing for people experiencing mental health issues

The connection between homelessness and mental health was captured in the Homelessness Inquiry, which referenced DHHS's submission that 35% of people returning to homelessness services identified as having mental health issues.⁹ VLA noted in its submission to the Homelessness Inquiry that it had assisted over 1000 people in 2017-18 who were experiencing homelessness and identified as having a mental health issue or disability. Through this work, VLA sees people who end up in crisis, and consequently in an mental health inpatient unit because of a breakdown in housing and services. Once people have entered these crisis-based systems, their exit, integration and/or recovery is again dependent on access to adequate housing and supports in the community.

Recommendation 25 of the Royal Commission into Victoria's Mental Health System (**Mental Health Royal Commission**) recognised the role that social housing can and should play for people experiencing mental health issues.¹⁰ Through our work we see directly how essential it is that the over-reliance on our mental health system to respond to the inadequacies in our housing system – and the impact this has for people and their rights and wellbeing – is front and centre of the system reform and redesign. Lydia's story highlights the two-way relationship between a person's housing and their mental health: Lydia's hoarding – directly related to her mental health – placed her at risk of eviction, and the stress of facing eviction exacerbated her mental health issues. Lydia's case highlights how community and public housing providers continue to resort to eviction as the mechanism for managing tenants with complex behaviours directly linked to their mental health.¹¹

Lydia's story: Threat of eviction for hoarding behaviours

Lydia is a 53-year-old woman living in a property managed by a social housing provider in suburban Melbourne. She identifies as Aboriginal and regularly travels to regional Victoria to help care for her ageing parents. Lydia has had some involvement with the criminal justice system and has spent some time in prison. She has been a victim of severe family violence.

Lydia has been affected by complex trauma and this manifests in hoarding behaviours. This has caused issues throughout her 12-year tenancy. Her relationships with some of the other occupants of the apartment building have broken down and they complain frequently to the housing provider about Lydia's hoarding. The housing provider has

⁹ Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Homelessness in Victoria*, (2021) 119.

¹⁰ Victoria, Royal Commission into Victoria's Mental Health System, *Final Report: Summary and recommendations*, (2021), 67.

¹¹ E.g. C Martin, D Habibis, L Burns and H Pawson for the Australian Housing and Urban Research Institute, *Social housing legal responses to crime and anti-social behaviour: impacts on vulnerable families* (AHURI Final Report, No 314, June 2019) 2 <<http://www.ahuri.edu.au/research/final-reports/314>>.

issued Lydia with numerous breach of duty notices over the years, and has applied to VCAT for possession of the property on multiple occasions. Lydia has managed to defend many of these applications and there have been negotiations with respect to others, such that she has been able to remain in the property.

In 2018 Lydia was again issued with breach of duty notices and a new application was made for possession of the property.

Lydia sought VLA's assistance with opposing the application for possession of the property. Lydia's mental health was adversely affected by the proceedings. –Her hoarding behaviours increased with the stress, despite her best efforts, including consistent therapeutic engagement.

For the moment, the VCAT proceedings have been adjourned indefinitely while VLA attempts to negotiate an appropriate outcome with the housing provider. Lydia, however, continues to experience high levels of stress knowing that the proceedings could recommence at any time, and she could again face the threat of eviction into homelessness due to her ongoing struggle with hoarding.

Without significant formal and informal supports, Lydia, like many other disadvantaged Victorians who are evicted, would face substantial difficulty getting back into secure accommodation, with private rentals unaffordable for many and the waitlists for public and social housing remaining prohibitively long.

We welcome the consultation paper's engagement with the Mental Health Royal Commission's recommendations about the importance of prioritisation on housing waitlists for people experiencing mental health issues, and particularly those attempting to transition from health or justice settings. In addition, we recommend that, any response to the Mental Health Royal Commission recommendation should also focus on the importance of avoiding eviction for those whose mental health contributes to the reason for their eviction. This includes people who enter mental health inpatient units, or justice settings for brief periods, and for whom wrap-around support systems should be put in place within the context of stable housing when they return home. Too often we see eviction proceedings occurring in the context of a client being detained in an inpatient or justice setting.

