Tenants Union of Victoria
response to

Heading for Home Residential Tenancies Act Review Options Discussion Paper

February 2017
About Us

The Tenants Union of Victoria (TUV) was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state.

Our aim is to promote and protect the rights and interests of residential tenants in Victoria.

We operate an integrated service model that combines our three main areas of activity:

> client services (advice and advocacy),
> community education, and
> social change

1. Client Services (advice & advocacy)

The purpose of our client service is to provide accessible and effective assistance to residential tenants across Victoria. Advice is provided by telephone, in person, by email and through secondary consultations with other services.

During 2014/15, the TUV handled more than 19,200 enquiries. The TUV provided advocacy on behalf of tenants in almost 880 matters, represented tenants in over 225 hearings at VCAT or other Courts, and attended 350 outreach visits to 250 rooming house, caravan parks and services.

2. Community Education

The TUV produces a wide range of publications and practical resources for tenants, rooming house and caravan park residents, and community service workers to assist tenants to understand their rights and responsibilities and to resolve their own tenancy problems. We have about 150,000 unique users accessing resources through our website each year.

The TUV also runs a training program for community sector workers to provide basic training in tenancy rights and responsibilities. During 2014/15 we did 29 training sessions and other community education presentations.

3. Social Change

The TUV undertakes a broad range of social change activities to represent the interests of tenants and to highlight the impact of living in the rental sector. This work includes research, policy formulation, lobbying and media liaison.

Across these three areas of activity our strategic goals can be summarised as:

> Better tenants’ rights
> Better tenant resources
> Betters tenant services
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Introduction

The Tenants Union of Victoria welcomes the review of the Residential Tenancies Act and the opportunity to contribute to the Heading for Home Options Discussion Paper.

The rental market has changed significantly since the Residential Tenancies Act was last reformed in 1997. There are now more people renting and greater numbers of long-term renters relying on the private rental market for substantial periods or lifelong tenure.

The current private rental market is characterised by short term tenancies and insecurity. Any reform to the legislation needs to increase safety, security and privacy for Victoria’s 1.2 million renters, to ensure that all Victorian families, retirees, and singles have access to stable homes. For this to occur there needs to be a significant shift towards recognising that the right to a home has to come before the right to profit from investments.

There are many other jurisdictions that provide strong protections for tenants, where the importance of home is recognised and reflected through their legislation. Despite providing strong protections for home, these jurisdictions have successful and profitable rental housing markets.

A focus on security of tenure

The Labor Government has indicated its intentions to make rental housing fairer and safer. Additionally the Heading for Home paper outlines the importance of security of tenure as a focal point for reform. Having strong security of tenure is the key component for longer and happier tenancies. Renters in Victoria currently don’t have security of tenure; tenants don’t have choice, certainty and control over their housing. The lack of security that tenants face permeates through all aspects of the rental experience. A large proportion of tenants feel unable to assert their rights with half of renters fearing being placed on a tenancy blacklist and many more too afraid to ask from repairs or assert their rights for fear of being given a notice to vacate, a rent increase, or a bad rental reference. The legislation has been failing tenants and needs to be rebalanced to ensure a fair rental market. We are supportive of the Government’s recognition of this need to modernise and recalibrate this significant piece of legislation that governs the growing rental market.

Despite the intention to make rental housing fairer and safer, the options that have been put forward in the Heading for Home paper would not take us towards this goal. Predominantly the options would not make renting more secure, but would in fact do the opposite. Many of the options put forward would significantly hinder longer term tenancies, resulting in insecure and shorter tenancies and a greater culture of fear experienced by tenants. These options would also increase the number of vulnerable people being evicted into homelessness, requiring social housing and other assistance. This comes at a time when Melbourne is experiencing a homelessness crisis.

Introducing many of the options described in this paper would result in the largest backward step for tenants in over 30 years, since before the introduction of the Residential Tenancies Act in 1980. The options indicate a lack of understanding of the realities of the rental market, and the power imbalance that exists between the parties. Instead of attempting to address legitimate issues in the rental market most of the options put forward seem to provide a series of trade-offs that give away too many rights for virtually no gains for tenants.

The options also place too much faith in VCAT preventing evictions at their discretion when the vast majority of tenants don’t apply or attend VCAT Hearings and the culture of VCAT is more inclined to evict than preserve tenancies unless they are told that is what they have to do.

Whilst some of the options would provide some positive outcomes for certain tenant groups in certain areas, on the whole long-term renters will suffer under the options presented in this paper. When looked at as a whole, the benefits from the options that we would support are likely to be diminished or not realised at all, because of other options that may also be introduced.

For example introducing minimum standards would benefit the subset of renters who reside in substandard properties; however the introduction of other options that withdraw protections from unnecessary and unfair evictions would likely diminish tenants’ ability to assert their rights around these standards. Similarly, whilst we would greatly support repealing ‘no reason’ notices to vacate, the introduction of measures that expand eviction powers and make it quicker and easier to evict vulnerable tenants would block any benefit to security of tenure that this reform would have provided.

**Getting the balance right**

Housing is a fundamental human need. It is the building block upon which the ability to participate in society, to have a healthy and fulfilling life, relies. Tenants do not enter into the rental market voluntarily; they do so to fulfil their fundamental need for housing. Landlords on the other hand join the rental market voluntarily, motivated with a desire to generate wealth. The two parties come together in the rental market to fulfil these different, and often competing, needs. Because of this fact, tenants as consumers of rented housing, experience a particular disadvantage.

Tenants are restricted from using any consumer bargaining power at the beginning and throughout their tenancy. From the outset landlords set the ground rules by providing a tenancy agreement on a take it or leave it basis. Once a tenancy agreement is entered into, the tenant is constrained from ‘shopping elsewhere’ by the physical, financial and emotional barriers associated with uprooting and moving house. For a landlord, the result of a failed negotiation may mean a momentary reduction in return and an inconvenience. For a tenant the result exchange is very different, the result will mean an emotional and financial loss, and the uprooting of one’s life.

It is always going to be difficult to move house, this is influenced not only by the financial cost involved, but also significant constraining factors such as:

> location and proximity to jobs, schools and community,
> size and required features of a property, and
> affordability.

These factors, coupled with low vacancy rates, high rent, and high demand causes market failure where tenants are not able to exercise effective choices in the market. These unique factors contribute to the inherent power imbalance that exists between landlords and tenants; demonstrating the need for strong and clear consumer protections to be provided through legislation. The RTA as it currently stands does not adequately recognise this disadvantage, resulting in a market that is far out of balance.
If reform of the *Residential Tenancies Act 1997* is concerned with balancing the rights of the parties it must first recognise the unequal footing upon which the parties stand, to ensure that reforms to the RTA truly balance the rights of both tenants and landlords.

**Implications for the rental market**

No legislative reform can occur without consideration of the potential impacts on the industry and the market. Claims that fairer laws would result in landlords selling their properties and moving their investments elsewhere are made loudly by property lobbyists at each and every review of tenancy legislation. Despite this, evidence continues to demonstrate that the connection between tenancy legislation and investor decisions is weak. Studies reaching back as far as the nineties have all reached the same conclusions; that law reform does not affect the economics of the rental market, and is not a motivator for investor decisions.\(^2\)

A study conducted by the *Australian Housing and Urban Research Institute* in 2009 came to the conclusion that:

“The relationship between investment and tenancy law reform continues to prove weak. Previous research has emphasised that investors simply do not consider tenancy issues when investing for the first time ... and in this study it was almost impossible to get investors to engage on tenancy law as an issue, let alone an important factor connected to investment decisions.”\(^3\)

Despite this evidence, property lobbyists and landlord representative organisations continue to use scare-tactics to stifle any opportunity for creating fairer laws.

If providing tenants a right to safe, secure and well maintained housing is too burdensome for a landlord then they should be investing their money elsewhere. As with any investment, investing in rental housing comes with a certain degree of risk and requires labour and capital to maintain the investment. This seems to be often forgotten when it comes to rental housing. Legislation falls in favour of the landlord where residential property is viewed as being first and foremost a means of making money, rather than recognising it as a means of housing people that happens to also make money.

**Making renting fair**

This Residential Tenancies Act review needs to make renting fair. This means addressing the failings in legislation that currently exist and rebalancing the Act so that 1.2 million Victorians have access to safe, secure, appropriate, and affordable housing.

1. **Improve security of tenure and rental access by:**
   - Remove ‘no reason’ eviction notices
   - Protect people from unjust tenancy database practices.

2. **Protect tenant health and safety by:**
   - Introduce minimum property standards
   - Create incentives for landlords to undertake repairs

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\(^3\) Seelig, Thompson, Burke, Pinnegar, McNelis and Morris, Understanding what motivates households to become and remain investors in the private rental market, AHURI final report No. 130, March 2009
> Expand privacy and fair use protections by:
> Prevent unwanted visits and photography
> Allow tenants to undertake fair modifications.

3. **Protect low income and vulnerable tenants by:**
> Prevent unreasonable evictions
> Implement the Family Violence Royal Commission recommendations.

4. **Rule out punitive measures that would harm tenants, particularly those at risk of homelessness, including:**
> Reject proposed changes to make evicting people quicker and easier
> Reject the proposed enforcement of onerous and unfair lease terms
> Reject the proposed special bond scheme for pet owners
> Reject additional restrictions on stays by guests and family
> Maintain existing protections for highly vulnerable tenants.

Unfortunately, far too many of the options in the *Heading for Home* paper fail the test of fairness.
Snapshot of current market issues

Policy objectives for a modern framework

R1. Include specific reference to consumer protection in the purposes of the Residential Tenancies Act.

The current purposes of the RTA do not recognise the important role that the rental market plays in providing a fundamental human need; housing. The RTA’s purposes, current and proposed, do not adequately address the nature of the residential tenancy market, and the vulnerable position that tenants are in due to their reliance on the landlord to provide safe, secure, affordable and appropriate housing. The Act’s purposes should convey the tenants overarching need for consumer protection. Without this recognition the RTA fails to provide the safeguards needed to ensure that both parties are able to participate in the transaction fairly and equally.

Other consumer legislation in Australia and Victoria clearly outline their intentions to provide consumer protection:

- Australian Consumer Law and Fair Trading Act 2012 - “to protect consumers”
- Motor Car Traders Act 1986 - “that the rights of those who deal with motor car traders are adequately protected.”
- Retirement Villages Act 1986 - “protect the rights of persons who live in, or wish to live in, retirement villages”
- Second-Hand Dealers and Pawnbrokers Act 1989 - “to enhance protection of consumers dealing with second-hand dealers and pawnbrokers”

Consumers of rental housing deserve adequate protection, just as consumers of cars and second hand goods do.
Application of the RTA and lease lengths

Limitations to the scope of the RTA

R2. Implement option 3.1 Remove the five-year limit on the scope of the RTA.

The Tenants Union supports removing the five-year limit on the scope of the RTA. However it is not thought that this will result in meaningful change on its own. The current legislation allows for tenancy agreements of anywhere up to five years, despite this the vast majority of tenancy agreements are offered as a fixed-term for 12 months or less.

Risks
Changing the scope of the RTA to cover longer fixed-term agreements would likely result in no change in the actual length of tenancies.

Benefits
Removing the five year exemption will future-proof the legislation and ensure that it has the ability to cover a greater number of tenancies. There is no rationale for precluding tenancies from the RTA just because of their length.

Scope of the RTA
When considering the scope of the RTA there are still significant gaps that have not been discussed, such as student housing. Tenants living in this type of housing have no protection under the RTA.

Long-term leasing in general tenancies
The Tenants Union does not believe that introducing optional longer fixed-term agreements will improve security of tenure to tenants.

The main obstacles to longer term tenancies are:

- The difficulty of securing a longer fixed-term tenancy agreement from estate agents and landlords (if a tenant wants one).
- The reluctance of tenants and landlords to enter into longer fixed-term tenancy agreements for different (and often competing) reasons.
- The relative simplicity with which a tenant under a periodic tenancy agreement can be evicted for no fault including for no specified reason.
- The limited amount of discretion to prevent evictions where the tenant is at fault but the fault could be rectified.
- The ability for rent to increase unpredictably during a long fixed-term agreement.

Tenants should be able to sign up to long term leases but this should not come at a greater cost to the tenant. This would provide no benefit to low income, vulnerable and disadvantaged tenants who will not be able to offer such financial incentives. Data
indicates that longer leases are more likely to be preferred by older renters, households on low incomes or receiving income support, and families with children.  

If longer fixed-term tenancies were introduced the following would need to be implemented:

- Greater protections for tenants against rent increases during the fixed term period and against lease breaking fees if a tenant is required to leave early.
- Stronger provisions to ensure compliance by the landlord to their duties under the Act.
- Additional safeguards so that vulnerable tenants such as the elderly, single parents and those on low incomes are protected against discrimination from landlords who may see these groups as an increased liability in a longer fixed-term agreement (For example, introducing a standardised application form and include reference to Equal Opportunity Act in the RTA).
- Additional information (about the property and landlord) to be provided to tenants at the contracting stage so that tenants are able to make considered, informed choices about their housing. A cooling-off period would also be beneficial.

**Longer fixed-terms – but less secure**

Many of the options put forward in the *Heading for Home* options paper will significantly decrease security of tenure for tenants; with the greatest impact to be felt by vulnerable and disadvantaged households. If these options are implemented it would mean that even if a tenant was in a longer fixed-term agreement they would have reduced security of tenure simply because of the weakening of protections in other areas. Eviction in many instances would be rapid and unforgiving with greater eviction powers being provided to landlords.

**Broadening and shortening the breach of duty process**

The options put forward under the breach of duty process would weaken protections for vulnerable and disadvantaged tenants, and provide less opportunity for tenants to remedy problems before eviction, instead advocating harsh and punitive eviction powers.

**More powers of eviction**

The options introduce two new notices to vacate whilst also creating additional avenues to eviction for already existing notices. These changes would target low income tenants and tenants with mental health conditions. Longer term tenancies would be of no benefit if these measures were also introduced.

**Longer fixed-terms – unlikely take up**

A significant risk of introducing an optional prescribed long-fixed term lease is that the option will not be utilised. Under current legislation tenancy agreements can run for up to five years, despite this we know that tenancy agreements are rarely longer than 12 months. Providing the option for fixed-term leases to be longer than five years will be unlikely to be supported by either party. We have seen this in other jurisdictions such as New South Wales, where an optional longer fixed-term agreement was brought in in 2010, but has been seldom offered by landlords.

**A better way forward to longer, more secure tenancies**

To improve security of tenure and the length of tenancies more generally, the focus needs to move away from the length of a fixed-term, to a wider view of the factors that make a tenancy secure. These include:

- having a rent that is affordable with predictable increases;
> having a properly maintained home with an accessible and simple process for accessing repairs;
> having privacy and quiet enjoyment of your home;
> having confidence that you will be able to stay in your home for as long as you want whilst maintaining your responsibilities as a tenant;
> having the ability to make your house a home; and
> in the first instance being able to access accommodation that is appropriate and affordable.

Most significantly, we need a paradigm shift away from the prioritisation of the landlords’ property rights, towards the tenants’ right to a home. For this the tenants’ exclusive possession of the property needs to have greater recognition and eviction needs to be thought of as a last resort. This means giving greater control to the tenant during their tenancy, and stronger, more enforceable obligations to the landlord. It means stronger protections to the tenant against retaliation and it means restricting the landlord’s ability to regain possession of the property to only clearly defined situations.

**Option 3.3 Provide for the option for tenants to extend fixed term leases for subsequent period.**

The Tenants Union would be supportive of this option if it were made compulsory for all tenancies. This could give greater security to tenants without locking them in to long fixed-term agreements. Were this proposal to be optional, that is subject to an offer by the landlord, it is unlikely to be adopted by landlords and real estate agents and therefore is unlikely to increase the length of tenancies or security.
Rights and responsibilities before a tenancy

Unlawful discrimination against applicants and tenants

R3. Implement option 4.2 Strengthen links between the RTA and the *Equal Opportunity Act 2010*.

Discrimination is still a major barrier for many tenants when it comes to accessing rental properties. Recent research found that 50 per cent of tenants reported facing discrimination when applying for rental properties.\(^5\)

A study by TUV in 2008\(^6\) found that discrimination by landlords against prospective tenants was ‘rife’. The study found that whilst agents do understand that they are legally obliged to view every applicant equally, many do not.\(^7\)

Migrants, Cultural and Linguistically Diverse communities, Aboriginal and Torres Strait Islanders, young people, single mums, people on low income or with disabilities all report to have difficulty accessing properties in the private rental market.

Proving that discrimination has occurred is very difficult, particularly in a tight rental market. A tenant may suspect that they are not being selected for a property due to discrimination however it is very difficult to provide evidence to support a claim.

**Penalties for discrimination**

Strong penalties should be included for any discrimination offence under the RTA. Penalties need to be high so that they act as a deterrent and so that they provide adequate compensation to those who have suffered due to discrimination.

For example under Scottish legislation if a tenant is wrongfully terminated they are entitled to compensation of up to six months’ rent. A similar penalty would be appropriate where discrimination has been found either where a tenancy has been terminated, or a tenancy was not offered due to discrimination. This would act as a disincentive for discrimination, and it would provide practical redress to the tenant.

Privacy and use of tenancy application information

R4. Implement option 4.3 Prohibit a landlord or agent from using information in tenancy application for other purpose.

The Tenants Union supports the introduction of option 4.3. This would provide protection to tenants against the misuse of their private information. There would need to be an appropriate penalty to ensure compliance with the provision.

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\(^1\) Choice, National Shelter, National Association of Tenant Organisations, 2017. *Unsettled – Life in Australia’s private rental market*


\(^3\) Ibid
Tenancy databases

R5. Implement option 4.4 Prohibit charging fee to tenant for copy of tenant's listing.

R6. Implement option 4.5 Give VCAT power to make an order if database listing is unjust in the circumstances.

Fee free access
The Tenants Union supports prohibiting database operators from charging tenants a fee for accessing a copy of their own listing. This option is preferred to offering a fee-free method, as this option could allow database operators to limit their free method to certain types of access. One database operator currently provides one free method, which is by post within 10 business days. If the tenant wishes to access their listing in a time-sensitive format they have to pay a fee. The option that is introduced should provide the tenant with free and time-sensitive access to their listing in an accessible format.

Prevent unjust listings
Being listed on a database makes the private rental market inaccessible, greatly increasing the likelihood of homelessness. Tenants may experience a once off financial crisis triggered by job loss, the flare up of a mental health condition or other illness, or family violence. It is not always fair or appropriate that the tenant be listed on a database.

NSW, Queensland, WA, Tasmania and ACT all include a provision in their legislation that allows the Tribunal to consider whether listing the tenant would be unjust. There is no reason why Victoria should have weaker protections for tenants than the other states and territories in Australia.

Disclosures and representations prior to entering a tenancy

R7. Implement and amend option 4.6 Require disclosure of certain material facts prior to tenancy and include that this must occur prior to entering into a tenancy agreement.

R8. Implement option 4.7 Prohibit false, misleading or deceptive representations prior to tenancy.

Disclosure of material facts
The Tenants Union supports the disclosure of certain information before the tenancy agreement is signed.