Recommendation 3: Stable housing with support for people experiencing mental health issues

In addition to the prioritisation of access to social housing for people experiencing mental health issues, there must be clear requirements and guidance for social housing providers that prioritise and support eviction prevention. This includes providing information and, with people's consent, support for tenants experiencing mental health issues to sustain tenancies.

1.5 Increased transparency and accountability

We support the publication of detailed information in relation to compliance with key performance criteria, with a particular focus on sustaining tenancies, eviction as a last resort, dispute resolution and referrals to support services and the legal assistance sector in the event of eviction.

We consider it essential for the Housing Registrar or Housing Ombudsman or other regulatory body to be equipped with the information they need to properly assess compliance and to engage with providers with low levels of compliance. This is a key element of effective regulation and accountability. It would also provide valuable guidance for embedding Victoria's human rights framework, fostering cultural change and focusing resources and training. This is because it would encourage reporting against criteria focused on avoiding eviction, provide valuable data about the role and effectiveness of referrals, and enable the regulator to identify and engage with social housing providers who are performing poorly. Where appropriate this information should be publicly available.

We support the publication and collection of the following data and information for each provider:

- De-identified statistics about processes that end tenancies (notices to vacate issued and the reasons for these, applications for possession orders at VCAT, warrants purchased for eviction, warrants executed, abandonment).
- For tenants where there is a risk to their tenancy, statistics broken down by provider enabling assessment of whether support service referrals were made, the type of service referred to, the stage at which the referral happened, whether the services were accessed by the tenant and, similar to the Scottish model, proportion of 'anti-social behaviour' cases resolved.
- Number of warm referrals to legal assistance services after a notice to vacate is issued or an application for possession is made.
- Number of complaints broken down by provider regarding a failure to comply with policies and guidelines around eviction, including a brief summary of the failure alleged and how the complaint was resolved.

We also recommend a one-off qualitative review involving interviews of tenants whose tenancies have ended, to understand why and what could have improved their experience. We consider that a more detailed understanding of why tenants leave social housing (either voluntarily or as a result of eviction proceedings) would assist in planning where support services are best focused and capture tenant experiences of the circumstances leading to them leaving, and the processes involved in their departure. It would provide important data to support cultural change and improvements for providers that is responsive to the experience of tenants.

Recommendation 4: Data analysis and a review to understand and prevent evictions

Data should be regularly collected, analysed and (where appropriate) publicly reported to help build an in depth understanding of why people's social housing tenancies are ending. A comprehensive review should be undertaken, which analyses this data and undertakes interviews with tenants whose social housing tenancies have ended in the last three years

to better understand why their tenancy ended and what could have helped sustain their housing. The findings of this review should inform future regulation, training and supports.

1.6 Avoiding practices that make housing precarious

Compliance orders under the *Residential Tenancies Act 1997* (Vic) (**Residential Tenancies Act**) are commonly sought at VCAT by public and community housing providers as a way of putting tenants on notice that a repeat of similar conduct may result in a notice to vacate. It is common for the order to be sought after a particular incident. In practice, the orders are typically not time limited, and due to the wording of the legislation and resultant orders, the compliance order itself will usually be very broad. In consequence, there is a broad range in the types of conduct that might result in a notice to vacate. We do not consider that indefinite compliance orders are a reasonable way to manage social housing tenancies. VLA strongly supports Recommendation 25 of the Homelessness Inquiry that recommends that the Victorian Government encourage the time limitation of compliance orders by VCAT. We also consider that community and public housing providers should not seek compliance orders that are longer than six months, or rely on orders that are more than six months old to initiate eviction proceedings. These requirements should be set out in the eviction prevention framework referred to above.