There is systemic information asymmetry between tenants and landlords at the point of contracting. Landlords and estate agents are able to require detailed personal information and check references for prospective tenants and generally have surplus demand to enable them to make choices about their preferred tenant. It is virtually impossible for the tenant to know many significant details regarding the rented premises, the tenancy history and the landlord's (or real estate agent's) management practices and reputation. By contrast to many other consumer transactions (including many of less significance than renting a home), a tenant is grossly "in the dark" about many material aspects of the proposed tenancy. Based on our research, this lack of knowledge about the premises and the other party is one of the key reasons that many tenants do not want to be locked into fixed-term agreements of any length.

The common problems resulting from this absence of information include:

> Unsafe facilities and higher than expected running costs (including the absence of electrical safety switches, the presence of asbestos, the lack of insulation, higher tariff appliances, inadequate servicing of gas heaters etc.)
Recurrence of problems experienced by previous tenants (including noise problems, anti-social behaviour in adjoining premises, intolerant owners corporations, chronic dampness or persistent mould, poor landlord conduct etc.)

Prolonged disruption due to sales campaigns commencing shortly after the tenancy agreement

Problems with connecting telephony and internet where wall sockets imply a functioning connection that doesn’t exist. This problem will be ongoing with the rollout of the NBN as tenants will be unable to ensure that the connection to the network is complete and functioning and will particularly effect low-income households who may not be able to afford either the cost of connecting someone else’s premises or alternative means of communication.

We believe that these problems can be partly addressed by mandatory disclosure of critical information by the landlord. This could be done through a simple prescribed checklist that the landlord or their agent must complete, declare and provide to the prospective tenant prior to the signing of any tenancy agreement.

It is important that tenants are provided with adequate information to assist finding housing that is appropriate to their needs. This will improve the longevity of tenancies as renters will be aware of what they are signing up for.

The introduction of any new requirement must include enforcement measures to ensure that they are complied with. We recommend that a tenant should be able to break a fixed-term or periodic lease at no cost if it is because they did not receive the prescribed information prior to signing the agreement, and additionally they should be entitled to compensation.

What information to disclose
The Tenants Union is supportive of the listed information that is to be required for disclosure. There is additional information that would be beneficial for tenants to receive before entering into a tenancy, including information that has been listed for inclusion in the condition report, such as the connectivity of telephone, internet and television cables, and details of ongoing and past maintenance issues.

Limiting the requirement to the listed material facts would restrict the benefits of having mandatory disclosure.

When information is disclosed
Any disclosure of information needs to be provided before the tenancy agreement has been signed, and with enough time to allow a tenant to make a meaningful decision about their needs and their housing. If the information is provided at or after the time of signing an agreement, its usefulness will be significantly diminished. Providing a cooling-off period could partially address this issue.

False and misleading information
Requiring that landlords provide information that is not false, misleading or deceptive should not be viewed as a burden for landlords. It must instead be understood to be the necessary basis upon which a just relationship can be developed. A fair contract cannot be entered into on the basis of false or misleading information. Allowing false and misleading information to be given by one party contributes to the power asymmetry that exists between landlords and tenants and it is not the basis of a fair rental market.

Details of landlord for legal proceedings
R9. Implement option 4.8A Landlord’s details must be provided in tenancy agreement.

Option 4.8A is the fairer option for both parties as it brings both parties onto an equal footing, ensuring that both parties in the contract are known to one another. When the tenancy agreement is signed the tenant and landlord enter into a contractual
agreement with one another and should therefore be known to one another. This will also ensure that both parties have the information required to engage in any future legal proceedings if required.

**Terms of tenancy agreement**

R10. Do not implement option 4.12B Additional terms enforceable, with limited exceptions.

R11. Amend the Act to state that additional terms in a residential tenancy agreement must be approved by the CAV Director to be enforceable.

**Issues at the letting stage of renting**
The power imbalance between landlords and tenants is demonstrated at no point greater than during the letting process. Tenants hold far less bargaining power than landlords during this transaction. This is due to a number of reasons;

- A home is a fundamental need,
- Tenants ability to exercise choice in the marketplace is restricted by external factors such as location and proximity to employment,
- Affordability and the availability of properties that meet the physical requirements such as number of bedrooms, and
- The high demand for rental properties, particularly at the more affordable end of the market.

Due to these reasons the tenant has a diminished bargaining power and is unlikely to be able to negotiate a fair tenancy agreement. This is why the Tenants Union argues that legislative protection through a prescribed tenancy agreement with a restriction on additional terms is vital to ensuring fairness in the process. The current provisions invalidating certain terms are not effective in restricting their occurrence. Additional invalid terms remain commonplace.

Very few tenants properly understand the additional terms and conditions to which they are agreeing despite the ritual observed by many landlords and real estate agents to require the tenant to initial each additional term. Commonly tenants are required to pay the bond and rent in advance at the same time or before they sight the written agreement. That process is inimical to informed consent.

The Tenants Union has previously reported to CAV about problems with additional terms in residential tenancy agreements⁸. In particular, many of the common additional terms are unfair in relation to the considerations in the Australian Consumer Law, invalid under section 27 of the RTA or potentially harsh and unconscionable.

Whilst it may be possible for a tenant to defend against the enforcement of any such unfair, invalid or harsh terms, a tenant would have to be sufficiently aware of this defence to contest any action by the landlord or their agents including the landlord’s insurers. We believe that the sole purpose of these terms is to create the misleading impression that a tenant must comply. It remains unclear why such terms should be allowed to remain.

**Ensuring a fair tenancy agreement**
The options put forward will not adequately address the issues outlined above. A more-comprehensive standard prescribed tenancy agreement will do nothing to stop the inclusion of additional terms in-and-of-itself. The Tenants Union would be supportive of a more comprehensive standard agreement if it were coupled with adequate protection from additional terms.

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⁸ TUV (2006), Unfair Terms in Residential Tenancy Contracts (and Source Documents)
Blacklists
The introduction of a blacklist does not go far enough to protect tenants from additional terms. It may protect tenants from certain terms included on the list but not be far reaching enough to prevent the use of other additional unfair terms. Additionally the Tenants Union does not agree with some of the terms that have been listed for inclusion in a blacklist, these are discussed below.

Terms referencing the landlord insurance
A tenant should not be prohibited from conduct on the basis of the landlord’s insurance requirements whether or not they have been provided a copy of the insurance requirements. This would bind the tenant to a third party agreement, which is not permitted under contract law. It is likely that some of the additional requirements would be overly onerous and will impact the tenant’s quiet enjoyment and exclusive possession of the property. For example, landlord insurance often attempts to restrict tenants from using certain types of heaters or running their washing machine whilst they are out of the house. If there were a term of this nature included on a blacklist it would need to be amended to state simply: “a term which purports to prohibit the tenant from conduct on the basis of the landlord’s insurance requirements.”

Terms referencing Owners Corporation rules
Again owners corporation rules are often overly onerous and restrict the tenants quiet enjoyment of the property. Allowing the enforcement of owners corporation rules through the tenancy agreement places a higher burden on a tenant than is applied to an owner occupier. Including owners corporation rules in tenancy agreements could reduce security of tenure for tenants, particularly those vulnerable to bullying by their landlord or agent. Owners corporation rules can include overly restrictive terms such as that occupiers must not hang their washing on their balcony. It would not be fair for a tenants housing to be reliant on compliance with the rules of an owners corporation. If there were a term of this nature included on a blacklist it would need to be amended to state: “a term which purports to bind a tenant to the rules of any OC.”

If a blacklist were introduced it should also include:

> A term that is invalid because it purports to exclude, restrict or modify the operation of the RTA.

Penalties for non-compliance
Strong penalties for non-compliance would need to be included in the introduction of a blacklist or an offence provision against invalid terms. There would also need to be adequate enforcement to ensure compliance in these areas. Without this the introduction of such a provision would do nothing to restrict the use of the blacklisted or invalid terms.

Enforcement of additional terms
The enforcement of additional terms would result in the significant decrease in security of tenure for tenants and would likely see an increase in the use of additional terms that are now thought to be invalid and unfair. The enforcement of additional terms would increase tenants’ vulnerability and provide landlords with more options for eviction. This is likely to affect vulnerable and disadvantaged tenants the most and runs the risk of increasing terminations for trivial and even obscure grounds. Terms that are not included in the Residential Tenancies Act should not be enforceable as it opens the tenants position up to far greater risk. Allowing for the enforcement of additional terms would create insecure tenancies and does not recognise the weakened bargaining power that tenants have.

The RTA outlines the rights and obligations of tenants and landlords, it provides the safeguards of legislation that these are fair and appropriate. Providing for the enforcement of additional terms allows for the landlord to impose extra obligations on the tenant.
Allowing the inclusion of unenforceable additional terms
There is no justification for permitting the inclusion of unenforceable terms. Including additional unenforceable terms does nothing except mislead the tenant. Allowing a term to be included in the tenancy contract creates the impression that the obligation is legally binding. Often these terms are promoted by the landlord or agent as being binding, further misleading the tenant of their obligations.

Allowing the inclusion of invalid terms creates an additional imbalance between the parties, allowing the landlord or agent to benefit from the inclusion of the term. The likely result of the inclusion a non-enforceable term is tenant compliance as the tenant will likely be unaware that it is unenforceable.

Neither option 4.12A or 4.12B are preferable, whilst option 4.12B will have a catastrophic impact on tenants’ rights, option 4.12A does nothing to address the issue of additional lease terms.

Professional cleaning additional terms
The Tenants Union opposes the options that would allow for the inclusion of a requirement for tenants to professionally steam clean the carpets at the end of a tenancy. Under the RTA the tenant is required to leave the property in a reasonably clean condition, this may mean that professional cleaning is required if the carpet has been significantly dirtied, however it does not necessarily require this level of cleaning. Allowing professional cleaning as an enforceable additional lease term requires a greater obligation than is currently outlined in the RTA.
Rights and responsibilities during a tenancy

Processes for breaches

R12. Do not implement option 5.2A Broaden the three strikes rule, but limit it to a 12 month period and require a VCAT order to terminate for repeated breaches.

R13. Do not implement option 5.2B Abolish the three strikes rule, allow VCAT to terminate if breach is sufficient to justify termination.


R15. Implement fairer compliance orders through:
   15.1 Introducing a 6 month time-limit.
   15.2 Amend section 332 to give the Tribunal discretion where they are satisfied that the breach was trivial or has been remedied as far as possible or that there will be no further breach of duty.

Eviction should be a last resort, it should be proportionate and it should be fair. Eviction is not always the appropriate mechanism for the resolution of disputes. The options provided for breach of duty appear to favour eviction over other more suitable resolution pathways. This is particularly concerning for low income, vulnerable, and disadvantaged tenants who are more likely to experience difficulties and complexities leading to breaches of duty.

Under the current provisions a tenant who breaches a specific duty multiple times can be evicted for that behaviour. This provides the tenant some allowance to remedy the breach whilst providing the landlord assurance that if the breach continues they can terminate the tenancy. By widening and strengthening this termination right, tenancies and particularly those of vulnerable and disadvantaged tenants will be significantly weakened. Landlords should not have unhindered rights to terminate a tenancy, although these options indicate that they should. The current protections against unfair eviction are already inadequate. There should not be any changes to further weaken these protections.

Processes for successive breaches

Option 5.2C is the preferred option for the breach of duty process.

The successive breaches pathway to eviction is inherently flawed as there is no pathway for a tenant to challenge a breach of duty notice. The perceived breach of duty can often be subjective and can be a matter of dispute between the parties. For example a breach of duty may be given due to the property being perceived as not reasonably clean, however if the tenant believes that the property is in fact clean they have no way of disputing the notice. If the matter progresses to a notice to vacate for successive breaches under s249 the tenant is still unable to dispute the breach. This process puts the tenants at great risk of eviction and allows estate agents and landlords to serve unreasonable notices with no mechanism for oversight or repercussion. S249 notice to vacate for successive breaches is unnecessary as s248
notice to vacate due to failure to comply with a Tribunal order serves essentially the same purpose but provides a far more rigorous process.

**Risks of option 5.2A and option 5.2B**

We know that landlords can use the breach of duty notice to evict tenants that they see as ‘problem tenants’, tenants who make too many requests or complaints. These options would make it incredibly quick and easy for a landlord to evict a tenant through the proposed breach of duty processes even where eviction was not warranted or appropriate.

The risk is associated with these options are that there will be far more unnecessary evictions and shorter and more insecure tenancies. The proposed options would directly impact vulnerable people. The law already provides that a landlord can evict a tenant where they serve a breach of duty notice, the landlord obtains a compliance order, and the tenant fails to comply with that order. This is adequate protection for landlords.

**Case study**

The Tenants Union assisted a rooming house resident who had been issued with multiple breach of duty notices at the same time for different alleged breaches, such as not keeping property clean and being an interference. We understood this was being used by the landlord to attempt to evict the resident.

The rooming house operator was prevented evicting the resident through this pathway because he could not show that the resident breached the same provision twice.

The current process for successive breaches provided the resident with an opportunity to respond to each allegation and comply. If a landlord or rooming house operator was able to evict for successive breaches of different obligations, a resident or tenant would not be afforded with an opportunity to respond to the allegation, remedy their behaviour (if needed) or comply with the breach of duty notice. The resident or tenant could then fear being issued with another notice for a different reason, and be evicted on that basis.

**Scope of the breach of duty process**

It is the Tenants Union’s view that the current list of duties should not be increased.

Additional terms of a tenancy agreement should also not be subject to the breach of duty process. Tenants do not have an equal bargaining power and are unable to negotiate a fair agreement. The enforcement of additional terms would not be fair to tenants. This has been discussed in greater detail above in the “terms of a tenancy agreement” section.

**Pets in rented premises**

**R16.** Do not implement option 5.3A An optional pet bond lodged with RTBA.

**R17.** Terms restricting the tenants’ ability to keep a pet should not be permitted in a tenancy agreement.

**R18.** Amend the Act to allow a tenant to give notice of a pet during their tenancy.

Tenants with pets have considerable difficulty accessing rental properties due to the large number of landlords who do not permit pets in their properties. This issue also constrains tenants who are in existing properties from getting a pet even if they wish to do so.
According to the RSPCA over 700 pets were surrendered to their shelters in Victoria in the last financial year because the owner was unable to keep them in a new home.⁹

Changes in the rental market over the past decade have seen an increase in long term renters. Families are the largest household type and many people are renting into old age. The restrictions on pets that are included in many lease agreements mean that many long term renters struggle to find housing or are forced to remain without pets for their entire lives.

Tenants are granted exclusive possession of the rental property for the duration of their tenancy agreement. This means that they should be able to live in the property as they see fit so long as they are adhering to their responsibilities under the Act. Tenancy agreements should not be permitted to include any terms that restrict the tenants’ exclusive possession of the property; this includes the tenants’ ability to keep a pet.

A tenant, like any adult, should be able to make their own decision about keeping a pet. After all having a pet is a personal choice; it is not a decision that should be up to the landlord.

The Act already provides safeguards to protect the landlord from financial loss due to damage. The tenant pays their bond at the start of a tenancy to cover any potential damage to the property. Additionally the landlord can apply to the tribunal to seek compensation for any damage that exceeds the amount of the bond.

Local council by-laws regulate the type and number of pets that are allowed in different property types, they also detail safety, registration and noise complaints; and nuisance and cleanliness provisions are captured by the RTA.

In some circumstances it may be appropriate for a landlord to object to a pet being kept on their leased premises, this is why there should be a mechanism whereby the landlord can apply to VCAT to object to a tenant housing a pet on their property in extreme circumstances. The landlord should be able to make an application to the Tribunal to object to a pet. The tribunal should only be able to make an order if the pet is an inappropriate size or type for the particular property. Or if the pet can be proven to cause severe hardship to the landlord, if the hardship suffered by the landlord would be greater than any hardship that the tenant would suffer if the Tribunal were to make an order against the pet.

It is important to ensure that issues such as animal welfare are not conflated with tenancy law. Whilst at times animal welfare may be a genuine concern, this should not be dealt with under residential tenancy legislation as this is not the appropriate avenue for such concerns.

**Pet bonds**
The Tenants Union does not support the introduction of pet bonds. Tenants are already required to pay a bond to cover any damage incurred during their tenancy. Potential pet damage should not be considered in a separate category to other damage. The introduction of pet bonds would create two classes of tenants, those who can afford to pay an additional upfront cost and those who can’t. The introduction of a pet bond is unlikely to make renting with pets any easier, it will just make it more costly. Research commissioned by CAV found that 59% of landlords would be no more inclined to allow a pet in their property than if there were no additional bond.¹⁰

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⁹ RSPCA Victoria, 2016, Submission to the Residential Tenancies Act Review Rights and Responsibilities of Landlords and Tenants – Issues Paper
¹⁰ EY Sweeney (2016) Rental experiences of tenants, landlords, property managers, and parks residents in Victoria, p72.
Introducing a pet bond is likely to increase the number of disputes over bond claims and whether certain damage has been made by a pet or not.

**Optional pet consent clauses**
The Tenants Union does not support the proposed optional pet consent clause as it is unlikely to address tenants’ concerns. Additionally the Tenants Union does not support including additional requirements on a tenant which may not be necessary. The tenant must already return the property in a reasonably clean condition, if that requires professional cleaning or fumigating, they are already obliged to undertake these actions. It is unlikely that an optional clause would result in any reduction in discrimination of tenants seeking pet friendly rental properties.

**‘No pets’ clause unenforceable**
The Tenants Union does not support option 5.4. There should be an outright ban on the inclusion of a ‘no pets’ clause, not simply that they be unenforceable. If a clause is unenforceable then it should not be permitted to be included in a tenancy agreement. The fact that such a clause is present in a tenancy agreement will mislead tenants to believe that they must abide by the term even though there may be a pathway to challenge it or simply ignore it.

This option does not address the main issue of renting with pets, which is discrimination at the letting stage. To address this issue there needs to be stronger protections for tenants with pets. The Tenants Union has previously recommended the use of a standard application form that disallows the landlord from asking the tenant whether they have a pet.

If VCAT is used as a deciding party the burden should be on the landlord to prove why a pet should not be permitted in their property and the reasons why this may be reasonable would need to be restricted to a directed set of criteria, such as does the property have a unique characteristic that makes housing a pet unsuitable.

**Open house inspections**

R19. Implement option 5.5 Seven days’ notice for general inspection or valuation.

R20. Implement option 5.6 Landlord liable for tenant loss caused during entry.

R21. Do not implement option 5.7 Reasonable inspections to show prospective purchasers, with right to compensation for tenant.

R22. Implement option 5.8 48 hours’ notice for entry to show to prospective tenants, within 21 days of termination.

R23. Amend the Act to expressly prohibit open house inspections and on-site auctions without the written consent of the tenant.

**Open house inspections and balancing the rights**
The Tenants Union does not support option 5.7 as this option reduces tenants’ current rights to quiet enjoyment. The below case study is one example of the impacts of open house inspections on tenants’ quiet enjoyment. This is a common story for tenants.

**Case study**

The Tenants Union assisted a tenant and his partner who were renting a property. The tenant was a shift worker and works to a roster, the tenant’s partner was studying at university. Their three children were aged under ten.
The tenants had a good relationship with their real estate agent and landlord. Rent was paid on time and in advance, and the tenants received their bond back in-full at the end of the tenancy.

In mid-2016, the landlord put the property on the market. The selling agent attended the tenants’ home to discuss the sales campaign. The agent provided the tenants with an extensive list of tasks for the tenants to complete “by Friday” in preparation for the first open house inspection. The selling agent informed the tenant that there would be two open house inspections per week: one mid-week and one on Saturdays.