We have also seen a practice of some social housing providers justifying proceeding with their application for a possession order on the basis that they will only request police execute a warrant if the client misbehaves in the future. Reginald's story below is an example of this.

This practice is not focused on sustaining tenancies, or stabilising housing, and should be discouraged. To purchase a warrant months after a possession order is inconsistent with public authority's responsibilities under the Human Rights Charter not to arbitrarily interfere with a person's home. It also denies the tenant an opportunity to be heard in relation to any further conduct. Providers should not be seeking and using possession orders as a tool to regulate tenant conduct and behaviour. Any eviction prevention framework guiding eviction decisions should make clear that possession orders should only be sought as a last resort, after negotiated alternatives have been properly considered, and should not be used in a way that leaves tenants with prolonged uncertainty, causing stress and insecurity.

Reginald's story: Using eviction proceedings to regulate tenant behaviour

I am a 46-year-old-man and I used to live in social housing. I was diagnosed with paranoid schizophrenia in the early 1990s. I sometimes have hallucinations and find it hard to keep on top of cleaning and tidying my unit. Through my NDIS plan, I was able to have a cleaner come around every week and clean it and put it in order so that things didn't get too messy.

Sometimes, because of my condition, I thought apparitions were coming out of the walls. Once, I reacted by hitting the wall and damaging it. I felt terrible and accepted responsibility for damaging the property. The housing provider wanted to evict me. My doctor suggested that I move into supported independent living. But I needed time while I waited for money to come through for that and didn't want to be evicted and homeless. I need this roof over my head to stay well and on top of my condition. I wanted to sit down with my housing provider to work out a timetable for me to move into supported living, and

to work out a better way for me to be supported while I transitioned out of social housing. I needed help, not to be evicted and homeless.

My support workers asked the social housing provider to engage in alternative dispute resolution with me to try and sort these issues out. But the social housing provider refused. They thought going straight to VCAT would make things move faster.

They made me go through more than one hearing at VCAT. It was extremely stressful and made things much worse with my symptoms. They didn't think about me and my rights. In the end, we agreed that I could have some extra time to leave my housing and make the transition. But the whole process could have been much less stressful and upsetting for me and reached the same outcome quicker, if only they'd agreed to sit down and talk it through.

Recommendation 5: Regulate conduct that makes tenancies precarious

Incorporate into the eviction prevention framework guidance that compliance orders should be limited to six months and possession orders should only be applied for as a last resort, after negotiated alternatives have been properly considered. Compliance orders and possession orders should not be used in a way that leaves tenants with prolonged uncertainty, risk and stress.

1.7 A regulatory framework attached to housing providers, not tenants

VLA does not support the “social tenant” model proposed for consideration in the consultation paper. We consider an effective social housing sector that prioritises sustaining tenancies and eviction as a last resort requires proper regulation and investment. Better outcomes would be achieved through a model that focuses services and policy settings on providers that are properly funded to deliver those services and outcomes, and that are regulated in a way to ensure accountability both generally and for individual clients.

We do not consider these objectives could be met in a private market based on our experience with clients with complex needs. We support a move towards greater regulation of community housing providers and consider the public housing model of regulation to be a better model in terms of sustaining tenancies, eviction as a last resort, and effective dispute resolution. A framework that attaches to the tenant rather than the housing provider would also not provide access to the protections of the Human Rights Charter which, as discussed below, provides an important regulatory framework for decision-making about social housing and evictions.

We see examples in our day-to-day practice of both public housing and community housing providers connecting tenants with the services they need, working constructively to resolve issues that arise in the tenancy, and being responsive to the complex and varied needs of a very diverse client base. This is crucial to tenants' experiences of stable and secure housing, particularly for clients with complex needs. It is important that future regulation builds on these practices and this commitment and culture within the social housing sector.