The tenant informed the selling agent that as they were a shift worker, that would not be possible, requesting instead that the inspections be negotiated on a weekly basis.

The purpose of the tenant’s request was to make allowances for the tenant’s shift work (so that he could sleep off his night shifts without groups of people being shown through his home). The tenants also informed the selling agent that open house inspections would severely disrupt their children’s routine and cause general disturbance to their children. The selling agent informed the tenants that fewer open house inspections would not be possible or negotiable.

An appointment for a photographer to attend the property was organised. The selling agent and the photographer attended the property on a weekday afternoon at 5pm. While the selling agent spoke to the tenants, more people presented at tenants home and let themselves inside. Those ten people congregated in the tenants’ main bed room. The tenants asked the selling agent why so many people were there. The selling agent said “it’s just our sales team”. The selling agent did not notify the tenants that up to ten people would attend the property on this particular occasion.

After the photos were taken, the agent informed the tenants of the times for the open house inspections. The tenants said that they would prefer one inspection per week. The selling agent said “I know what you would prefer but we are doing two opens per week”.

The tenants complained to the agent about the manner in which the “photograph” inspection was conducted. The tenants also insisted, again, that open house inspections be done with the correct notice, and with consultation with the tenants. It should be noted that at no time did the selling agent give the tenant a notice of entry under ss.85 – 88 of the RTA.

The tenants appealed to the selling agent to consult with them about the open house inspection times. The selling agent indicated that it was not open to negotiating inspection times, with the selling agent indicating that the times were “set”. The tenants had not received a Notice of Entry, and the agent insisted on doing open house inspections at times that could disrupt the tenants’ routine, and disturb the tenant’s children.

The tenants sought an interim injunction against the selling agent. That injunction was granted. The agent was prevented for conducting open house inspections. At the return hearing, the tenant and selling agent reached an agreement for OFIs to be conducted on Saturdays only.

Since that time, the selling agent has twice attempted to sue the tenants in VCAT’s Civil Claims list for losses associated with its advertising campaign.

**The law**

**Sections 85 – 91A RTA**

The existing statutory framework set out in ss.85 – 91A RTA enables an owner or their agent to access a property by providing notice of their intention to do so to the tenant, in writing, at least 24 hours in advance of the proposed time of entry. Section 86(1)(b)
RTA relevantly provides that the owner or their agent may exercise a right of entry where:

“… [T]he premises are to be sold or used as security for a loan and entry is required to show the premises to a prospective buyer or lender.”¹¹

Once the owner or their agent has given notice in accordance with ss.85 – 88 RTA, s.89 RTA imposes a duty on a tenant to permit the owner or their agent to enter the rented premises. A owner or agent may then breach a tenant who fails to comply with s.89 RTA. In effect, the existing statutory framework balances owners’ rights to deal with their property by showing it to a prospective buyer or lender, with tenants’ right to have quiet enjoyment of the home for which they pay rent.

**VCAT’s interpretation of sections 85 – 91A RTA**

In *Higgerson v Ricco*, Member P Tyler made the following comments about the effects of ss.86(1)(b) RTA:

“I consider that for an agent to invest time and resource in arranging for and conducting a private inspection of a premises, they would have made an assessment of the party being shown the premises and formed the view that they were a prospective buyer even if the premises in question was only one of the properties which the buyer may eventually buy. On the other hand the “Open for Inspection” format can be regarded as a “fishing” exercise and an opportunity for a wide range of parties to enter the premises for a number of reasons including those unrelated to a prospective purchase. In this context, Section 86(1)(b) only allows entry for the purpose of showing the property to a prospective buyer and a situation where others, who are not prospective buyers, are gaining entry is not permissible. This in turn means that “Open for Inspections” are not permitted.”¹² [own emphasis]

In relation to tenants’ rights and owners’ obligations under s.67 RTA, the Member said:

“Further, Section 67 requires "A landlord to take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises...". I consider it to be unreasonable that entry to a premises by strangers who might or might not be prospective buyers during an "Open for Inspection" as an unreasonable interruption to the tenant's quiet enjoyment.”

It is our submission that the Member correctly applied the law in this case. It is an interpretation that upholds both parties’ rights and obligations. The existing statutory framework provides an owner or agent with a series of conditions with which the owner or agent must comply, if they seek to show a prospective buyer or lender through the property. Once the owner or agent complies with those conditions, there is then an obligation on the tenant to give the owner or agent access to the property.

The Open House Inspection or “Open for Inspection” format is justifiably controversial and unpopular with tenants because, as Member Tyler pointed out, the “Open for Inspection” format enables a wide range of parties to enter a tenant’s home. An inspection, organised in advance and in accordance with the Act, where a prospective buyer or perhaps a couple attend the property, causes some small amount of disruption to a tenant. An “Open for Inspection” opens a tenant’s home to potentially anybody, and causes significant disruption.


Tenants have reported personal effects and money going missing during open house inspections. Tenants have reported break-ins, shortly after an open house inspection has been conducted and a “prospective buyer” has used the open house inspection to “case out” the property. Tenants have reported damage to the property or to personal belongings during open house inspections. In addition to these issues, tenants report encountering difficulty in getting any kind of redress from agents or owners in relation to loss or damage of that kind, despite selling agents’ assurances that “we take everyone’s name at the start of the inspection”.

Tenants with children report feeling extremely uncomfortable at having groups of strangers congregate in children’s bedrooms, or in areas where their children are present. Tenants with children have also voiced concerns about having, for example, two open houses per week; inspections of this frequency and format are highly disruptive to family life, particularly where children are young and require supervision, or where a child has special needs. We note that the open house inspection format which caused difficulty for our client involved an inspection on Wednesday evening after hours, which is usually when the family is preparing for an evening meal, and on Saturday; traditionally a time for the family to relax together and when quiet enjoyment of the home is paramount.

The proposal to amend the Act to require tenants to “agree” to two open house inspections per week would skew access rights in favour of owners and their agents. Where the current statutory framework balances the parties’ rights and obligations, the proposed amendment confers few rights, if any on tenants. It only creates additional obligations for tenants.

It represents not only an amendment to the entry provisions in ss.85 – 91A RTA, by extension it amends the owner/agents obligations to provide the tenant with quiet enjoyment under s67 of the RTA. It would be hard to argue that a tenant is getting quiet enjoyment of the home for which they pay the owner rent, if the owner or their agent is able to enter the property twice per week with a number of complete strangers. To put it in purely commercial terms, the tenant receives a reduction in services for which they receive no commensurate benefit from the owner: the other complaint tenants (including the tenant in the case study) make is that owners and agents tend to be parsimonious when it comes to offering the tenant compensation for the tenant’s loss of quiet enjoyment.

In addition to these objections, the proposal to oblige tenants to “agree” to two open house inspections per week creates additional duties for the tenant. Section 63 of the RTA currently requires tenants to keep their home in a reasonably clean condition. Anecdotally, and in the case study above, tenants report selling agents pressuring tenants to have the property in a perpetual “sale worthy” state. Tenants report being given checklists of things to do (including extensive gardening and professional cleaning) in preparation for open house inspections. Tenants effectively end up doing large amounts of the work associated with preparing the house for sale, which is clearly additional to what is required by s63 of the RTA. Tenants have reported harassment and bullying by agents, where the agent formed the view that the tenant had not adequately prepared their home for an open house inspection. This has particularly been the case where tenants have small children.

In short, any amendment to the Act needs to balance owners’ rights and obligations with those of tenants. The proposal to oblige tenants to hold bi-weekly open house inspections erodes tenants’ rights significantly. The existing law should not be amended in this manner.

We received the following comments from one of our clients about their experience:

“Having opens scheduled without any consultation to me or my partner regarding our particular family’s needs was frustrating. Being told we had no choice made us feel powerless, especially with regards to our children’s’ routine. Forcing a Wednesday evening inspection was the main
problem for the children, with the time set at 6:00pm to 6:30pm, right when our children are having their dinner. Our toddler at the time going through a picky eating stage and just being put into his own bed meant routine was paramount for him and his moods. Any change could see him unsettled, resulting in a domino effect with the rest of us.

Having no control over who was entering our house was also another issue. The children were not old enough to understand what was happening, and after the sales team came through together unexpectedly, they could sense our uneasiness with the situation and were distressed. With regards to the opens, we had to trust that the real estate agent would do the right thing by taking details, keeping track of what was being touched and ensuring nothing was being stolen. We felt the agents would let anybody inside, regardless of whether they were a true potential buyer. We also felt we could not trust the agents to do the right thing by us, as based on the treatment we received from the start it was clear our needs were at the very bottom of their list. It was a hard decision whether to leave the property during the opens (as preferred by the agents), or leave and take the kids out for dinner or to the park etc. There are negatives to both that outweigh the benefits.

The overall feel of the whole situation was that our privacy had been invaded, and our rights we believed we had as tenants were infringed. Signing a lease should ensure as a tenant, provided you follow the rules and laws etc, that you have a right to maintain control of who enters your house and when. With young children especially, landlords should be aware of the massive impact a 4 or 6 week sales campaign can have on their tenants, and should endeavour to mitigate this, and any individual circumstances a family/tenant may have.

I believe that with more and more families forced to rent, it is imperative that there are rights for tenants embedded in the RTA regarding inspections that give them a good starting place to negotiate with the landlord regarding their individual circumstances to ensure they are not treated unfairly throughout the process.”

A fairer option would be to introduce legislation that is used in Queensland that requires the landlord to first gain the tenant’s consent before undertaking open house inspections. This would clarify the situation that currently exists in Victoria, whilst maintaining tenants’ rights to quiet enjoyment:

204 Lessor or lessor’s agent must not conduct open house or on-site auction without tenant’s consent

(1) The lessor or lessor’s agent for premises must not do either of the following without the tenant’s written consent—
(a) conduct an auction, or allow an auction to be conducted, on the premises;
(b) conduct an open house, or allow an open house to be conducted, on the premises.

Maximum penalty—20 penalty units.

(2) In this section—open house means an advertised period during which premises that are for sale or rent may be entered and inspected by prospective buyers or tenants generally.

Photographing a tenants possessions

R24. Amended the Act to expressly prohibit the use of photographs or videos of a tenant’s possessions without the written consent of the tenant affected.
R25. Do not implement option 5.9A VLRC recommendations for entry to take advertising images.

R26. Amend option 5.9B to require the tenant's written consent for entry to take advertising images.

R27. Amend the Act to state that the landlord must not interfere with the reasonable peace, comfort or privacy of the tenant in using the premises.

Photographing and display photographs of tenants' possessions
Neither option 5.9A nor option 5.9B adequately protects tenants' right to quiet enjoyment and privacy within the property. Option 5.9B is a better option however it does not go far enough to protect tenants' privacy.

The fundamental purpose of a tenancy agreement is to grant a tenant exclusive possession of the rented premises. When a landlord signs a lease they agree to this and they are compensated by the payment of rent at a level which they set. Renting should be a legitimate, appropriate and long term housing option for those who choose it. The notion that someone's personal space can be photographed against their will and even without their knowledge is unacceptable and should be clearly legislated against.

Option 5.9A weakens tenants' current rights to quiet enjoyment by introducing a new right of entry, to take advertising images, whilst providing very limited scope for a tenant to object to having their belongings photographed and displayed in an advertising campaign. The VLRC's findings were based on the fact that tenants in Victoria do not have an express right to privacy. This should be considered a failing of current legislation, rather than the basis for making future decisions for law reform.

Case study
The Tenants Union was contacted by a tenant who was renting a property that had recently been put on the market. The tenant came home from work to find that the contents of her lounge room – including the expensive entertainment system, bedroom and kitchen was pasted in large colour pictures on the photo board out the front of 'her home'. The tenant's ex-husband dropped the children off on the weekend and took a very long and detailed look at the photos on the board, as do all people passing on the street and road. The tenant's relative phoned to tell her that she was looking at the tenant's bedroom from her office as it had been emailed to her inbox by an automatic real estate update. The tenant was shocked and upset that she had not been consulted or informed that the inside of her home was going to be used in this manner.

The risks with option 5.9A are significant, as there is no obligation on the landlord to inform the tenant of their intentions to display the insides of their home to the world. Whilst this option requires that the landlord inform the tenant if they require entry to take photographs, it does not require that they inform them if they intend to display the photographs. We know from current practice that estate agents often take and keep photographs throughout a tenancy to use at future times.

Case study
The Tenants Union was contacted by a tenant who had been living in a property for a number of years. At an earlier time the apartment the tenant was renting was sold by the landlord and internal photos of the tenant's possessions were taken. Although the tenant did not give permission at the time, they allowed the agent and photographer in. Two years later the tenant was dismayed to see her home featured in a prominent newspaper which included photographs of her possessions. The tenant was not informed that this was going to happen.
Another problem with option 5.9A is that often the tenant will not have the opportunity to object until after the photographs have been published, as in many cases this is the first instance in which they know about them. At this stage the damage has already been done. This is particularly a risk for people who are affected by family violence and for tenants who need to protect their home and identity for other reasons. This option leaves open the unnecessary risk for theft where valuable possessions have been displayed and the removal of the images may not rectify the problem as they have already been published and seen by the public.

**Case study**

The Tenants Union was contacted by a tenant who had been living in a property for two years. The tenant notified the landlord of his intention to move out at the end of the month. The tenant found photos of his home and possessions advertised on the internet and was very unhappy. The tenant does not know when the photos were taken but assumes it must have been during a general inspection, however he was not informed at any point about displaying photographs.

Option 5.9B again weakens tenants’ protections to quiet enjoyment by creating an additional reason for entry. Whilst this option does require that the landlord obtain ‘reasonable’ consent for the taking of images it remains silent on the need for consent to display images. This option restricts what can be considered reasonable to certain predisposed criteria, holding what is reasonable to higher standard than is fair and necessary. A tenant has a right to quiet enjoyment of the property and has exclusive possession, this should entitle the tenant to decide whether the contents of their home are displayed to the world or not.

**Case study**

The Tenants Union was contacted by a tenant who had recently moved into a new property which the landlord has now decided to sell. When the tenant moved in she asked if there were any plans to sell the property and she was informed that there weren’t. Shortly after moving in she was told that the landlord intended to sell. The tenant was concerned because she was a survivor of family violence and had recently escaped from a threatening stalking situation and her ex-partner does not know where she lives. The tenant was distressed that if any advertising images were used he may be able to find her.

Neither of the options address the issue that there is no requirement for gaining consent or even requiring notification about the displaying of photographs. Other jurisdictions do this better and we strongly support introducing legislation that mirrors Queensland on this issue. Queensland’s rental market continues unabated despite the existence of this provision.

**203 Lessor or lessor’s agent must not use photo or image showing tenant’s possessions in advertisement**

*Unless the lessor or lessor’s agent has the tenant’s written consent, the lessor or agent must not use a photo or other image of the premises in an advertisement if the photo or image shows something belonging to the tenant.*

**Case study**

The Tenants Union was contacted by a tenant who was living in a property that was being sold by the landlord. The tenant was concerned because photographs of her children were being used for advertising purposes on the internet and on a billboard out the front of the house. The tenant had managed to persuade the estate agent to remove the photos of her children from the internet but they remained at the front of the property. This made the tenant incredibly uncomfortable.
Tenants’ right to privacy
Tenants in Victoria have a lesser right to privacy than tenants in all other states and territories in Australia. In Victoria tenants have a duty to not interfere with the reasonable peace, comfort or privacy of any occupier of neighbouring premises; however they themselves do not have a right to peace, comfort and privacy.

In its recent report the Victorian Law Reform Commission observed (inter alia) the following:

“Victorian tenants do not currently enjoy an express right to privacy, although they have an obligation not to interfere with the reasonable peace, comfort and privacy of their neighbours. Rooming house residents, caravan park residents and site tenants have a right to privacy, peace and quiet … With the exception of Victoria, the residential tenancy legislation of every state and territory in Australia incorporates an express right to reasonable peace, comfort and privacy within the statutory right to quiet enjoyment…”

The current quiet enjoyment protections for tenants are woefully inadequate and antiquated. As the VLRC observed, a breach of quiet enjoyment would ordinarily be understood to require a substantial interference with the tenant’s right to possess the property or to enjoy it for all usual purposes. This narrow interpretation means that many unreasonable actions may still be allowed including breaches of privacy.

Legislation in NSW, Tasmania, Queensland, ACT, South Australia, Western Australia, and Northern Territory all provide that the landlord must not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant.

Sub-letting and assignment
R28. Do not implement option 5.10 Landlord consent required for parting with possession for consideration.
R29. Do not implement option 5.11 Fee for consent to parting with possession for consideration.
R30. Do not implement option 5.12A Assignment fee: reasonable expenses.
R31. Do not implement option 5.12B Assignment fee: fixed cap prescribed in regulations.
R32. Amend the Act to clarify that the tenant should only be liable to pay an assignment fee if a written assignment is prepared, and then, only for the cost of the preparation of the written assignment.

Short stays and parting with possession
The Tenants Union is of the opinion that tenants should be able to make their own decisions about who they have stay in their rental property, and that this should not be a concern of the landlord.

The grant of exclusive possession should allow tenants to host guests in their home, whether or not payment or ‘consideration’ is received. The tenant remains liable for any damage to the property during this time, but should be able to make their own choices about how they use the property.

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14 Ibid, p50.
15 Residential Tenancies Acts: NSW section 50, Tasmania section 55, Queensland section 183, ACT section 52, South Australia section 65, WA section 44, NT section 66.
In many instances tenants use short stay platforms such as Airbnb to supplement their rent where they struggle financially. If provisions targeting the use of such platforms is introduced it is likely to result in a higher number of evictions for rent arrears.

The proposed options are incredibly far reaching and will likely have affects over a broad range of tenancy situations where it is not appropriate to enforce tenants to seek consent of the landlord.

If the proposed options were introduced, the following situations are likely to be captured as “parting with possession for consideration”:

> A tenant has a partner who stays over in the property a few nights per week. The partner buys groceries and contributes to the bills.

> A tenant has a friend of a friend housesit for the week whilst they are away. The guest waters the plants and brings in the mail during this time.

> A tenant’s sister is in-between jobs and needs a place to stay for a few weeks; she contributes by walking the dog and picking up the kids from school.

> A tenant has a dinner party and one friend stays over. As a thank you the friend buys a box of chocolates and does the dishes.

> A tenant often has extended family stay with them. The family usually put in some money or buy groceries to contribute to the household.

> A tenant with a child has a regular babysitter who sometimes stays overnight. The babysitter contributes to the household by looking after their child.

> A tenant has joint custody of their child, their child stays overnight a certain number of days per week. They receive a financial contribution for these stays.

Above are just some of the scenarios that would be captured by the options outlined in this section. The unintended consequences of these provisions are that households described above could be evicted for going about their daily business to no risk or detriment of the landlord. Introducing a new notice to vacate for this purpose will significantly decrease security of tenure and create greater instability for renters. There is a risk that landlords would use these notices to evict tenants who they are unhappy with for other reasons, for example because they asked for repairs or asserted their rights in other areas.

**Fees for consent**
The Tenants Union opposes allowing a fee be charged for consent to ‘parting with possession for consideration’. The option claims that the parties would be able to negotiate a fee, when in reality tenants do not have equal bargaining power and will have no ability to influence the outcome of any such ‘negotiation’. There is no justification as to why landlords should be able to claim a fee from the tenant for their consent. This would not benefit tenants.

**Assignment fees**
Both option 5.12A and 5.12B increases the scope of what the landlord can charge for undertaking an assignment. The current legislation prohibits the charging of a fee for granting consent to an assignment it also provides:

*This section does not prevent a landlord from requiring the tenant to bear any fees, costs or charges incurred by the landlord in connection with the preparation of a written assignment of a tenancy agreement.*

Option 5.12A would alter the existing legislation by opening up the tenant’s liability to ‘any reasonable expense’ rather the costs associated with the preparation of a written assignment. The existing issue with assignment fees is that estate agents routinely charge excessive fees for the act of assignment. This option would not address this issue and may in fact open the door to even higher excessive fees.
Option 5.12B introduces a fee where one does not currently exist. Whilst the tenant currently must pay any costs incurred by the landlord, there is no set fee that can be charged. This option appears to introduce a standard fee which would likely not be linked to any incurred costs, in place of a reclamation of costs that currently stands.

Whilst the issue of excessive fees being charged is something that needs to be addressed it is thought that the proposed options would enable landlords to charge greater excessive fees than currently is possible under the legislation.
Rights and responsibilities at the end of a tenancy

Lease break fees

R33. Implement option 6.1 Codify common law compensation principles for lease break fees, with some amendments.

R34. Do not implement option 6.2 Fixed lease break fees as an optional clause in prescribed tenancy agreement.

The Tenants Union supports codifying common law compensation principles; however the description of what this looks like has not been entirely accurate. The option states that the landlord would be required to mitigate their loss by placing the premises back on the rental market promptly at the same rent, however there are certain situations where the rent may actually need to be reduced. For example if the rent was originally above market rent or excessive.

Lease breaking fees exist to cover any loss suffered by the landlord but should not excessive. A tenant’s decision to uproot their life and move out of a property is never a trivial one. Tenants will only make the decision to break a lease if their circumstances determine that it is entirely necessary. Lease break fees should therefor stand to cover any costs incurred by the landlord, but should not act as a punitive measure. This punishes the tenant for circumstances that are most likely outside of their control and will not act as a disincentive (if the tenant has to move they have to move) but will merely leave them out of pocket.

Option 6.2 offers fees that are excessive and punitive. The option would greatly increase the amount that tenants to break their lease, but will not result in fewer break leases (if the tenant has to move they have to move). The option does not require the landlord to mitigate their loss - the break fee is payable even though the landlord might rent the premises out again immediately and incur little to no actual loss. This is not a fair option as landlords are able to profit from the tenant’s situation.

Longer fixed-term tenancies

Introducing higher lease break fees for long fixed-term agreements is likely to discourage tenants from entering into these types of agreements.

Severe hardship

R35. Implement option 6.3 VCAT can take a tenant or landlord’s severe hardship into account when awarding compensation after a lease is broken.

R36. Implement option 6.4 In cases of recognised severe hardship, compensation to landlord capped at two weeks’ rent.

Severe hardship

The Tenants Union strongly supports option 6.3 which would amend section 234 of the RTA to give it greater coverage. We frequently see tenants who should have been able to access the protections of this existing provision, but have either received bad advice from their agent or have sought advice too late, after they have moved out of the
property and returned the keys. This option would allow the provision to work as it is intended which is to provide protection from lease breaking fees for those who are experiencing severe hardship due to a change in their circumstances.

There are minimal risks with this option because VCAT will still be required to consider the hardship of both the landlord and the tenant and to make their decision based on these considerations.

**Compensation where there is severe hardship**
The Tenants Union supports option 6.4, however where there is demonstrated severe hardship it would be more appropriate that VCAT waived compensation altogether.

**Lease breaking in special circumstances**
R37. Implement option 6.5 Tenants in special circumstances not required to pay lease break fees.

The Tenants Union support option 6.5, this would protect vulnerable tenants and bring Victorian legislation in-line with New South Wales.

**Goods left behind**
R38. Implement option 6.6A Stored goods procedure based on NSW model.
R39. Implement option 6.7 Update notification requirements for stored goods.

The Tenants Union supports option 6.6A as the most appropriate option that would best balance the interests of landlords and tenants.

Under new notification requirements landlords should be required to notify the former tenant about their goods through all known points of contact including phone, email and next of kin. This is reasonable given the detriment that can be caused by the loss of personal items and goods of monetary value.
Bonds and rent

Maximum bond amounts and rent in advance

R40. Implement option 7.1C Remove all exemptions but the VCAT exemption.

The Tenants Union is in favour of updating the provision that outlines the maximum amount of bond that can be charged. The maximum bond amount is an important issue, if a bond is too high it can be a barrier to being able to secure a tenancy.

Bonds are capped at one month’s rent; unless the rent payable per week exceeds $350, as stated in section 31(3). This was originally designed to be set at three times the median rent, however it now sits below the Victoria’s median rent which was $370 in December 2016. Adjusting the amount will merely defer this problem. It is our recommendation that it would be best to remove the exemption all together.

Bond increases

Sometimes a landlord seeks to top up bonds for long term tenants as their rent increases over time. The current legislation states that an additional bond is able to be claimed if the rent for the premises is greater than $350 per week. Given that the median weekly rent in Victoria is currently at $370 this subsection of the Act is out of date and needs to be modernised.

Pathways already exist for landlords to recover any costs that exceed the bond amount. It is not reasonable to burden the tenant with additional expenses throughout their tenancy. It is our recommendation that the exemption be removed altogether.

Bond claims

R41. Implement option 7.3C Automatic bond repayment for tenants when a claim is not disputed and evidence based claims for landlords.

Under the s417(2) of the RTA an application for the tenant’s bond must be made within 10 business days after the tenant delivers up vacant possession of the property. This however frequently does not occur, with landlords lodging claims well over the 10 business day period, as it is understood that there will be no practical consequence of a late application.

It is recognised that VCAT is required to act with minimal formality and has the power to dispense with procedural requirements, including time limitations. This however is aimed at achieving fairer outcomes, whereas delaying bond claims can greatly disadvantage tenants who often rely on the refund of their bond to pay their bond at their next property.

There needs to be adequate protections in place to ensure that tenants’ bonds are able to be fairly returned to the tenant where appropriate. It should not be the tenant’s responsibility to apply to have their bond returned; it is the tenant’s money after all.

56 DHHS Rental Report
The Tenants Union is not in favour of incorporating provisions used in jurisdictions such as New South Wales. In NSW if the landlord makes a claim on the bond it is the tenant's responsibility to lodge an application to the Tribunal in order to dispute the claim. This process unfairly burdens the tenant with the responsibility of defending their bond, rather than requiring the landlord to substantiate their own claim.

As we know the current VCAT process does not work for tenants, tenants do not use this avenue. Of the 59,184 applications to the Residential Tenancies List in 2015/16 less than 7 per cent were lodged by tenants.17

Introducing a process that requires tenants to utilise a system that currently does not work, will unfairly disadvantage tenants, and will result in an outcome where it is more likely that the landlord will receive some, or all, of the tenants' bond.

This is currently the case in New South Wales where 47 per cent of tenants lose some or all of their bonds to landlords' claims.18 In contrast in Victoria only 37 per cent of tenants lose some, or all, of their bond.19

Another issue with the NSW model is that the tenant's ability to challenge a claim for their bond relies on their knowledge that a claim has been made. Currently it is common practice for landlords to post applications for bond to the vacated property, even in situations where an agent or landlord has been in recent telephone or face-to-face contact with the outgoing tenant.

We advocate that the bond should be automatically refunded to the tenant after 10 business days if the landlord has not made a claim during this time. If the landlord does make a claim, they should go through the VCAT process to ensure their claims are legitimate.

We recognise that there is currently a problem with the timeframe in which tenants' bonds are refunded. We recommend that any changes keep in mind that this 10 day period needs to be properly enforced through additional regulation.

Rent increases

R42. Implement option 7.4 Annual rent increases and also amend the RTA to require that if a landlord intends to increase the rent at a level greater than the consumer price index, they must provide evidence as to why it is not excessive.

R43. Implement option 7.5 Disclosure of rent settings in fixed term leases.

Current provisions for rent increase are failing to protect tenants from unfair and excessive rent increases. Rents continue to increase far beyond CPI and wage growth, leaving tenants struggling to maintain their tenancies (see figure 1). The Tenants Union recommends strengthening protections against excessive rent increases by reversing the onus of proof where rent increases are higher than the CPI over the relevant period. Through these measures a landlord would be required to provide evidence that the increase were not excessive. This would be a fairer and more useful measure than is currently provided in the RTA.

Rent regulation

The *Heading for Home* paper is dismissive of the topic of rent regulation, despite the rapidly increasing unaffordability in the rental market. The paper incorrectly claims that rent regulations exist only in markets that are ‘fundamentally different to Victoria’; when in reality rent regulation in different forms exists in a significant number of jurisdictions, many of which are similar to the Victorian rental market. Similarly *Heading for Home* puts forward unsubstantiated claims for the impacts that rent regulation has on rental stock quality and supply.

Below is an inexhaustive list of countries that have some form of rental regulation:

- Austria
- Belgium
- Canada
- Czech Republic
- Denmark
- France
- Germany
- Ireland
- Luxemburg
- Netherlands
- Norway
- Scotland
- Sweden
- Switzerland
- USA

Victoria itself already has a system of rent regulation. It just doesn’t work very effectively and we have previously made recommendations about how it could be improved.
Affordability, particularly the lack of affordability, is the biggest issue in the private rental market. This is largely the reason that there are so many evictions for rent arrears. In Victoria rents are higher than ever before and this continues to be a problem that cuts across low and moderate income earners. A higher proportion of the population are now falling into rental stress with 76% of all low income private renters paying over 30% of their incomes in rent. For low income tenants in particular, private rental housing can be incredibly difficult to access and maintain. It is hard to find housing that is suitable in terms of location, size and condition. Low income tenants are continually pushed to areas of low amenity such as the urban fringe where there is minimal access to jobs and infrastructure. Low income households often find themselves in substandard properties as this can be the only properties that they can access and are able to afford. Table 1 below highlights the impact of median rents on low income tenants, with the disparity between income and average rents so high that most households would need to pay the majority of their income to rent an average dwelling.

Table 1 TUV December 2015 Affordability Bulletin

This strain has also been highlighted in a TUV report[20], which provided a snapshot of the rental market by looking at all the available properties advertised on a particular day. The study found that there were very few options for households on low incomes. In fact for singles on Newstart or Austudy, there were zero properties that were both appropriate and affordable in the whole of metropolitan Melbourne; a single aged pensioner had slightly more luck with two suitable properties, whilst a single parent household could afford only one property.

Rents and rent increases are an important contributor to the level of security experienced by tenants. Considerations pertaining to the capacity for tenants to afford rent payments, both at the outset and into the future, represent a de facto issue of security of tenure.[21] Whilst some households value flexibility and choice rather than security, skyrocketing house prices and an inadequate supply of social housing has meant the private rental market in Victoria is housing an increasing number of households who have little choice but to rent in this sector. There are clear issues of rental affordability, particularly for low income households as already high, market-derived rents continue to escalate and rent assistance remains insufficient to ameliorate the deteriorating sense of financial insecurity. It is for these reasons, in addition to the fact that moving costs can act as a barrier to tenants being able to change their situation, that some form of rent regulation should be imposed as a

means to constrain rapidly rising rents in Victoria and curtail the current monopoly power of landlords to increase rents.

Rent payment fees and methods

R44. Implement option 7.6 One fee-free method of paying rent.

R45. Implement option 7.7 Landlords must accept Centrepay payments.

The Tenants Union supports options 7.6 and 7.7.

Rental bidding

R46. Implement option 7.8B Rental properties must be advertised at a fixed price and landlords cannot request or accept rental bids.

Rental bidding occurs when an offer is either made or invited for a rental property that is higher than the advertised rent.

Up until recently, this practice has been limited to particular market segments (higher amenity premises) and market cycles (low vacancy rates) but we are now seeing the process occurring in some market segments irrespective of the general vacancy rate. This is a further indication of supply and demand pressures. However, landlords should not be able to unreasonably profit from poor market conditions even if this is limited to certain market segments.

In addition, the practices involved are characterised by a lack of transparency about the identity of the alternative bidder and the quantum of any alternative bids.

The tenant may have some protection under the misleading and deceptive conduct provisions of the ACL but it is completely unclear whether VCAT or any other body would have the power to retrospectively adjust the contract price even if the tenant was able to overcome all the hurdles involved in establishing the unlawfulness of the conduct.

It is tempting to believe that this problem can be addressed by simply introducing rules governing the bidding process as currently exist for other forms of auctions. However, as is evident from the public discourse around auctions for residential sale, to deal with a great diversity of situations that may be encountered, such rules are invariably complex and are difficult to enforce.
Property conditions

Condition reporting

R47. Amend the Act to allow the tenant five business days to return the condition report.

Contents of the condition report
The Tenants Union supports the expansion of information contained in the condition report. There is a recognised information asymmetry that restricts tenants’ choice and results in a greater number of disputes and lease breaks. The usefulness of information is however inextricably linked to the time at which it is provided. If the tenant has already signed the tenancy agreement, payed their rent and bond, and potentially moved in to the property then it is unlikely to be of benefit.

Timeframe for returning the condition report
The Tenants Union supports extending the period of time in which tenants have to return the condition report at the start of a tenancy. This would bring Victoria’s legislation to a similar level of NSW where a tenant has seven days to return the condition report.

Condition report at the end of a tenancy
The Tenants Union has some reservation with the timeframes outlined for completing an end of tenancy condition report. Requiring an end of tenancy condition report to be completed may create difficulties for both landlords and tenants. For tenants, moving out of a property can be a stressful and complicated time. Tenants may be moving due to financial crises, hospitalisation, family emergency, job changes, or to move interstate or internationally. It will not always be possible to return to the property to complete a condition report, and we would hope that this constraint would not weaken their case for having their bond refunded. It is not clear in the option put forward whether the tenant would have an opportunity to complete a condition report in the first instance, before they exit the property. We would propose that this would be beneficial, however reiterate that there are many circumstances in which a tenant may not be able to complete a report at the time of exit and should not be penalised for this.

From the point of view of the landlord, requiring that a property be left empty for a period of up to five days may be an unreasonable financial burden.

Condition report during a tenancy
The Tenants Union does not support requiring a condition report to be completed at every periodic inspection. This would be a great invasion of the tenants’ privacy and quiet enjoyment as the landlord or agent would be required to thoroughly inspect and photograph the tenants’ home every six months. It is not clear what identified problem this option is intending to address nor, by extension, whether the option is worse than the problem itself.

Condition of vacant property at the start and end of a tenancy

R48. Amend option 8.7 Composite repair and cleanliness duties and consideration of additional criteria.

R49. Do not implement option 8.8 Cleanliness and good repair clarified through guidelines.
R50. Implement option 8.10 Opportunity to repair or clean premises after vacating.

Option 8.7 – Composite repair and cleanliness duties
This option refers to the Supreme Court decision set out in *Shields v Deliopoulos* as a basis for a standard that a rental property is required to be provided in. The *Heading for Home* paper draws upon a certain interpretation of the decision, claiming that the landlord would be required to provide the property in a reasonably clean condition and in good repair, so as to be reasonably fit for occupation, having regard to the age and character of the property.

It is our opinion that this reading is not entirely accurate as it refers to the decision in *Shields* partially out of context and does not include other parts of the landlord’s obligation to ensure a premises maintained in good repair which was outlined in *Shields*.

For example, in the decision at 38, Daly AsJ states:

“I also agree that the term ‘good repair’ means ‘tenantable repair’, or ‘reasonably fit and suitable for occupation’[1] and that while what amounts to ‘good repair’ may be referable to the age and character of the relevant premises,[2] it cannot ordinarily be qualified by the state of repair at the commencement of the tenancy, regardless of the state of repair. Again, the obligation to maintain rental premises in good repair imports an obligation to put them in good repair in the first place.”

The reference to *Shields* does not include some of the obligations imposed by the judgement – for example that the property be reasonably fit and suitable for occupation, and making clear that “the obligation to maintain rental premises in good repair imports an obligation to put them in good repair in the first place.”

There is a risk that the reference to “age and character of the property” be interpreted incorrectly in a way that would caveat or limit the landlord’s obligation to ensure the premises is in good repair.

The Tenants Union would be supportive of this option if it provided a correct interpretation of the *Shields* decision, which is:

**The landlord is required to provide the property in a reasonably clean condition and in good repair, so as to be reasonably fit and suitable for occupation.**

The standard should also make clear that the landlord must ensure the premises is maintained in good repair (which is the current obligation under section 68). This would ensure it is clear that the obligation is ongoing. This would codify the obligation on the landlord to ensure the property is in good repair, even if the tenant knew about the repairs at the beginning of the lease, whilst maintaining their obligation to provide the property so that it is reasonably fit for habitation.

Option 8.8 – Guidelines for cleanliness and good repair
The Tenants Union does not support option 8.8 as it would give too much power to CAV to control and interpret what is accepted as good repair, rather than allowing VCAT to interpret the legislation on the facts of each matter.

While it has been noted that the guidelines would not be intended to be an exclusive list, it is very likely VCAT would interpret it as such. The result would be that if there were repair items not listed in the guidelines the tenant may struggle to convince VCAT that they should still be considered.

It would be more appropriate for VCAT, or another dispute resolution body, to interpret the law, as the relevant judicial body.
Locks and security devices

R51. Implement option 8.11 Single action deadlocks on external doors.

R52. Implement option 8.12 Duty to provide reasonable security measures.

The Tenants Union supports both options 8.11 and 8.12. These options would ensure that tenants were able to adequately secure their premises and access insurance policies requiring locks on all external entry points.

Health, safety and amenity standards at point of lease

R53. Amend and implement option 8.13D Minimum health, safety, amenity standards for vacant premises with additional detail.

R54. Implement option 8.14A Staggered implementation.

R55. Implement option 8.15B Complete prohibition on letting non-compliant properties.

Options for minimum standards

Mandatory minimum standards for rented properties are vital for ensuring that renters have access to a level of housing quality that is consistent with community expectations. Renter households are more likely to be living in properties that are of a poorer standard than owner-occupier households. Minimum standards provide a simple and effective mechanism for guaranteeing the provision of safe, healthy and efficient housing for renters in Victoria and will bridge the existing gaps in the regulation of dwelling standards for rented housing.

Mandating minimum standards becomes particularly important for low-income renter households. The market currently relies on the capacity of consumer choice within rental housing, where renters are allegedly able to refuse substandard properties. Yet the lack of affordable housing and high level of competition for lower cost properties limits the housing choices of low income renters. Additionally the high level of competition in this segment of the market provides little incentive for landlords to voluntarily meet certain standards by investing in improving the quality and efficiency of these rental properties. This has a disproportionate effect on the most vulnerable and disadvantaged; with young people, people with disabilities and ill health, those with low incomes and without employment, and Indigenous people being overrepresented in poorer quality housing.

Minimum standards are about ensuring the liveability of rental housing. They are about providing safeguards so that rental housing is healthy and habitable. Option 8.13D provides the most suitable platform to develop standards for general tenancies. Option 8.13B Adapts minimum standards for rooming houses provides a good basis for standards within a rental property however there remains significant gaps with relation to the safety of the dwelling structure itself. This is because rooming house operators are governed by a number of different pieces of legislation, and standards for building safety are outlined in the Building Act 1993. Option 8.13D is preferred because it outlines basic standards to improve the health, safety and energy efficiency of the property as a whole. The Tenants Union supports the outlined standards and includes that a property should also:

- Be vermin proof (no structural ability for infestation),
- Have adequate waste provisions,
- Not be a fire hazard, and

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22 Ibid, p224.
23 Ibid, p225.
Have an approved gas (if available and connected) and electricity connection.
The Tenants Union notes that none of the features listed go beyond basic standards.