Rather than linking obligations to ‘social tenants’, we consider attention should be focussed on strengthening positive cultural change in the social housing sector, underpinned by effective regulation. This includes consumer leadership and engagement (i.e. with people with lived experience as social housing tenants), improved resourcing and training focused on sustaining tenancies and human rights, and increased accountability measures. This can only occur where there is a clear delineation between social housing providers and private landlords.

Recommendation 6: Avoid a 'social tenant' model and instead strengthen the social housing model

Rather than focus on individual tenants, the regulatory model should focus on building an effective social housing sector that prioritises sustaining tenancies and eviction as a last resort. This requires a commitment to services and policy settings for providers that are properly funded to deliver those services and outcomes, and who are regulated in a way that ensures accountability. To build on the strengths of the social housing sector and foster positive cultural change, regulatory change should include consumer leadership and engagement (i.e. with people with lived experience as social housing tenants), improved resourcing and training focused on sustaining tenancies and human rights, and increased accountability measures.

1.8 Ensuring effective referrals to legal assistance when eviction proceedings begin

The particular circumstances that lead to the risk of eviction can also lead to a person being unable to attend to VCAT or, even if they do attend, being unable to properly defend their rights under the Residential Tenancies Act.

Eviction proceedings are frequently successfully defended when a person has access to legal advice and representation. With social housing tenants, legal representation will include exploring supports that can be put in place to assist the tenant, engagement with the provider about alternatives to eviction, and advocacy around the provider’s obligation under the Human Rights Charter. It may also involve the collection of expert reports and evidence to deepen the provider’s understanding of the client’s circumstances. The importance and value of properly resourced legal representation by community legal centres and VLA has increased with the recent introduction of the “reasonable and proportionate” test for eviction proceedings as part of reforms to the Residential Tenancies Act.

Many of the tenants assisted by VLA’s duty lawyers at VCAT have had no legal advice prior to attending on the day of the hearing. Many clients we work with would struggle to self-represent in what can be complex matters, further complicated by the emotional situation of having their housing at risk. Unfortunately, funding constraints mean that access to legal advice and representation in tenancy matters is limited in Victoria, including VLA’s duty lawyer services which are usually only available in two locations across the state. The temporary introduction of remote hearings has facilitated a significant increase in coverage across the state, although capacity to provide this assistance has not increased, which leads to strain on services.

We encourage the Panel to consider introducing a requirement that there is both a notification given and a referral made for legal assistance as soon as a notice to vacate is issued in public or community housing. We recommend consultation with VLA, specialist Community Legal Centres (CLCs) and CLCs providing tenancy assistance to determine the best model for both notification and referral. The objective is to provide an effective warm referral pathway to the legal service best placed to assist the client based on location, type of matter and timelines.

Recommendation 7: Proactive referrals for legal assistance

Implement a process requiring that there is both a notification given and a referral made for legal assistance as soon as a notice to vacate is issued in social housing. Consultation, including with VLA, specialist CLCs and CLCs providing tenancy assistance, should be undertaken to determine the best model for notification and referral.

2. Meaningful human rights protections

2.1 Embedding Victoria's human rights framework

As the consultation paper recognises, key problems with the regulatory system for social housing include that it is inequitable, in that there is variation in standards depending on the category of housing provider, and that dispute resolution processes are not well developed or consistent.¹² A key aspect of this is the lack of consistency in terms of the applicability of the Human Rights Charter, and a lack of effective and accessible processes for seeking remedies for breaches of the Human Rights Charter.

The Human Rights Charter sets out that a person has the right “not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with” (s 13). It specifies that it is “unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right” (s 38). There are several barriers for tenants seeking to rely on these provisions in the Human Rights Charter to prevent or minimise the risk of eviction.