To address clarity of development and implementation of the standards we suggest that the RTA review process should create a power in the RTA requiring compliance with the standards that would be developed at a later time an outlined in the regulations.

The Tenants Union was contacted by a tenant who was a young single mother with a baby who had struggled to find a rental property. She applied for 23 properties before being accepted to one. At this point she was desperate and accepted a six month lease as the property was to be demolished at the end of this period.

The tenant discovered that the house had asbestos in the walls and was particularly concerned as the walls were full of cracks and holes. During the first week in the property a wall caved-in in the second bedroom. The tenant was forced to block off this room as the estate agent and landlord refused to undertake any works on the property.

The kitchen floor had been covered by a loose sheet of carpet, when the tenant rolled it back for hygiene reasons she found that the floorboards beneath were covered with mould.

The tenant also had problems with hot water faults in the kitchen. She was advised after inspection from a plumber that the pipes needed to be replaced in the property. She was warned not to drink the water without boiling it as it was unsafe. The landlord refused to undertake these works.

In addition to this the property had windows that were jammed open and a toilet that leaked. Sarah was worried about the health of herself and her baby but felt she had few options because she had found it so difficult to be accepted to a property.

**Capacity of Victoria’s rental properties**

Most rental properties will already meet all or most of the standards we have set out below. It is poorer quality often lower cost housing which is more likely to be substandard. It is also the segment housing the most marginal and disadvantaged tenants which this legislation is ultimately protecting. Collectively, these tenants are not in a position to exercise market choice and are forced to live in housing of lower quality construction and design, with its associated health, safety and financial implications.

A secret shopper survey of rental properties at the lower end of the market conducted in 2010 by the Victorian Council of Social Services (VCOSS) for the ‘Decent not Dodgy’ campaign, found that 41 per cent of the rental properties surveyed either met VCOSS’s proposed minimum standards or required a minor change and 12 per cent of properties required two changes. Meanwhile 21 per cent and 26 per cent of surveyed rental properties would require three and four (or more) upgrades or repairs, respectively. The survey did find that 12 per cent of the surveyed rental properties could be considered uninhabitable, with multiple significant problems that had implications for the health and safety of the tenants living in them.

**Claims against minimum standards**

Opposition to the regulation of property standards is typically based on unsubstantiated claims that any such modification will drive away investors and initiate the sector’s decline. However, available research tends to suggest that tenancy law reforms are of marginal importance to what ultimately motivates individuals and
households to invest in residential property, and to continue investing over a long period of time.24

Another popular claim is that introducing mandated minimum standards would see rents increase. Again, however, there has been minimal impact globally. There is little evidence from other jurisdictions who have adopted similar measures – in the UK, Canada and New Zealand, for instance – to corroborate such arguments. In Alberta, Canada, for example, minimum standards have been in operating since 2000;25 however, there is no evidence that their introduction had any significant impact on the supply of rental housing, nor on rents.

Minimum standards are about legislating for the bare essentials. Nothing in what is proposed is about luxury, or goes beyond basic health, safety and efficiency measures.

Current tax arrangements provide incentives to landlords who report a loss through their property investment. It is assumed that most landlords who own properties requiring improvement will be able to cover their losses through these measures. This would mean that rents need not be affected by any cost to the landlord. This should mitigate effects on rent levels overall and in particular instances.

Duties relating to good repair or reasonable cleanliness vs minimum standards
Section 65 of the RTA requires that the landlord provide the rented premises in a reasonably clean condition:

65(1) A landlord must ensure that on the day that it is agreed that the tenant is to enter into occupation, the rented premises are vacant and in a reasonably clean condition.

Whilst section 68 of the RTA requires that the landlord maintains the property in good repair:

68(1) A landlord must ensure that the rented premises are maintained in good repair.

These provisions are important for ensuring that the rental property is properly cleaned and maintained, they however do not provide for a minimum standard that the property must meet. These mechanisms attempt to address different issues that arise in rental housing and are equally important. Minimum standards outline what must be provided in the property, whilst repairs detail how these elements should be maintained.

Guidelines of repair vs minimum standards
The Tenants Union does not support the introduction of guidelines as detailed in option 8.8. Additionally guidelines for good repair would not have regard to important health and safety considerations such as whether a property is structurally sound and weather proof, has adequate ventilation, or even whether there are useable facilities such as cooktops, a toilet, and hot water. Guidelines of good repair would, for example, only apply if a property had a hot water service and the hot water service was not properly functioning; guidelines would not apply if the property simply had no hot water service at all.

The absence of minimum standards is a legitimate gap in tenancy legislation; these issues are not covered in pre-existing provisions.

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25 The Minimum Housing and Health Standards form part of Alberta’s Public Health Act 2000.
Energy and water efficiency

Energy and water efficiency standards are important because they influence the ongoing affordability of housing for low-income households. There is clear evidence that Victoria needs to prepare its housing for the future: a future that will increasingly be dictated by climate change and the heat waves and other extreme weather events that are likely to ensue. Low-income renters are especially vulnerable to these changes, particularly the elderly and those suffering from chronic health conditions, because they live in poorer quality housing and have less capacity to climate-proof their homes.26

A good example is insulation. Numerous surveys demonstrate the difference in thermal efficiency between owner-occupied dwellings and dwellings that are rented. In 2015, the Victorian Utility Consumption Households Survey found renter households, private and public, were far less likely to live in a dwelling with at least some form of insulation, than owner-occupiers: 58 per cent, 55 per cent and 95 per cent, respectively. Such a stark differential, however, does not necessarily take into account the extent of inadequate or ineffective insulation. The Victorian Energy and Water Taskforce in 2008 found that the proportion of renter households with inadequate insulation was much greater than the households with no insulation.27

Tenants in low cost housing have little control over their housing situations and are more likely to suffer most from higher energy and water prices. Research for the Brotherhood of St Laurence in 2015 found 38 per cent of private renters were unable to heat their home, while 43 per cent were unable to pay their energy bill on time.28 Importantly, these tenants typically reside in poor quality housing and remain heavily reliant on inefficient heating and cooling devices. Introducing minimum standards for rented premises provides a cost effective mechanism to drive the uptake of basic energy and water efficiency measures in these rented properties.29

Transition period

The development and implementation of minimum standards is best done with an adequate lead-in time to ensure that appropriate standards and mechanisms are put in place with minimal disturbance to tenancies, whilst allowing adequate time for landlords to undertake improvements where required. It is noted that when Tasmania recently legislated minimum standards they undertook a staggered implementation process where certain standards were required effective immediately and other more onerous standards were given a lead-in time of two years. This is thought to be an appropriate implementation strategy.

It is important that once the transition period is complete the minimum standards apply to all residential tenancy properties. There should be no opportunity for exemptions, as this would create unfairness, and would expressly defeat the purpose of a minimum standard.

Letting conditions

The Tenants Union supports option 8.15B Complete prohibition on letting non-compliant properties as this creates the greatest incentive for compliance. It is thought that if there is no penalty for letting a property that does not meet the minimum standards, then landlords will be more likely to do so. Providing a complete prohibition provides greater opportunity for a regulator to intervene and enforce compliance. Including a financial penalty with an avenue for compensation to the tenant would

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27 Department of Sustainability and Environment 2009, Housing condition / energy performance of rental properties in Victoria, July 2009, p.34
28 Azpitarte, F., Johnson, V. and Sullivan, D. 2015, Fuel poverty, household income and energy spending, Brotherhood of St Laurence, p.viii
provide the greatest likelihood for compliance. In instances where a tenant was residing in the property there would need to be avenues to remedy the non-compliance whilst the tenancy continued, to ensure that tenants wishing to remain in the property were provided this opportunity.

Additional remedies
The Tenants Union supports the additional remedies included in option 8.37 and would welcome their application to breaches of the minimum standards. These include prohibiting the landlord from charging market rent, ordering a freeze on any rental increases, and a prohibition on reletting a non-compliant property, as well as protections against eviction. These remedies are vital to ensuring that there are adequate incentives for landlords to comply with the standards. Including these remedies will not encourage tenants to take possession of properties that are in poor condition. Properties in poor condition are already let out now, and landlords rarely have a problem finding a willing tenant even in situations where a property is significantly substandard. Competition in the rental market, particularly at the lower end, is fierce and low income tenants are often forced to live in properties that are unsafe because there is simply nothing else that is affordable or available. These remedies would enable tenants living in substandard properties to be appropriately compensated and protected, whilst ensuring the landlord is compelled to bring their property up to standard.

Compliance and enforcement
Enforcement costs can be minimised by providing processes for both regulator and consumer enforcement. Regulator enforcement is vital to protect the interests of vulnerable and disadvantaged tenants. Additionally there should be a consumer enforcement mechanism to allow tenants’ to raise breaches to the standards themselves.

Compliance with the minimum standards should become a condition of the lease agreement. In this way it would be triggered at the beginning of a new tenancy agreement or when a lease renewal is signed. This is similar to the approach to the energy efficiency standards in England and Wales, as well as the minimum insulation standards which recently came into force in New Zealand.

In England and Wales, recently passed regulations will implement minimum standards in energy efficiency, which will make it unlawful, from 1 April 2018, for landlords to grant a new lease or renew a lease for properties that have an energy performance certificate (EPC) below a certain level; however, these measures are also triggered by a periodic tenancy arising from the end of a fixed term agreement. Similarly, in New Zealand, from 1 July 2016, all new tenancy agreements will need to include a statement of the extent and condition of insulation in the property, and any replacement or installation of insulation must meet the require standard.

The onus for compliance with the standards would be placed on the landlord and enforced by CAV and VCAT. Similar to the repairs process TUV has outlined in our responses to previous issues papers, a renter could apply to the CAV Director to investigate whether the dwelling meets the standards and produce a binding report. Alternatively, the CAV Director could choose to investigate of its own volition.

This investigative power is similar to that used in the rooming house minimum standards, as well as in the UK, and Alberta, Canada where local authorities are given powers to investigate and enforce compliance with these measures. In Alberta, the Residential Tenancies Act specifies that a rented dwelling must meet the mandated

30 The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015
31 Greater detail can be found via the New Zealand Ministry of Business, Innovations an Employment’s website on tenancy related matters, https://tenancy.govt.nz/maintenance-and-inspections/insulation/
32 The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015
33 The Minimum Housing and Health Standards form part of Alberta’s Public Health Act 2000.
minimum standards Minimum Housing and Health Standards under Alberta’s Public Health Act. Tenants can make a complaint to the health authority to investigate and request the landlord make the necessary modifications to meet the standards. The authority also has the power to take the landlord to court; if the landlord does not comply with a court order, he or she is liable to a daily fine until compliance is met.³⁴

**Penalties for non-compliance**
Penalties need to be sufficient so that they act as a deterrent for non-compliance.

An example of where this has been done well, is the minimum energy efficiency standards in England and Wales, where the following penalties for non-compliance have been legislated:³⁵

> Providing false or misleading information to the PRS Exemptions Register - £1,000 & Publication of non-compliance
> Failure to comply with a compliance notice from a local authority - £2,000 & Publication of non-compliance
> Renting out a non-compliant property - Less than 3 months non-compliance £2,000 fixed penalty & Publication of non-compliance, 3 months or more of non-compliance: £4,000 fixed penalty & Publication of non-compliance.

These penalties are fixed and do not vary according to the severity of the non-compliance.

**Condition of premises during a residential tenancy**

R56. Do not implement option 8.16 Rental agreement to clarify responsibility for particular maintenance.

R57. Do not implement option 8.17 Maintenance guidelines to which VCAT must have regard.

R58. Implement option 8.18 Specific provision for safety related maintenance.

The Tenants Union does not support option 8.16 the introduction of a maintenance schedule in a tenancy agreement. The option proposes that compliance with the schedule could be enforced through the breach of duty process. Currently non-compliance with tenancy agreement terms cannot be enforced through this avenue and the Tenants Union does not support its introduction due to the tenant’s inability to bargain for a fair agreement.

This option also seems to conflate keeping a property clean with maintenance of a property. It is the landlord’s duty to maintain the property, whilst it is the tenant’s duty to keep the property clean. Combining these two separate duties is likely to confuse as responsibility for the duties lie with both parties. Whilst the Tenants Union agrees that the list outlined for the landlord’s duty to maintain the property is accurate, the list put forward for the tenant is overly burdensome and impinges on their right to quiet enjoyment of the property. It is agreed that the tenant must return the property to the landlord in a reasonably clean condition, however strictly outlining how a tenant must keep their home during a tenancy is unreasonable.

Statistics show that more Victorians are going to be renting for their entire lives, it is unfair to enforce an arbitrary standard on these 1.2 million Victorian’s homes. They, like any other Victorian, should be able to make choices about how they keep their home, as long as they are not damaging the property. This type of legislative reform is not conducive to long term leasing and does not support the interests of either party.

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³⁴ Ibid.
Introducing these types of overly burdensome requirements for tenants also leaves tenants more vulnerable to eviction. It gives a broader set of tools to landlords to evict tenants who they are unhappy with who may be seen as ‘trouble’ for asserting their rights in other areas, but who should be protected by law to remain in the property. This type of introduction could see a landlord evict a tenant because they did not periodically clean their window tracks, dust their heating vents or wash scuff marks off the walls. It should be of no concern of the landlord if the tenant is happy with their home looking a certain way, as long as they were not damaging the property.

Similarly the Tenants Union does not support option 8.17 as it would have the same effect as option 8.16.

The Tenants Union support introducing a provision for safety related maintenance (option 8.18).

**Maintenance in rooming houses**

The *Heading for Home* paper puts forward that rooming house residents are responsible for cleaning in the rooming house common areas. In fact rooming house operators are bound by the *Public Health and Wellbeing Act 2008* and the *Public Health and Wellbeing Regulations 2009*. Rooming house accommodation is classed as ‘prescribed accommodation’ and under section 18 of the regulations it outlines the operators’ requirements:

**18 Maintenance of prescribed accommodation**

A proprietor of prescribed accommodation must maintain the prescribed accommodation and all bedrooms, toilets, bathrooms, laundries, kitchens, living rooms and any common areas provided with the accommodation—

(a) in good working order; and
(b) in a clean, sanitary and hygienic condition; and
(c) in a good state of repair.

There is a widespread non-compliance with these obligations which is frequently witnessed by the Tenants Union’s Outreach Program. Residents routinely suffer living in appalling conditions due to inconsistent monitoring and compliance of these provisions.

**Maintenance obligations and longer term leases**

The Tenants Union does not support the provision of tenancy agreements that place additional obligation on the tenant. Tenants should not be required to undertake additional maintenance tasks unless their rent was significantly reduced to reflect the increased financial burden that would be required of the tenant. Tenants have significantly weaker bargaining power and are unable to negotiate for fair terms of an agreement. Any type of longer term lease would need to be strictly regulated to ensure that tenants were getting a fair deal.

**Modifications**

**R59.** Implement option 8.20A Landlord may not unreasonably refuse consent to certain modifications.

**R60.** Implement option 8.20B No requirement to approve certain modifications.

**R61.** Implement option 8.21 Liability for removing fixtures and/or restoring the property.

The shift in in the market towards long term renting, where families and the elderly increasingly remain in rental properties for longer periods, indicates the need for relevant and appropriate legislation allowing tenants to make a home. If we want long term, secure tenancies then legislation is going to have to allow tenants freedom to make reasonable changes in order to be comfortable in their own homes. There are
adequate protections in place for the landlord to claim any loss or damage through the bond or compensation claims for costs that go above the bond.

Although tenants have exclusive possession of the rental property, section 64 prohibits tenants from treating the property like their home. Under the Act there are no incentives for landlords to agree to reasonable modifications. The Equal Opportunities Act provides some protection to people with disabilities; however these protections are not adequate.

The ability of people with disabilities to install fixtures is an issue of great importance particularly with the rollout of the National Disability Insurance Scheme. Access to housing that is physically appropriate is a large barrier for tenants with disabilities who live in or wish to access the private rental market. Many landlords are reluctant to allow disability fixtures to be added to their properties, despite provisions under the Equal Opportunity Act. People with disabilities are one group who are more likely to experience discrimination at the letting stage of renting, and are unlikely to have enough bargaining power to demand agreement to fixtures at this stage of the process. Many people with disabilities have low incomes due the barriers to employment and so already struggle to gain access to the private rental market.

Installing disability fixtures can be costly and when there is little certainty that the tenancy will last beyond the first fixed-term, making the decision to outlay the costs to install items can be a difficult one.

The Act provides further barriers through the provision that the property must be restored to its original condition prior to moving in. This does not take into account that the fixtures may add value to the property and the landlord may wish to keep them installed or the significant burden this can place on tenants with disabilities.

**Liability for access to services**

R62. Implement option 8.22 Update landlord’s liability in line with modern installation and supply practices.

The Tenants Union supports updating the Act to provide that the landlord is responsible for installation of essential services, including telephone, internet and television connections. These changes would better reflect the modern world and would reflect legislation in other jurisdictions, for example the ACT s42(1):

*The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).*

Landlords should be liable for fees and charges relating to the pump-out of septic tanks. This is the equivalent of the sewerage changes that landlords pay when their property is connected to mains water and sewerage channels and so similar provisions should apply in these instances. If the tenant is made liable for these costs it will create two classes of tenancies between urban and rural properties. It also would create complications for tenants living in properties with septic tanks, particularly if they have been living in the property for a short timeframe. It seems unfair that a tenant who may have only resided in a property for a few months should pay for a septic tank pump.

**Reporting and addressing damage**

R63. Do not implement option 8.24 Tenant must notify landlord of, and compensate for, damage.

R64. Implement option 8.27 Consideration of depreciation in claims for compensation.
The Tenants Union does not support option 8.24. It is thought that this option, if implemented, would result in greater confusion and may encourage landlords to attempt to claim costs for damage where the tenant should not be liable. The rationale behind this option is to resolve the inconsistency in wording in the tenant’s current duty to take care to avoid damage to the property, whilst taking reasonable care to avoid damage to common areas. We do not agree that this option will adequately address this issue as it is likely to cause greater disputes about responsibility for repairs. We would instead recommend applying consistent wording to the current duty.

The risk in undertaking the change as put forward in this option is that describing the duty as, ‘tenant must notify of and compensate for damage’ amends the duty to have strict liability. It appears that it will not consider whether reasonable care was taken by the tenant and is likely to create greater confusion of liability between the parties. The current duty is much clearer than the rooming house duty under section 116 of the RTA, and therefore should remain.

**Resolving disputes about repairs**

R65. Implement option 8.29 Expand list of urgent repairs.

R66. Implement option 8.32 Faster resolution of repairs disputes.

R67. Implement option 8.35 Landlord repairs and maintenance bond.

R68. Implement option 8.36 Better access to Rent Special Account.

R69. Implement option 8.37 Increased range of remedies for a breach of repairs duty.

R70. Implement option 8.38 Special provision for excessive usage charges caused by leaks, intermittent faults or hidden problems.

The Tenants Union supports implementing more accessible pathways for dispute resolution and greater incentives for repairs to be undertaken.

**Incentives for repairs**

The Tenants Union supports the incentives put forward in options 8.35, 8.36 and 8.37. These options will provide legislated support to tenants to ensure that repairs are undertaken in a timely manner, and would successfully encourage landlords to respond promptly to repair requests. It is thought that these options could easily be translated to other tenure types.