- It is not clear that all community housing providers are public authorities for the purposes of the Human Rights Charter. As community housing providers administer an increasingly large proportion of social housing stock, this should be clarified.
- Remedies for ensuring compliance with the Human Rights Charter are not accessible. Currently, Human Rights Charter compliance is only enforceable through the expensive and complex process of judicial review (which may not even be available in relation to the conduct of community housing providers).
- Unlike the Director of Housing, it is difficult to assess the degree of Charter compliance on the part of community housing providers where they are not subject to freedom of information laws or to a duty to give reasons to a tenant facing eviction.

Despite these legal barriers to the Human Rights Charter's effectiveness, a number of community housing providers are committed to compliance with the Human Rights Charter as part of best practice social housing management and in line with their values. We note the Statement of Shared Principles submitted in response to consultation paper 1 of this Review, which was endorsed by a group of community legal centres with tenancy law practices led by Tenants Victoria (Inner Melbourne Community Legal, Justice Connect – Homeless Law, West Heidelberg Legal Service, Peninsula Community Legal Centre, WEstjustice), VLA, and the peak organisation for the community housing sector, Community Housing Industry Association Victoria. One of the five shared principles is: ‘All social housing renters’ human rights are protected through the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*’.

This part discusses the current barriers to realising this protection.

¹² See consultation paper at 3.1.

2.2 Community housing providers as public authorities

The Human Rights Charter imposes duties on ‘public authorities’, which are defined in s 4. Community housing providers have been held to fall within the scope of the definition in s 4(1)(c), as entities “whose functions are or include functions of a public nature, when ... exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)”. Some housing providers have been recognised as public authorities, in part because of the fact that they provide a “function of government of fundamental importance”.¹³

However, following the decision in *Durney v Unison Housing* [2019] VSC 6 (**Durney**), some uncertainty has arisen about whether community housing providers will be treated as public authorities for the purposes of the Human Rights Charter without further legislative clarification. The decision in *Durney* also raises the question of whether the decisions of a community housing provider are amenable to judicial review on any basis (not just on the basis of non-compliance with the Human Rights Charter). There remains a technical legal question about whether a community housing provider should be seen as exercising public power, and therefore should be subject to judicial review. Importantly for people’s rights under the Human Rights Charter, a person may only challenge a decision on the basis of non-compliance with the Human Rights Charter where, apart from the Human Rights Charter claim, they have the right to challenge the decision as unlawful. If a community housing provider is not considered to be engaged in the exercise of public power, and its decisions are therefore not subject to judicial review, no right to seek a remedy for breach of the Human Rights Charter will be available.

Given the shift of resources away from public housing towards community housing providers, there should be amendments to specifically state that decisions of a community housing provider are judicially reviewable decisions, and that a community housing provider is a public authority for the purposes of the Human Rights Charter. There is no principled basis for decisions of community housing providers being treated differently to the decisions of the Director of Housing in terms of the applicability of the Human Rights Charter. This deeming could occur by regulation, pursuant to s 4(1)(h) of the Human Rights Charter. This would also be consistent with the recommendations of the 2015 review of the Human Rights Charter.¹⁴ In implementing this recommendation, it will also be necessary to consider whether changes should be made to ensure that community housing providers are amenable to judicial review, making remedies for Human Rights Charter breach available.

Recommendation 8: Provide certainty that community housing providers have human rights obligations

Provide that an incorporated body that receives financial assistance from the government for the purposes of providing non-profit housing constitutes a public authority for the purposes of the Human Rights Charter.

¹³ *Goode v Common Equity Housing Limited* [2016] VCAT 93, [53] (Nihill DP), citing *Metro West v Sudi* [2009] VCAT 2025, [15] (Bell P).

¹⁴ The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, Recommendation 13, Chapter 2, 55-56.