**Faster resolution of repair disputes**

The Tenants Union supports amending the timeframe in which landlords must reimburse tenants who have paid for urgent repairs from 14 days to 7 days. We also support specifying that a VCAT hearing for repairs must be heard within 7 days. We support the option that tenants could apply directly to VCAT without first applying to CAV for an inspection, although the option to have CAV inspect the property should remain as this is often the more accessible pathway for tenants to enforce repairs. Often the CAV report is enough for landlords to undertake the repairs. The Tenants Union also recommends an option that would have the CAV repairs report be binding on the landlord, again this is more accessible to tenants that taking their landlord to the Tribunal.
Rooming houses

Rooming house definition and emerging accommodation models

R71. Implement option 9.1 Future inter-governmental project to consider whether rooming house definition requires amendment to capture emerging accommodation models.

The Tenants Union is in favour of modernising the definition of rooming houses to better suit the current market. The current extensive review process is thought to be the better time to undertake this work as CAV has put aside significant resources to review the RTA, stakeholders have been engaged, and there is a commitment to develop an evidence base. It is unclear why a future intergovernmental project is thought to be a preferred avenue for reform.

Under the RTA a rooming house is defined as “a building in which there is one or more rooms available for occupancy on payment of rent –

(a) in which the total number of people who may occupy those rooms is not less than 4; or
(b) in respect of which a declaration under section 19(2) or (3) is in force”

This definition was developed at a time when the nature of the rooming house industry was vastly different, with predominantly large purpose built properties used. The definition does not reflect the current rooming house market, which is increasingly tending towards smaller properties. At the current time, properties operating like rooming houses, but which do not satisfy the current definition, are not covered by the Act, a situation that disadvantages both residents and owners. Changing the definition of a rooming house to include these smaller properties will provide a clear and transparent regulatory and dispute resolution process for all parties.

The TUV Outreach team encounters properties that are run as if they are rooming houses, often by operators who have other registered rooming houses. These unregistered properties house up to three people who are on separate rooming house or tenancy agreements who have often been referred by homelessness agencies. Because they do not reach the four person threshold local councils are unable to enforce registration even if the property operates as a rooming house in every other respect. This allows operators to dodge rooming house regulations such as minimum standards and compliance with the Public Health and Wellbeing Act 2008.

Our Outreach team have seen operators house four or more residents, only to force out the fourth or fifth resident when Council have requested to inspect the property. Due to the resource intensive and lengthy process involved in prosecution Councils are unlikely to take matters further unless they can be absolutely certain that a property meets the definition of a rooming house.

The definition of a rooming house should incorporate the way in which the property is run and the occupancy right rather than the number of occupants. No other state or territory limits a rooming or boarding house to four or more residents. See other jurisdictions below.
<table>
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<th>Jurisdiction</th>
<th>Definition</th>
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| NSW | Boarding premises means premises (or a complex of premises) that:  
(a) are wholly or partly a boarding house, rooming or common lodgings house, hostel or let in lodgings, and  
(b) provide boarders or lodgers with a principal place of residence, and  
(c) may have shared facilities (such as a communal living room, bathroom, kitchen or laundry) or services that are provided to boarders or lodgers by or on behalf of the proprietor, or both, and  
(d) have rooms (some or all of which may have private kitchen and bathroom facilities) that accommodate one or more boarders or lodgers. |
| QLD | Rooming accommodation is accommodation occupied or available for occupation by residents, in return for the payment of rent, if each of the residents—  
(a) has a right to occupy 1 or more rooms; and  
(b) does not have a right to occupy the whole of the premises in which the rooms are situated; and  
(c) does not occupy a self-contained unit; and  
(d) shares other rooms, or facilities outside of the resident’s room, with 1 or more of the other residents. |
| Tasmania | Boarding premises means a room and any other facilities provided with the room where  
(a) the room is occupied as a principal place of residence; and  
(b) any of the bathroom, toilet or kitchen facilities are shared with other persons — but does not include premises located in a building occupied predominately by  
(c) tertiary students; or  
(d) TastAFE students within the meaning of the Training and Workforce Development Act 2013; |
| South Australia | Rooming house means residential premises in which—  
(a) rooms are available, on a commercial basis, for residential occupation; and  
(b) accommodation is available for at least three persons on a commercial basis; |

**Declared rooming houses**

**R72. Do not implement option 9.2 Buildings owned or leased by registered housing agency can be declared rooming houses.**

The Tenants Union opposes allowing registered housing agencies from declaring self-contained apartments to be rooming houses. Self-contained apartments do not meet the definition of a rooming house and do not have the necessary characteristics of a rooming house to warrant the application of the rooming house provisions under the RTA. Rooming house provisions under the RTA are designed to deal with the unique characteristics found in rooming house accommodation. These include the communal nature of rooming houses where residents have exclusive occupancy of a single room, sharing all other facilities with a potentially large number of other residents. This communal nature is really the key feature found in rooming houses and provides reasoning for provisions allowing for the use of house rules and different notice periods. It would be detrimental to residents and tenants if registered housing agencies were given the power to declare different types of housing to be a rooming house. This would allow the provider to reduce the security of tenure of the tenants where it is not necessary or appropriate to do so.

**Unregistered rooming houses**

**R73. Implement option 9.3 Test where building owner or agent ought to have known premises was unregistered rooming house.**
R74. **Implement option 9.4 Enhanced inspection powers for CAV rooming house inspectors.**

The Tenants Union supports any measures that will improve monitoring, enforcement and compliance within the rooming house industry.

One consideration with option 9.4 is that residents’ quiet enjoyment would need to be taken into account if CAV were to enact their rights to inspect a resident’s room.

**Tenancy agreements in rooming houses**

R75. **Implement option 9.5 Allow rooming house residency agreements with a specified occupancy period, and remove use of tenancy agreements for occupancy of rooms in rooming houses.**

R76. **Amend the Act to provide mandatory use of a prescribed standard rooming house agreement.**

The Tenants Union strongly supports option 9.5. As discussed in our previous submissions there is considerable confusion around residential tenancy agreements in rooming houses. Although counterintuitive the presence of tenancy agreements is not beneficial to residents in rooming houses. Tenancy agreements and particularly fixed-term agreements are generally not appropriate for this form of accommodation.

Tenancy agreements, particularly with fixed-terms, can trap tenants in unfavourable living arrangements that the tenant has little control over. Unlike other forms of tenure a resident in a rooming house has less autonomy over their living space. Residents do not have control over who they live with or how many people they share their accommodation with. Rooming house residents often have complex needs and may have conflict with other residents. If the resident is under a tenancy agreement it can be more difficult to leave an undesirable situation or find more suitable housing because notice periods are longer and there may be lease-breaking costs.

In rooming houses a fixed-term tenancy agreement offers very limited security due to the high level of unaffordability in the sector. The overwhelming majority of residents are in severe rental stress and are at a high risk of falling into rent arrears.

**Case Study**

A resident rented a room in a registered rooming house. The agreement was called a ‘house rules and license agreement’ and referred to the residents variously as occupants, licensees and residents.

The agreement contained many clauses that were inconsistent with both the tenancy and rooming house residency provisions of the *Residential Tenancies Act 1997* (RTA). For example, the agreement required the residents to give 14 days’ notice if they intended to vacate. A rooming house resident must give 2 days’ notice of their intention to vacate under the RTA. A tenant must give 28 days’ notice of their intention to vacate.

The agreement also provided that the resident could be required to vacate on 24 hours written notice for any breach of the agreement. The agreement was for a fixed term and contained an early termination clause that provided that the resident must pay 2 weeks rent (for advertising and re-letting fees) and 28 days rent if they moved out before the end of the lease. However, lease-breaking costs would only be payable if the agreement was a tenancy agreement instead of a rooming house residency agreement.

Uncertainty about whether an agreement is a tenancy agreement or a residency agreement means that the resident rights and obligations are unclear without a determination from VCAT as to what the agreement is.
The rooming house operator also required the resident to enter an agreement with a company to provide furniture to the room. The furniture leasing agreement and the rooming house rental agreement required the resident to pay a ‘furniture deposit’ in addition to the bond that was not lodged with the Residential Tenancies Bond Authority. The terms of both agreements provide that the furniture deposit was to be used to secure breach of either the furniture leasing agreement or the rooming house rental agreement.

Transition from current law to this option would be beneficial to all parties involved because it would create greater clarity to the resident, rooming house operator, and sector as a whole.

This option would provide greater certainty for rooming house operators and residents as to their rights when a fixed term agreement is entered into. At the moment, there is often confusion whether a resident can give 2 days’ notice or can be liable for compensation if they leave early where an agreement is considered a section 94 agreement. This option will enable vulnerable people to have more certainty of their liability.

The cap on rent payable for termination without notice should not be increased from 2 days’ rent. Two days is appropriate because this is the amount of notice a resident is required to give under the RTA and so is consistent with the RTA requirements. Rooming house residents are highly vulnerable often with low incomes, it would not be fair to charge more if they need to move.

It is not thought that there should be rooms in rooming houses that would require the provisions of a tenancy agreement under part 2 of the RTA rather than a residency agreement under part 3. If exemptions were introduced this would cause confusion for residents and operators and would likely lead to exploitation as currently occurs with relation to tenancy agreements in rooming houses.

It would be beneficial if a standard form residency agreement were introduced to give greater consistency and clarity for the parties. Rooming house operators often develop agreements that take parts from tenancy agreements and parts from residency agreements to create the best possible outcome for themselves whilst leaving the tenant with little protection. The inclusion of additional and often unlawful terms is commonplace. Rooming house residents have very little bargaining power, often having nowhere else to go for accommodation. Greater protection is needed to ensure rooming house residents have access to fair contract conditions that reduce opportunity for exploitation and uphold the rights provided to them in the RTA.

**House rules**

R77. Implement option 9.6 Display of house rules required in common areas as well as in each resident’s room.

R78. Implement option 9.8 No termination for breach of house rules if rules invalid or not properly made.

The Tenants Union supports options 9.6 and 9.8. Whilst these options are unlikely to greatly improve the circumstances for residents, they would at least provide greater clarity about rules and an avenue for residents to challenge unfair rules.

**Pets in rooming houses**

R79. Amend the RTA to state that a rooming house owner must not unreasonably withhold consent to a pet.

Rooming houses provide more complex social environments than other forms of tenure under the Act given their communal nature. As a result there are more considerations to take into account when determining whether a pet should be permitted in a property.
The comfort and safety of other residents is one such consideration. This does not mean that an outright ban is always appropriate. A recent VCAT decision found that a blanket ban on pets in Owners Corporation rules was unlawful. 9 We would argue that similarly, pets in rooming houses should be considered on a case by case basis. There are many arguments for the therapeutic benefits of pets. Additionally many pet owners have significant difficulty finding accommodation in the rental market, this need not be exacerbated by disallowing pets in rooming houses. By allowing the rooming house operator to refuse consent for a pet in reasonable circumstances gives adequate protections for situations where a pet would not be appropriate.

**Rights of entry**

**R80. Implement option 9.9 Two month frequency for general inspection of resident’s room with 48 hours’ notice.**

The Tenants Union supports option 9.9 as it provides for a greater right to quiet enjoyment for rooming house residents.

**Minimum standards**

**R81. Implement option 9.11 Amend rooming house minimum standards.**

The Tenants Union supports updating the rooming house minimum standards as outlined in the *Heading for Home Options Paper*.

**Personal security and security of mail**

**R82. Implement option 9.12 Operator to provide mail box for each room and ensure sorting of mail.**

The Tenants Union supports option 9.12 as an important measure to protect the privacy and security of rooming house residents’ mail.

**Quiet enjoyment of other residents**

**R83. Implement option 9.13 Restrict resident’s quiet enjoyment duty to conduct within property boundary of rooming house.**

The tenants union supports option 9.13. The quiet enjoyment of rooming house residents is complicated by the close quarters and communal nature of the accommodation. Section 113 places an overly burdensome responsibility on the resident by using the phrase “anything” rather than “unreasonably.”

It is also an overly high burden for a resident to be expected to control the behaviour of a guest when they are not only in the rooming house but near it. It puts responsibility on the resident for behaviour of another in what potentially could be a public space. The rules around guests and relationships would be better addressed in the context of house rules.
Dispute resolution services and mechanisms

Tools for independent resolution of disputes
When reviewing the information and advice services it is important to properly
distinguish between “information” and “advice”.

Information is general in nature and is delivered through a number of different
channels, with or without direct contact by the tenant. There is a large amount of
existing information available for tenants to understand their rights and responsibilities.

Both CAV and the TUV have significant web based resources that are relatively easily
accessible. TUV resources are translated into twelve non-English languages.
Importantly, almost all tenants are given the statement of rights and duties as a
condition of entering into every tenancy agreement.

Despite this array of information;
> many tenants still do not understand their basic rights and responsibilities and
  are often mislead by real estate agents and landlords
> there are gaps in the information provision, particularly for some emerging
  language groups
> the information currently available does not appear to have had any
demonstrable effect in reducing disputes in key areas
> the information currently available has not reassured or encouraged tenants to
  engage in the current dispute resolution processes

Whilst there are some tenants who can self-help, the power imbalance in the
residential tenancies market means that most tenants cannot. The TUV does not
believe that providing more information will overcome this fundamental power
imbalance unless rights are significantly enhanced to minimise adverse consequences
for tenants seeking to assert them.

Advice is more specific in nature and relates to the actual circumstances of a problem
or dispute and the situation of the person involved. There are clearly a significant
number of tenants who are seeking advice to resolve problems with their tenancies.
Our view is that the vast majority of enquiries received by CAV, TUV and other
agencies are from people seeking advice (not just information).

It is also important to distinguish between different styles of advice. The TUV advice
service (and similar services provided by TAAP agencies) is provided ONLY for
tenants to advise them of the best means to resolve their specific problem and the
legal remedies that they can use to enable this resolution. This includes advising
tenants where the law may not work for them in their individual situation. This is very
important for vulnerable or disadvantaged tenants who will generally feel more
reluctant to exercise legal rights if there might be adverse consequences.

Our general experience is that services provided by CAV, where they do stray into
advice do not usually engage in any detail with the specific circumstances of the
tenant. A good example of this difference in the style of advice is in relation to the
advice provided about lease breaking. The TUV (and in our experience most TAAP services) do not hesitate to advise tenants that they should cease paying rent once they have returned the keys irrespective of the lease end date. We understand that CAV is reluctant to advise tenants to do the same.

The value of good advice is that it enables tenants to make properly informed decisions and empowers them in relation to their housing choices.

It is also our longstanding experience that most tenants, particularly those that are vulnerable and disadvantaged, having received advice will require further assistance to resolve any problem or dispute. This further assistance is generally advocacy of one form or another and may include negotiation, representation and referral to complimentary community services. The referral pathway often creates a loop back to advocacy services for other clients in need.

Contrary to assumptions that may apply in other areas, vulnerability and disadvantage for tenants extends up the income scale to households on moderate incomes due to the high transaction costs associated with residential tenancies. If the dispute or problem is not effectively resolved or the tenant is evicted then relocation will be expensive, time consuming and may have other significant consequences, such as requiring children to move schools. By contrast, the landlord will generally suffer none of these consequences. This level of vulnerability and disadvantage is in addition to the blunt categories of disadvantage often cited.

The consequence of both of the above is that real demand for tenant advocacy services is very high. We believe that tenant advice and advocacy services should be properly funded to meet this demand. In our view, this is a fairer use of the interest on tenants’ bonds than simply subsidising landlords’ use of VCAT for evictions.

However, as was identified in the review of the TAAP, there is a very significant interrelationship between the effectiveness of advocacy services and the rights available to tenants to exercise. In the end, tenant advocates can only seek to achieve the legal rights that a tenant is entitled to and their service effectiveness is limited accordingly. Many very vulnerable and disadvantaged tenants are reluctant to go beyond receiving advice unless they have nothing left to lose, typically in relation to evictions. Ironically, strengthened tenants’ rights will be likely to increase demand for advocacy services whilst theoretically making it less necessary.

**Third-party assisted non-binding dispute resolution**

R84. Do not implement option 10.2 Extend CAV’s Frontline Resolution (FLR) and conciliation services to landlords, property managers, and rooming and parks operators.

Independent third-party assistance is generally not a valuable tool for tenants in residential tenancies. This is due to a number of reasons including the voluntary nature and non-binding decisions. In our experience landlords are unlikely to engage in a voluntary dispute resolution process if they have already declined to engage with the tenant over a dispute.

In our experience, the mediation services provided by DSCV are not often used in landlord-tenant disputes but may be of value in inter-tenant or co-tenant disputes if both sides to the dispute are willing.

Additionally, and perhaps more importantly, alternative dispute resolution (ADR) such as mediation or conciliation does not commonly lead to favourable outcomes for tenants who are in a weaker bargaining position and will often settle for less than the law entitles.
Mediation is not an appropriate tool where the two parties hold unequal bargaining power, an inherent characteristic of landlord-tenant relationships. This is particularly true for vulnerable and disadvantaged tenants.

Mediation is not appropriate where:

> there is an imbalance of power between parties because of socioeconomic disadvantage

> there is an unwillingness of parties to engage in constructive ADR, or to acknowledge that there is a problem

> participation would result in personal or financial hardship

Residential tenancy disputes are characterised by all three of these elements. Whilst the tenant is not always in a position of socioeconomic disadvantage they are much more likely to be in this position than the landlord. Even if a tenant is not marginalised they will always have less bargaining power than the landlord as it is the tenant’s home that is at stake and they are constrained by the limited supply of rented housing, particularly housing that is affordable.

Whilst we support increasing the authority of CAV to resolve some disputes, services such as Frontline Resolution and other CAV conciliation services do not always provide the support that tenants need to ensure their rights are upheld. It is unclear whether tenants utilising these services received favourable outcomes or ended up accepting something less than the law provides.

Negotiation services provided through the TAAP agencies are a much more effective mechanism for resolving residential tenancy disputes as they provide additional assistance to ensure that tenants are adequately protected.

**Binding agreements, orders and determinations**

R85. Implement a residential tenancy Ombudsman.

The Tenants Union is not supportive of option 10.3. It is not thought that this would adequately address the issues experienced through current dispute resolution pathways. A new administrative dispute resolution service would be too similar to VCAT and would not provide features that would make it more accessible to tenants.

We want to see a fair and accessible dispute resolution system that recognises the vital role that housing plays in people’s lives. The dispute resolution system in the residential tenancies sector must work to protect tenants’ rights as consumers of rented housing.

Tenants are reluctant to engage in the dispute resolution process because of the possible negative consequences to their current and future living arrangements. The dispute resolution system needs to improve the balance of power between tenants and landlords and enforce compliance in the sector. Tenants need to be able to access assistance for disputes without having their security of tenure threatened.

A major cultural shift is needed so that tenants are able to access the rights that are legally available to them. This shift will only occur if there is strengthened consumer protection available.

The most effective model for consumer protection is industry or government Ombudsman schemes. This is why we recommend the introduction of an Ombudsman model in the residential tenancies sector. This would see a number of areas being taken out of the hands of VCAT and put to an Ombudsman-like service, through CAV or through an independent statutory body.
The residential tenancies sector is highly suitable to an Ombudsman model, one where there are ‘a large number of consumers who cannot easily “shop elsewhere”’. The characteristics that lend themselves to an Ombudsman scheme have been described as where:

1. essential services are involved
2. the market is characterised by large firms and limited competition, thus creating significant power imbalance
3. there is significant asymmetry of information, such that consumers would have difficulty asserting their rights
4. there are a large number of disputes.