2.3 Accessible remedies for non-compliance with human rights obligations

Even if community housing providers are ‘public authorities’ for the purposes of the Human Rights Charter, following the decision in *Director of Housing v Sudi* (2011) 33 VR 559, it is clear that VCAT does not have the power to review whether a landlord has abided by obligations under the Human Rights Charter, in assessing whether the landlord was “entitled” to issue the notice to vacate. This means that even where a landlord has had no regard to the rights of the tenant under the Human Rights Charter, and has pursued eviction, VCAT does not have jurisdiction to consider a provider’s compliance with the Human Rights Charter when making a decision in relation to eviction, including at the possession order stage.

Therefore, people facing eviction from public or community housing who are concerned that there has been no proper consideration of their human rights, guaranteed under the Human Rights Charter, must pursue complex, expensive and lengthy judicial review proceedings in the Supreme Court to test whether the decision to evict them is a proportionate and reasonable limitation on their human rights.

The decision of *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648 (**Burgess**) has further complicated the process for seeking redress of possible human rights breaches when facing eviction. Burgess makes clear that whether a decision by a landlord is judicially reviewable will depend in part on timing. Following the decision in Burgess, it seems that a tenant must either:

- apply to the Supreme Court after the decision is made to issue the notice to vacate but before VCAT makes the possession order; or
- apply to the Supreme Court very quickly after the decision is made to purchase a warrant but before the warrant is executed.¹⁵

In summary, neither VCAT processes nor Supreme Court judicial review provide usable dispute resolution processes by which tenants are able to vindicate their human rights. In our view, VCAT should be expressly conferred with the power to consider the lawfulness under the Human Rights Charter of decisions by public authorities in respect of eviction – including decisions to issue notices to vacate, make applications for possession and make applications for warrants of possession. This would be consistent with the recommendations of the 2015 Review of the Human Rights Charter.¹⁶ It would also be a more accessible, affordable forum for social landlords, who also face challenges when matters must be heard in the Supreme Court. This reform would support meaningful consideration of, and dialogue about, practical application of the Human Rights Charter and contribute significantly to a stronger regulatory framework for social housing.

Recommendation 9: Make human rights protections meaningful and accessible through giving VCAT powers to consider human rights compliance in eviction decisions

Expressly confer on VCAT the power to consider the lawfulness under the Human Rights Charter of decisions of public authorities in respect of eviction, including decisions to issue

¹⁵ Additional complexity arises from the decision in *ARF v Director of Housing* [2021] VSC 199, which indicates that at least some steps in the decision-making process leading to eviction will not be amenable to judicial review.

¹⁶ *The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Recommendation 27, Chapter 4, 117-122.

notices to vacate, make applications for possession and make applications for warrants of possession.

2.4 Fostering a human rights culture

Beyond clarifying that community housing providers are, like the Director of Housing, subject to Human Rights Charter obligations, and making dispute resolution processes available and accessible, there is a need to ensure that systems are in place to support and monitor Human Rights Charter compliance. It will be important to provide education to staff at social housing providers, so that they are supported to understand and comply with Human Rights Charter obligations.

One key area for reform in this respect relates to the availability of policies. Tenants of community housing providers frequently find it challenging to know exactly what their landlord's policies are in relation to evictions, whether they have been followed, or whether there has been compliance with the Human Rights Charter. We would support amendments to the *Housing Act 1983 (Vic)* that would require a community housing provider to have clearly articulated policies around evictions and have these policies published or made available on request.

Recommendation 10: Publicly available policies on eviction

Amend the *Housing Act 1983 (Vic)* to require community housing providers to have clearly articulated policies in relation to evictions and require them to publish those policies and make them available on request.

Additional problems are caused by the lack of transparency in community housing provider decision making. Community housing providers are not subject to freedom of information laws, or to any general obligation to provide reasons for a decision. *ARF v Director of Housing* [2021] VSC 199 shows that the provisions of the *Administrative Law Act 1978 (Vic)* will not always provide effective access to reasons for decision, even if a community housing provider is subject to its provisions (which it would probably not be).

Recommendation 11: Transparent decisions, reasons and information. Require community housing providers to give written reasons for decisions on request, and consider whether they should be made subject to disclosure obligations such as those under the *Freedom of Information Act 1982 (Vic)*.

3. Effective, accessible review and dispute resolution

3.1 Clear review processes for important decisions

As the consultation paper recognises, dispute resolution procedures are not well-developed or consistent in respect to social housing providers.

It is a well-established element of Australian public law that important decisions dealing with basic rights will be subject to meaningful review processes. In the context of decisions about tenancy and housing, which have such substantial impacts on people's lives and wellbeing, robust, clear, consistent and accessible processes for reviewing decisions are important.

The Director of Housing in Victoria has an internal appeal process which enables those affected by a limited range of its decisions¹⁷ to seek a review of those decisions.¹⁸ While some social housing providers have similar processes in place, these processes are not uniform across the sector, and are often opaque.

We consider that there should be a centralised appeals process for decisions of all social housing providers which can consider compliance with public and community housing policies and procedures, and compliance with the Human Rights Charter. All appeals should be considered by an independent agency with specific responsibility for determining social housing appeals for public and community housing tenants. Having social housing appeals determined by a single agency will increase consistency in individual decisions, and best support a clear, effective and accessible appeals system. It also has the potential to provide direction for social housing providers which will facilitate cultural change and the development of a consistent practice around the application of the Human Rights Charter.

Decisions of the social housing review agency should also be subject to merits review by VCAT. VCAT's Review and Regulation List currently hears *de novo* reviews of a range of other government and tribunal decisions of an administrative nature such as working with children check matters, and decisions of the Mental Health Tribunal. Expanding VCAT's jurisdiction to consider decisions of the social housing review agency would provide external independent review and oversight and assist with encouraging consistent decision-making.

Recommendation 12: Review and oversight of decisions

Introduce a robust, clear, consistent review process for decisions of social housing providers (including regarding compliance with policies and the Human Rights Charter). An independent body should oversee this review process. Decisions of the independent review body should then be the subject of review by VCAT. These mechanisms will support accountability and help embed compliance with laws, policies and frameworks that make evictions a last resort.

¹⁷ Decisions which are not amenable to this internal appeal process include decisions of the Director to issue eviction notices, and to apply to VCAT for orders of possession.

¹⁸ See: <https://www.housing.vic.gov.au/appeal-decision>.

3.2 Effective dispute resolution

Where the social housing provider's decision engages VCAT's jurisdiction – for example, in eviction proceedings, matters regarding rental arrears and repairs – alternative dispute resolution (**ADR**) should be available and utilised (in appropriate circumstances) as a mechanism to assist parties to try and resolve disputes. VCAT has compulsory conference and mediation powers set out in the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* (**VCAT Act**). VCAT should take an active role in directing such matters to ADR and where a matter is urgent, facilitate a speedy initial ADR hearing.

Parties who cannot resolve their disputes through either one of these mechanisms retain the right to have their dispute determined through a standard hearing. The positive aspect of parties utilising these ADR mechanisms at VCAT is that, even where ADR fails, the process itself enables:

- the parties to explore support services that might sustain the tenancy;
- referral of tenants to a duty lawyer where they have been unable to obtain legal representation;
- exploration of evidence that might be relevant to the reasonable and proportionate test;
- the parties to explore alternatives to eviction;
- the parties to make important concessions;
- the Tribunal to narrow the issues in dispute for any future hearing;
- unsuccessful parties to more readily accept the outcome of the future hearing, on the basis the party has had a chance to have their say outside a formal, adversarial hearing;
- the social housing provider to demonstrate its pursuit of an alternative to eviction or a compliance order.

Unfortunately, very few VCAT users are aware that these ADR processes exist. As a result, they are rarely used by parties in the Residential Tenancies List. This is especially the case with social housing providers and their tenants. Many social housing providers are unfamiliar with the ADR provisions. When tenants or their representatives suggest ADR as an alternative to eviction or compliance proceedings, in our experience, social housing staff are often reluctant to engage in the ADR process because it is unfamiliar to them. This was the case for Tyrone.