Indeed the residential tenancies sector is characterised by the provision of an essential good, an asymmetry of power, high volumes of disputes, and limited supply resulting in restricted competition. The Fair Work Ombudsman operates in a very similar environment to that of residential tenancies, with large numbers of smaller players.

Given the known issues with access to justice in the current dispute resolution system, establishing an industry Ombudsman scheme would help to promote an accessible option that tenants could navigate independently to have their disputes resolved.

Ombudsman schemes are known to be more accessible than other dispute resolution methods such as tribunals or courts, and are considered effective in promoting access to justice and overcoming power imbalances. There is also a critical difference in culture within such schemes, where they are directed at resolving consumer complaints, generally consistent with good industry practice and the law. This is exactly what the residential tenancy sector is in desperate need of.

As well as resolving individual disputes, Ombudsman schemes are able to address systemic issues, which over time would lead to a reduction in the number of disputes between tenants and landlords and the identification of repeat offenders.

A residential tenancy Ombudsman scheme would be a great step forward in upholding consumer rights and industry accountability.

The success of an Ombudsman scheme would depend largely on whether membership was compulsory or not. A voluntary scheme would have little to no effect as noncompliant landlords would simply avoid the scheme. The introduction of the scheme must include legislation to ensure the Ombudsman has jurisdiction over all private residential landlords.

Funding for a tenancy ombudsman could come from the interest from landlord maintenance bonds.

**Quality of decision-making by VCAT**

**R86. Implement option 10.4A Introduce re-hearing process for residential tenancies cases at VCAT.**

The Tenants Union is strongly supportive of the introduction of a re-hearing process for residential tenancies cases at VCAT. This is thought to be the best way to address issues that have been raised about the quality and accountability of VCAT’s decision making. The Residential Tenancies List makes decisions about fundamental aspects of life; that is whether or not a person has housing, whether a person has to uproot

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37 Ibid p334.
38 Ibid, p315.
themselves and their family, and whether or not a person will be given more time to find another property or will be rendered homeless. Because of the significance of the decisions being made in the RT List it is our view that a re-hearing process should be introduced to ensure accountability. This would bring the RT List in line with processes that exist for other legislation governed by VCAT (Guardianship and Administration Act 1986, Power of Attorney Act 2014, and the Disability Act 2006).

It is thought that problems with VCAT’s decision making have been well outlined by all users of the Residential Tenancies list. Further evidence is difficult to produce in part because of the precise problem this option is aiming to address. The lack of transparency around decision making can be demonstrated by the inconsistency of issuing written reasons. The lack of accessibility for rehearing is confirmed by the small number of appeals that are filed with the Supreme Court.

Fees and awarding of costs
The Tenants Union supports an application fee for rehearing, however asserts that it will be necessary to include relevant protections for low income tenants. This should be remedied by way of a fee waiver to ensure that all parties have equal access to justice. The Tenants Union does not support the awarding of costs against the other party, as this is likely to further disincentivise tenants from accessing and attending VCAT in the first instance. Fear of retribution and costs are significant issues that block tenants’ access to justice. Appropriate measures would need to be put in place to ensure that tenants feel secure accessing dispute resolution services.

Implementation
The Tenants Union generally supports the proposed features outlined in this option. It is understood that further work will be necessary to determine exactly how re-hearings in the RT List would operate. It is thought that this could be modelled from other jurisdictions in consultation with stakeholders.

Compliance and enforcement
R87. Implement option 10.5 Expand civil remedies under the RTA.

The Tenants Union supports increasing CAV’s involvement in enforcement of the RTA. It is our understanding that CAV already has power to apply civil penalties for specified breaches, however we support extending this power. It is our understanding that although CAV has the power to apply civil penalties this is something that is rarely if ever done. We would support the increase of use of penalties as a way to tackle non-compliance with the Act.

The Tenants Union supports the additional powers that are outlined under this option. Particularly the ability to issue a range of binding orders aimed to achieve compliance with minimum standards and other duties.

In addition to amending CAV powers, increased resourcing and a clear direction to enforce non-compliance through these avenues needs to be included to ensure that action in this space does occur.
Terminations and security of tenure

Terminations instigated by landlord or owner: tenant at fault

Termination orders

R88. Do no implement option 11.1 “Introduce a process for termination orders to the RTA.”

The introduction of termination orders is not supported by the Tenants Union. It is thought that this would reduce procedural fairness, reduce safeguards currently available to tenants, and increase the number of unfair and unnecessary evictions.

Severely impacting procedural fairness
The notice to vacate process enables a tenant to know the allegations against them, and to collect evidence to potentially refute the landlord. Circumventing this process will create a system where there is no procedural fairness or natural justice.

With various ‘at fault’ notices to vacate, the purpose of serving the notice to vacate and then seeking a possession order, is that it enables a party to collect evidence, change their behaviour (such as make rental payments), understand the allegations made against them, seek legal advice, providing the tenant an opportunity to move out or negotiate.

If termination orders were introduced tenants would have less time to remedy any issues and less time to prepare for a termination hearing. Two important features of the current process for eviction are; the information that is required in a notice to vacate, and the notice period given to a tenant after receiving a notice to vacate (e.g. 14 days).

Importance of notices to vacate
Section 319(d) of the RTA states that a notice to vacate must provide the reason why the notice has been given (with the exception of no reason notices), “A notice to vacate given under this Part is not valid unless— (d) except in the case of a notice under section 263, 288, 314, 317ZF or 317ZG, it specifies the reason or reasons for giving the notice”.

A Supreme Court decision in 2005 Smith V Director of Housing found that there must be a certain level of detail included in a notice to vacate. The decision detailed that the landlord must include; “a sufficient degree of detail to enable [the tenant] to understand the facts being alleged as a basis for terminating the tenancy. It required no technical expression, no particular formal verbal formula and no particular legal knowledge.”

In relation to the purpose of requiring reasons for Notices to Vacate, the Supreme Court judge found that the purpose of section 319 “is to lay a proper basis for the pursuit by a landlord of a very summary method of terminating a tenancy and thus extinguishing the rights of the tenant. It is incumbent upon a landlord who seeks to avail himself of such a summary remedy to comply strictly with the law so as to ensure

39 Smith V Director, Section 17.
that by resorting to such a remedy he is neither deliberately nor accidentally trampling on the rights of the person against whom the remedy is being sought."  

The introduction of termination orders in place of notices to vacate will remove these important safeguards that ensure tenants receive adequate information about allegations being made against them and allow time for preparation or remedy.

**Tenants don’t always receive VCAT applications**  
According to Regulation 4.07 of the VCAT Rules, the ‘applicant must serve a copy of an application or referral on each other party’. This is provided so that the responding party is aware that an application has been made against them and the reasons why the application has been made. The responding party should also receive a notice of hearing from VCAT, giving further information of the time and location of the hearing. The Tenants Union often hears from tenants who have not received the application from the other party. Previously if this were the case, we would advise the tenant to contact VCAT to have them send a copy of the application. VCAT has recently changed its internal procedures and they will no longer provide a copy of the application, instead advising the tenant to contact the other party to request a copy of the application. This creates barriers for the tenant or advocates as it can be difficult to contact the other party and they can be unwilling to provide the application.

This has significant implications on procedural fairness and natural justice, and would be particularly worrying if termination orders were introduced. If a tenant were not to receive an application in this instance they would be greatly disadvantaged. We know that a proportion of tenants would seek assistance through ourselves, CAV, or another community legal service, and in these instances the likely outcome will be an adjournment. We also know that the majority of tenants would not seek assistance and would be likely to not attend the hearing.

If termination orders were introduced they would need to be accompanied by amendments that ensure VCAT enforce proper service of applications.

**Overly adversarial**  
If termination orders were introduced the first point at which the tenant would be notified that something was wrong would be a notice of hearing for a Termination order. This is highly adversarial and intimidating approach and will not promote security for tenants. It is likely that this will cause tenants to feel more insecure rather than improving fairness and safety.

**Confusion and lack of clarity of the process for regaining possession.**  
Introducing a separate process for certain notices is likely to cause unnecessary confusion amongst both tenants and landlords.

**Termination orders unlikely to address issues as stated**  
Any intended benefit from this recommendation will not be realised as tenants do not attend VCAT (only 20% of hearings are attended by tenants). The introduction of termination orders is likely to further reduce tenant attendance at VCAT as tenants would receive less information and less notice time.

**Unintended consequences**  
As well as increasing unfair terminations and reducing procedural fairness, this option is likely to increase the number of adjournments and drain VCAT resourcing. It is likely that tenants would not attend hearings, resulting in a greater number of renewals, which will waste the time and resources for all parties. It is highly unlikely VCAT would be able to cope with the high demand which this proposed amendment would require.

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40 Ibid, section 20.  
41 Ibid, section 20.
**Other jurisdictions**
No other Australian jurisdiction provides this pathway for eviction for instances other than immediate notices. Evidence has not been provided as to why this avenue would be necessary in Victoria where it is not elsewhere. Victorian tenants deserve security and procedural fairness.

**Alternative solutions**

R89. Implement Justice Connect’s recommendation to rename the Notice to Vacate to be more accurate.

The options paper alleges that termination orders would address the issue that many tenants leave after receiving a notice to vacate, not realising that they are entitled to challenge the notice at a VCAT hearing. It is our opinion that this issue will not be remedied through the introduction of termination orders. To address this problem we would instead recommend implementing the suggestion made by Justice Connect Homeless Law, to change the name of the notice to vacate to something more accurate, such as a ‘notice of intention to end a tenancy’. This would be a more appropriate way to title the notice, and would give tenants a better idea of their rights in the situation. This would enable tenants who wish to challenge a notice a chance to do so, as they would have a clearer idea of their rights and the process.

We strongly oppose weakening tenants’ rights through the introduction of termination orders in an attempt to streamline the eviction process. Eviction is an incredibly serious action and should be given the proper process to ensure that tenants are properly informed, have an adequate timeframe to remedy any issues and to prepare for any hearings, are given opportunities to remedy any issues in the most appropriate way, and are protected from unnecessary and unfair eviction.

**VCAT decision-making process in granting termination and possession orders**

R90. Implement option 11.2 Require VCAT consideration of reasonableness in making possession orders.

The Tenants Union supports the introduction of a reasonableness test for eviction. Eviction should only ever be a last resort, it should be proportionate and it should be fair. A reasonableness requirement would ensure that eviction only occur where it is the most suitable course of action given the circumstances. This would work to assist longer and more secure tenancies and provide vital protections to the most vulnerable tenants.

This option is incompatible with a number of other options that have been put forward in the *Heading for Home* options paper. This option aims to reduce unfair and unnecessary evictions and create greater stability in the rental market providing for opportunities for longer term tenancies. Options that have been put forward at odds with the reasonableness test aim to make evictions punitive in nature, opting to end tenancies rather than address issues through more appropriate pathways. Many of the suggestions opt to reduce discretion of VCAT to force termination even where an issue is no longer occurring or likely to reoccur and in many instances where there is no risk or loss to the landlord.

If option 11.2 were introduced there would need to be clear legislated direction for VCAT outlining what is to be considered in the reasonableness test, and that consideration of reasonableness must be done before termination can be determined.

**Immediate notices to vacate**
The test for immediate notices should remain at its current level. Lowering the bar for landlord’s to access immediate notices to vacate is not supported by the Tenants Union as it is thought that the current legislation works to balance the rights of tenants and landlords. The changes outlined for the immediate notices will not make renting
safer or fairer, nor will it increase security of tenure. The options suggested make it easier to access immediate notices; this will have a significant impact on tenants with mental illness or other disabilities, lower socio-economic status, and tenants with CALD backgrounds. There are significant risks that tenants will be unfairly evicted, where alternative resolution options would be more appropriate.

The purpose of these immediate notice should remain as a means to protect neighbours, rather than acting as a punishment to tenants. The ability to issue these notices with greater ease will significantly impact people with mental health issues and disability, when the RTA already adequately deals with legitimate conduct concerns.

The introduction of these changes will increase evictions into homelessness and will create a greater drain on homelessness services.

Eviction should not be the tool to deal with criminal behaviour, the more appropriate for avenue for resolution of criminal matters is with the police.

**Damage**

R91. Do not implement option 11.3 Amend the description of damage and include injury.

R92. Do not implement option 11.4: Require a landlord to apply direct to VCAT for a termination order for damage.

Option 11.3 puts forward the suggestion to amend the damage notice to create greater clarity around wording. The term ‘malicious’ is suggested to be amended to ‘intentionally or recklessly caused or permitted’. It is not thought that this change will create greater clarity, as it will simply substitute one set of wording for another, which will present its own set of interpretation issues. It is also thought that the suggested change does not accurately reflect the meaning of the word ‘malicious’. The changes suggested are likely to capture a broader set of actions where immediate eviction may not be appropriate. The term malicious implies certain motivations that are misrepresented by changing the notice to include: ‘intentionally or recklessly’. In these instances the breach of duty process would be more appropriate. The Tenants Union strongly opposes the introduction of these options, they will result in more evictions and more people suffering homelessness unnecessarily.

**Danger**

R93. Do not implement option 11.5 Clarify the description and guidelines for interpretation of danger.

R94. Do not implement option 11.6 Require a landlord to apply direct to VCAT for a termination order for danger.

The Tenants Union does not support incorporating the changes outlined in option 11.5 as they would change the intention and broaden the scope of the immediate Danger notice. The current Danger notice enables a tenant to be evicted if they pose a threat to occupants of neighbouring premises. The commentary included under S244 in the ANSTAT annotated RTA states: “the purpose of the section is to protect occupiers of neighbouring premises rather than to punish the tenant.”

The *Director of Housing v Pavletic* Supreme Court decision found that for possession to be granted there must be an ongoing threat. In situations where there is a likelihood that the tenant will continue to be a source of danger to neighbours then the Tribunal

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can evict the tenant. In situations where there is not an ongoing threat of danger then this provision, rightly, cannot be applied.

The proposed amendments will change the intention of the notice, from that of protection to one that is punitive in nature. The Tenants Union does not support the withdrawal of housing as a punishment tool. If matters are of a criminal nature, they would be much more appropriately dealt with through the police. Tenancy law after all makes for a very blunt law enforcement tool.

**Case study**

The Tenants Union of Victoria assisted a resident who lived in a rooming house of 5 men.

There was an incident between two residents, when they got into a heated argument. As a result of this, our client stood over the other resident, which scared that other resident.

The other resident did not complain to the housing worker for a number of days. The other resident also didn’t call the police and didn’t leave the rooming house because after the incident, he was no longer afraid for his safety.

The rooming house operator issued an immediate notice for danger.

At the VCAT hearing, it was clear that although the other resident was afraid for that brief moment, it was recognised that the other resident instigated the argument by making a derogatory comment. It was also considered that our client did not continue to pose a danger to the other resident and therefore, could not be seen to “endanger” the other resident.

This threshold ensured both residents’ rights were adequately protected because it provided a forum to discuss the issues, and to consider whether it is such a serious incident that a resident should be evicted. The landlord was also provided with the right to evict, if they could show that the danger was continuing, and not a one-off incident.

It should also be recognised that both residents had mental health issues and would have been homeless if evicted.

The risks associated with enacting this option are that the number of unnecessary evictions is likely to increase. As this is an immediate notice tenants are likely to be evicted into homelessness, putting greater strain on homelessness services and social housing wait lists. The detriment to individuals will also be great, as immediate homelessness will interfere with work, school and ties to the community. This is particularly a concern where children are involved.

The Tenants Union believes that the current notice provides adequate protection for neighbouring occupants, whilst also providing safeguards so that eviction only occurs where necessary.

**Case study**

The Tenants Union of Victoria assisted a client in a rooming house run by a community housing organisation. The landlord arranged for certain classes to be held at the rooming house, for residents who chose to attend, such as photography, art etc.

At this rooming house, the woman who was running a workshop offended the resident by using his artwork in her art show without his permission.

English was not the resident’s first language. When he saw the instructor at the rooming house, while she was running a class, he became very
upset and yelled at her. The fact that he was from a non-English speaking background meant that instead of telling the instructor that she embarrassed him, he said she had killed him and now he is going to kill her. His intention was that he would embarrass her, not threaten her life. In his culture, it was extremely inappropriate what she had done without his permission.

If the bar is lowered to access immediate notices where someone like the class instructor is “in danger” or threatened, then this may lead people to be evicted from their houses even where the person offended by the conduct is not a resident of the house or the Rooming house operator.

This would give a landlord a right to evict people where it would not be appropriate for a person to lose their home.

Notices to leave

R95. Do not implement option 11.7 VCAT must terminate tenancy if it was appropriate to give notice to leave.

R96. Do not implement option 11.8 Notice to leave can be served on resident for visitor's serious violence.

R97. Implement option 11.9 Notice to leave to include practical information for suspended resident.

R98. Implement option 11.10 Suspended resident can arrange for authorised representative to collect goods.

R99. Implement option 11.11 VCAT must hear application within two business days, with adjournment of no more than five business days.

Notices to leave provide operators of managed premises with a tool to immediately expel residents where a serious act of violence has occurred, or where the safety of another person is in danger. These notices provide significant risk to residents as they enable the operator to expel them for 48 hours without having to first be tested at VCAT. We know that in rooming houses, residents are particularly vulnerable to illegal evictions; we frequently hear reports from residents who have been served notices for attempting to ask for repairs or asserting their rights in other ways.

The Tenants Union does not support the changes put forward in option 11.7 and 11.8 as they would likely increase the use of unnecessary evictions through the use of notices to leave. Notices to leave exist to protect residents in managed premises, they do not exist to punish. It is our opinion that the most appropriate avenue for dealing with a serious act of violence is through the police or courts system. Tenancy law should not be tooled used where criminal matters are concerned.

Option 11.7 would change the notice’s intention to protect; notices to leave would become punitive rather than about safety. Residents in rooming houses often experience multiple complex needs, and their eviction is likely to be into homelessness. It is our belief that if there is no longer a threat to safety then a termination of the residency is unnecessary and should not occur. Doing so will only result in more people experiencing homelessness and more people requiring support and housing.

Disruption

R100. Repeal s304 Notice to Vacate for Disruption in caravan parks, rooming houses and residential parks.

OR
R101. Implement option 11.12 Increase notice period for termination for disruption.

R102. Do not implement option 11.13 Amendment to the conditions under which a possession order must not be made.

R103. Do not implement option 11.14 Require a landlord to apply to VCAT for a termination order for disruption.

It is our belief that s304, notice to vacate for disruption is an overly harsh provision and should be repealed. Disruption is unlikely to cause any loss or damage to the landlord and therefore should not warrant eviction with no opportunity to remedy the issue. Whilst the quiet enjoyment of other residents is important, there are alternative provisions that can be used to manage instances where disruption occurs, such as through the breach of duty process. We don’t believe that a once off disruption of another party’s peace and quiet is a serious enough offence to result in expulsion from the home. We argue that this is neither proportionate nor appropriate, and would be better dealt with through the breach of duty process.

Notice period
If the Disruption notice were to remain it would be appropriate to extend the notice period as outlined in option 11.12. With disruption the seriousness of breach is generally thought to be lesser than the other immediate notices. Causing disruption is not likely to cause detriment or harm to other residents in the same way that danger or damage may.