Tyrone's story: Social housing provider wary of ADR

Tyrone has an ongoing dispute with his social housing provider, which has resulted in the social housing provider seeking an application for possession in VCAT. Tyrone experiences physical and mental health issues, including epilepsy, and has a history of substance use issues. He needs his social housing unit otherwise he will be back on the street and will find it hard to stay away from drugs and crime. Tyrone's social housing provider is aware of this and does not want to evict him, however after several incidents involving other tenants at the property sees no choice other than to apply to VCAT to evict Tyrone.

Tyrone acknowledges that a dispute has arisen between the parties, and he wants to resolve it, but he doesn't want to talk to his housing provider "one-on-one". Instead, he wants a chance to discuss the matter in a conference at VCAT, to see if the parties can reach an agreement which would see Tyrone sustain his tenancy, while also addressing issues which may have led to the dispute. Tyrone thinks that it will be better if an independent person can help talk the parties through the issues.

Tyrone's representative asks the social housing provider to consider consenting to orders that would require the parties to attend a compulsory conference (under s 83 of the VCAT Act), rather than going straight to eviction proceedings. The social housing provider refuses because they do not understand how the ADR process works and have never participated in one.

Tyrone must defend the social housing provider's application for possession at a contested hearing. The only possible outcomes for such a hearing are the dismissal of the social housing provider's application, or an eviction order made in relation to Tyrone's tenancy. If the social housing provider was aware of VCAT's ADR processes and had experience with them, it is possible that the parties would have the opportunity to work out their differences in a less formal, less stressful setting.

In determining how to ensure better and more appropriate utilisation of ADR, there should be engagement with relevant sector stakeholders to develop a proposal for broader use of ADR in tenancy disputes. An expanded ADR scheme must be designed to centre the rights and interests of renters who are experiencing vulnerability and disadvantage, including ensuring that negotiations are fair and any power imbalance between the parties is properly addressed. This would require trained mediators with an understanding of the complex legal and social issues.

Recommendation 13: Encouraging alternative resolution of disputes

Additional training and support should be provided to VCAT members and social housing providers to increase awareness and utilisation of existing ADR mechanisms in tenancy disputes to help foster negotiation and meaningful contemplation of alternatives to eviction. Further engagement should be undertaken, in conjunction with tenants and relevant sector stakeholders, to determine the desirability and model for a more comprehensive ADR scheme for tenancy disputes.

3.3 A re-hearing mechanism at VCAT

Another element of the regulatory landscape that prevents the effective resolution of disputes is the complex and inaccessible mechanism for having decisions of VCAT reviewed. As it stands, these decisions can only be appealed if there is an error of law and only in the Supreme Court.

During the consultation phase of the "Fairer Safer Housing" review of the Residential Tenancies Act, a range of agencies representing users of the Residential Tenancies List at VCAT worked together to reach a joint position on the need for an internal re-hearing right, similar to that which exists in

New South Wales where in certain circumstances parties can appeal a decision to the NCAT Appeal Panel. The agencies included VLA, the Law Institute of Victoria, the Community Housing Industry Association, the Real Estate Institute of Victoria, Tenants Victoria and Justice Connect. This was an unusual alliance of organisations representing both landlords and tenants across private and social housing. In September 2018, Consumer Affairs Victoria indicated that it intended to take steps to introduce the internal re-hearing right, but this has not yet eventuated.

A mechanism like this would help improve the consistency of decisions made in the VCAT Residential Tenancies List, recognising the significant impact of these decisions on both landlords and tenants.

Recommendation 14: A re-hearing mechanism at VCAT

Introduce a re-hearing mechanism at VCAT to improve access to a timely and cost effective review of decisions and the consistency of decision-making in the VCAT Residential Tenancies List.

Annexure: Our clients