The effect of an immediate notice can be devastating, as it renders the resident or tenant homeless, expelled from their home without time to find somewhere else to live. The likelihood of eviction into homelessness is far greater if the tenant is not provided with an opportunity to search for a new property, or to engage homelessness services for support to be rehoused.

VCAT discretion
For Disruption, VCAT is able to consider whether the disruption has ceased, is not a recurrence, and will not be repeated. This is an important protection to ensure that eviction is fair and reasonable. Disruption can refer to a relatively minor behaviour and this warrants a level of discretion to ensure that eviction is the appropriate avenue. This is particularly important for security of tenure for vulnerable and disadvantaged tenants where complexities such as mental health conditions can influence behaviour.

Non-payment of rent

R104. Do not implement option 11.15 Provide option for tenant to negotiate repayment plan where seven days’ rent owed.

R105. Implement option 11.16 Require that repayment of arrears invalidate termination processes.

R106. Do not implement option 11.17 Enable VCAT to make a termination order for repeated late payment of rent.

R107. Implement option 11.18 Amend provisions for rooming houses to be consistent with general tenancies.

Maintain the 14 day safeguard
The Tenants Union is supportive of allowing the landlord to give notice of late payment of rent and offer a payment plan at 7 days’ arrears. This change would only be supported however if the landlord were not permitted to issue a notice to vacate until after the tenant was in arrears by 14 days as is currently legislated in the RTA. Any
weakening of the current 14 day period would cause significant detriment to low income tenants and would severely reduce security of tenure.

Any reduction of the current 14 day period would also put Victoria out of step with the other states and territories and would unfairly punish Victorian tenants for an unaffordable rental market.

Rental affordability issues continue to grow as a problem in Victoria, with now three quarters of low income tenants in housing stress. A recent study found that 48 per cent of renters in Australia have a personal income of less than $35,000 per year. 43 This, coupled with the long term decline in public housing investment, means there are more and more low income tenants relying on the private rental market for their housing. Tenancy legislation needs to reflect this reality to ensure that it adequately meets the needs of those it governs.

**Incentives for timely payment of rent**

No tenant wants to pay their rent late. Late payment of rent puts unnecessary stress on the household, and leads to relationship breakdowns with the landlord and estate agent. It is in every tenant’s best interest to have a good relationship with their landlord and to meet their obligations under the Act.

A recent study found that 50 per cent of tenants fear being placed on a tenancy database and another 14 per cent of renters avoided making a complaint or requesting a repair out of fear of adverse consequences. 44 Tenants feeling of insecurity are so great that tenants are highly unlikely to withhold paying their rent intentionally. Assertions that tenants are disincentivised from paying their rent on time, or are purposefully gaming the system are unsubstantiated and disconnected from reality.

The Tenants Union does not support limiting VCAT’s ability to grant extensions on the repayment plan, this will significantly weaken tenant's current protections.

**Option 11.17 Repeated late payment of rent**

We would argue that current provisions do not discourage tenants from paying their rent on time. We submit that it is in a tenant’s best interest to pay rent on time, as any late payment of rent is likely to adversely affect the tenant’s relationship with their landlord and agent.

The current 14 day period provides vital safeguards for tenants who are struggling financially. Introducing a new notice for repeated late payment of rent will significantly decrease security of tenure for tenants, with the hardest hit being low income tenants. This measure is draconian and would punish financially struggling families.

The introduction of this option would render longer term leases virtually meaningless as the longer the tenancy continued the more likely a tenant could be evicted for paying their rent even a day late multiple times.

**Case study**

The Tenants Union assisted a tenant who was on a lease with his daughter. The property was advertised with a rent of $720 per fortnight. When the tenants signed the tenancy agreement, the tenancy agreement stated that the rent would be payable monthly and provided a monthly rent amount.

The tenants received Centrelink benefits because they were each entitled to receive a disability support pension. Our client was visually impaired. As Centrelink is paid once a fortnight, the tenants needed to pay their rent

44 Ibid, p15.
in fortnightly instalments, rather than monthly payments. As a result of this, at times of the month, the tenants were in advance of rent, and at other times, may have been a day or two behind in rent.

If the landlord was allowed to evict the tenants because their rental payments were frequently late, it is likely that these tenants would have been evicted, in spite of their ability to pay rent and comply with the obligations of the tenancy agreement and the Residential Tenancies Act 1997.

Allowing tenants to be evicted if they frequently pay rent a bit late would unreasonably impact tenants’ security of housing and target those who are either on Centrelink benefits, or are paid in weekly or fortnightly payments. Introducing a right to evict tenants for frequent late payment of rent is also in contradiction to section 331 of the RTA, which gives VCAT the discretion to adjourn or dismiss an application where satisfactory arrangements can be made to avoid financial loss to a landlord.

The introduction of this option would significantly increase the number of evictions and the number of tenants needing support from homelessness services. It is likely to create great instability in the market. Landlords’ rights to evict tenants are already protected by the right to issue a notice to vacate where a tenant is 14 days in arrears.

Landlords make money from tenants living in their investment properties. Due to this investment choice, landlords need to understand that people housed in their properties have legitimate and often competing needs to their own. These needs can sometimes be associated with financial risks, however they are unavoidable given the type of investment the landlord has chosen. Investment properties are people’s homes, and Government has chosen to increasingly rely on the private rental market to provide housing to greater numbers, including households with low incomes. Tenancy legislation needs to reflect this reality, and the emphasis should be on educating landlords and potential investors about the risks and responsibilities of providing people housing, rather than on weakening protections for financially struggling tenant households.

Other jurisdictions
Other jurisdictions provide far stronger protections for tenants who are struggling financially. These countries maintain healthy rental markets despite providing safeguards for rent arrears. In Scotland for example a tenant must be three months in arrears before a landlord can issue an eviction notice. France and Germany provide at least 2 months of arrears before a process can begin for eviction. And even in Ireland where the process is similar to Australia a tenant is provided 14 days to rectify arrears and then has a further 28 days’ notice if they are unable to pay.

Failure to comply with VCAT order

R108. Implement option 11.19 Place time limitation on compliance orders.

R109. Do not implement option 11.20 Require a landlord to apply directly to VCAT for a termination order for failure to comply with a VCAT order.

R110. Amend option 11.21 Amend conditions under which a possession order must not be made.

Under s332 (Order not to be made in certain circumstances) of the RTA the Tribunal must consider:

> S332(1)(b)(i) whether the order was trivial or has been remedied as far as possible,
> S332(1)(b)(ii) whether there will be any further breach of the duty, and
> S332(1)(b)(iii) whether the breach of duty is not a recurrence of a previous breach of duty.
This section has the potential to provide safeguards to tenants from unnecessary eviction however because of the inclusion of S332(1)(b)(iii) this provision proves. If the breach of duty is not a recurrence of a previous breach there would not be grounds to make a possession order. This is because to obtain a compliance order under section 212 the landlord must establish that there has been a breach of a duty provision.

This section should be amended to enable it to achieve its purpose, which is to enable a tenant to retain their tenancy if the breach of the order is trivial and the issue is not likely to reoccur in future.

This would bring the legislation in line with Australian Capital Territory legislation where:

“The ACT may, if satisfied that it is appropriate and just to do so in relation to an application mentioned in subsection (1)(a) refuse to make a termination and possession order if—
(i) the tenant has remedied the relevant breach; or
(ii) the tenant undertakes to remedy the breach within a reasonable specified period and is reasonably likely to do so”

To improve compliance orders the following reforms should be made:

> Repeal S332(1)(b)(iii) the breach of duty is not a recurrence of a previous breach of duty.
> Amend S332(1)(b)(ii) to include the word ‘or’, as shown below:

S332(1)(b)(i) whether the order was trivial or has been remedied as far as possible; and/or S332(1)(b)(ii) there will not be any further breach of the duty.
> Provide that compliance orders have a 6 month time limit.

**Use of premises for illegal purpose**

**R111.** Implement option 11.22A Require a conviction to be in place for a notice to vacate for illegal purpose.

**R112.** Do not implement option 11.22B Require a landlord to apply directly to VCAT for a termination order for use of the premises for illegal purposes.

The illegal purposes notice to vacate allows people to be evicted without conviction as a notice to vacate gives only two days to leave the premises in which time the person is unlikely to have been convicted or otherwise found not guilty. It is unfair that tenants are at greater risk of homelessness than an owner occupier who would not have their housing security threatened by the same behaviour. An eviction for potential illegal activity serves as a double punishment and should be amended as described in option 11.22A. The introduction of this requirement would result in fairer outcomes for tenants whilst still protecting landlords from illegal activities in their properties. It is thought that the most appropriate way to deal with illegal activity is through criminal pathways rather than through tenancy legislation.

Introducing termination orders as described under option 11.22B would not address concerns about the misuse of illegal purpose notices to vacate.

**Parting with possession for consideration without consent**

**R113.** Do not implement option 11.23 Include parting with possession for consideration without consent as grounds for termination.

The Tenants Union does not support the introduction of a new notice to vacate for ‘parting with possession for consideration’. The issues with this new notice have been discussed earlier in this submission.
Antisocial behaviour

R114. Do not implement option 11.24 Expand definition of antisocial behaviour to include a wider range of behaviours and people who may be affected by those behaviours.

Existing pathways to evict for anti-social behaviour
There are already adequate pathways in the RTA to deal with situations where tenants are displaying problematic behaviour that effects the quiet enjoyment of people around them.

Section 60 of the RTA requires that tenants not cause a nuisance or interference. Under this section a tenant or their guest must not behave “in any manner that causes an interference with the reasonable peace, comfort or privacy of any occupier of neighbouring premises.” Under this provision a landlord can issue a breach of duty notice, and where necessary evict a tenant through the successive breaches or compliance order pathway.

For tenants and residents living in closer proximity to others, in rooming houses, caravan parks, and residential parks, sections 260, 304, and 717Z Notice to Vacate for Disruption are additional provisions that provide for the immediate eviction of tenants displaying problematic behaviour.

Over reliance on eviction
It is our opinion that additional provisions are not necessary and will provide too much power to landlords and neighbours, particularly in the private rental market. These provisions will disproportionately affect tenants who have mental health conditions and will severely weaken security of tenure for vulnerable groups. The likely effect will be greater churning in the social housing sector and more people without a place to call home.

It is our concern that an introduction of this notice will result in an over reliance on eviction, rather than addressing problems through more suitable avenues such as the breach process, or in the case of social housing – introducing supports to assist people with mental health or other complexities. Eviction is generally not the appropriate mechanism to deal with genuinely ‘anti-social’ behaviour as it does not address the problem but merely shifts it elsewhere.

Over reliance on tenancy law for behavioural management
Vast inconsistencies already exist between owner occupiers and renters with relation to security of tenure, and any move towards these additional measures will further exacerbate the problem. If a person who owns their own home behaves in a disruptive manner, the person cannot be expelled from their home. Instead the issue must be dealt with through police or local council. Where the person in question is a tenant however, a very different outcome may occur, where they may be subject to law enforcement measures but also too may lose their home.

This is particularly important to note that there is an increasing reliance on the private rental market as a policy solution to rising house prices and declining public housing stock. This is an issue that will affect an increasing number of Victorians as more people rely on rental properties for their homes. A 2005 paper raises the question; ‘how (if at all) does [antisocial behaviour eviction] acknowledge the inter-relationship of eviction, homelessness and social exclusion and how does it relate to strategies in place for their reduction?’

The paper points out that attempting to control behaviour through property rights is a flawed and confused approach, stating that anti-social behaviour is not fundamentally a housing issue and so would be better addressed through mechanisms outside of housing policy.\(^{46}\)

Looking historically at anti-social behaviour provisions introduced in the UK and Australia the report states that, ‘The change has been effected through specific, targeted statutory provisions that alter the property rights of social landlords and tenants, shifting the balance increasingly away from the tenant and towards the landlord.’ This gives an ever-increasing power to the landlord to control the behaviour of tenants or to evict them from the property.

**Anti-social behaviour provisions**

The suggested provision for anti-social behaviour is incredibly broad and goes beyond anything currently existing in Australia. The terminology of particular concern is “reasonably likely to cause the person to be alarmed”.

The introduction of a new notice for anti-social behaviour and lowering the bar for landlord’s to access immediate notices (such as danger or damage) would target the most vulnerable or disadvantaged members of society.

**Case study**

The Tenants Union of Victoria represented a client who was living in community housing. The tenant had significant mental health issues, and cognitive impairment issues. This meant that the tenant would not be able to remember recent events or discussions.

The tenant had an incident where the neighbour alleged the tenant had threatened entry to his property.

Also, due to the tenant’s mental health issues, the tenant sometimes behaved in a way (such as her use of certain language) or said things that may not be considered “social” by her neighbours. She never threatened them, and was often not aware of this because of her disability.

At the same time, the tenant had many other residents in that building who really liked her and provided evidence to support her. If the community housing organisation was able to give a notice for “anti-social behaviour”, this tenant may have been evicted and would be homeless.

The ability for a landlord to give a notice to vacate for damage or danger already gives the landlord enough power to evict a tenant where it may be appropriate to do so.

Also, the landlord could issue (and did) a breach of duty notice outlining the alleged conduct. This enabled the tenant to know of the alleged breach and gave her an opportunity to remedy it and enter in to discussions to try and resolve the issues and sustain her tenancy long term.

If the tenant did not comply with the breach of duty notice, the landlord would have had the option to apply for a compliance order and ultimately evict the tenant if she did not comply with that Tribunal order.

If the landlord had been able to issue her with a notice for anti-social behaviour, this could have led to the tenant’s eviction, homelessness and detrimentally impacted her health. Instead, the process already included in the RTA adequately ensured the tenant could sustain her tenancy, was

\(^{46}\) Ibid
Other jurisdictions must be looked at in context
In Scotland, where inspiration has been drawn for the wording of the ‘anti-social’ behaviour provisions, private tenancies and social tenancies are governed by separate legislation.

In both private tenancies and social housing tenancies there are a number of other aspects of the legislation that should be considered for context.

Private tenancies:
> A tenancy cannot be terminated for ‘no reason’.
> For certain grounds the court will only make an order of possession if it is considered reasonable in the circumstances.
> Landlords must be registered.
> There are strong provisions for recourse if a tenancy is wrongfully terminated. A tenant can claim compensation of up to six months’ rent.
> Eviction on the basis of criminal behaviour must be coupled with a conviction.
> Eviction for rent arrears can only occur after a tenant is in arrears for three consecutive months.
> Certain areas with high rents can be classed as ‘rent pressure zones’ and certain regulation measures can be put in place to ease rent increases.

Social housing tenancies:
> A tenancy cannot be terminated for ‘no reason’.
> For certain grounds the court can only make an order of possession if other suitable accommodation is available to the tenant to move into.
> For certain grounds the court will only make an order of possession if it is considered reasonable in the circumstances, with regard to the ‘reasonableness test’.
> Social housing landlords must complete the ‘pre-action requirements’ where an eviction involves rent arrears.

Whilst the language in the ‘anti-social’ behaviour provisions goes further in Scotland than it does in similar provisions in Australia there are additional safeguards in place to reduce unfair and unnecessary eviction. If any additional anti-social behaviour provisions are considered in Victoria these type of protections must also be introduced.

Case study
The Tenants Union of Victoria represented a tenant who was living in a community housing property. The landlord alleged that the tenant had engaged in anti-social behaviour because he did not wish to socialise with his neighbours because he did not particularly get along with them. Also, his mental health issues and disability meant that he would sometimes speak to himself on the street and engage in behaviour many would consider odd (which did not endanger or scare other people).

The landlord issued the tenant with a breach of duty notice. As a result of this notice, the tenant met with the landlord to discuss the alleged behaviour and try and come to a resolution. This helped the relationship between the parties. Following this, the landlord applied to VCAT for a compliance order to try and direct the tenant’s behaviour.

As a result of the discussion before the VCAT hearing, the tenant and the landlord were able to amicably agree on the terms of the compliance
order. The tenant understood that he must comply or face eviction, and the landlord was satisfied that this gave them enough rights to ensure the other residents and neighbours were happy.

As a result of this process, the tenant was able to stay in the tenancy and sustain it. The organisation also developed a better understanding of the support the tenant needed.

If the landlord has been able to issue the notice to vacate for anti-social behaviour, the tenant may have been evicted and would likely have been homeless.

This notice would give too much power to the neighbours or possibly housing workers to determine what is considered “anti-social” behaviour and determine a person’s tenancy. The Act already provides for the right to evict people where it would be appropriate.

Protection for tenants with mental illness
It is commendable that CAV intends to include protections for tenants with mental illness, it is however questionable what type of protections are intended to be implemented and if they could adequately protect tenants in these circumstances.

Protections would need to be adequate so that VCAT could consider whether the ‘anti-social’ behaviour occurred as a result of mental illness and that possession should not be made in these instances.

Terminations instigated by landlord or owner: tenant not at fault
End of fixed term and no specified reason notices to vacate

R115. Implement option 11.25A Remove the notice to vacate for end of fixed term agreement.

R116. Do not implement option 11.26 Enable the notice to vacate for the end of a fixed term agreement to specify date on or after the end of the fixed term.

R117. Implement option 11.27D Remove the notice to vacate for no specified reason.

The Tenants Union supports the removal of notices to vacate for no reason, including the end of fixed-term notice to vacate. Option 11.25A and 11.27D would be most effective in protecting tenants against unfair termination while providing adequate scope for landlords to exit an agreement through the at-fault or prescribed change of use notices to vacate. Introducing these options would help to balance the rights between landlords and tenants.

The ability for a landlord to evict their tenant for no reason is a great inhibitor to security of tenure. The threat of being evicted for no wrong-doing hangs over the head of every tenant and inhibits tenants from exercising their rights under the Act. A recent national survey of renters[^1] found that fear of eviction was a major inhibitor of tenants enacting their rights.

The Act provides over 20 alternative notices to vacate for landlords who wish to gain possession of their property. This covers an extensive list of reasons, however unfortunately landlords are using the no reason notices to sidestep the safeguards that the specified reasons provide.

The misuse of no reason notices has been demonstrated through the current consultation process undertaken for the review of the RTA. The following comments were made on the Consumer Affairs Victoria Facebook page by landlords in response to the question of why landlords use no reason notices.

“1. Premises were always very dirty and tenants were arrogant.

2. Tenants constantly complaining about very little or irrelevant things, like something eating their garden plant”

“annoying tenants who constantly complain”
“Damaging homes, keeping it in a disgusting [sic] mess, winging [sic]”

Despite the fact that there are provisions in the RTA to deal with tenants who are not adequately meeting their duties, landlords have stated that they use no reason notices to side-step this legislated process. It is also disturbing to note that ‘complaining’ was often raised as a reason to serve a notice.

**Scope for landlords to evict**

There are over 20 legislated reasons why a landlord can evict a tenant, these include where the tenant has breached their duties or where the landlord wishes to use the property in another manner. There is no justification why a landlord should be able to evict a tenant for reasons not already contained in the legislation. These notices cover a broad range of reasons why the landlord may wish to regain possession of the property. The landlord should be prevented from regaining possession for any reason not listed in the legislation. This is the only way to protect tenants from unnecessary and unfair eviction. Many international jurisdictions do not offer eviction without cause and have healthy rental markets despite this.

Amending no reason notices to require a reason be given would in no way improve security of tenure or reduce the number of unfair notices issued.

**Option 11.26**

If end of fixed-term notices to vacate were to remain the Tenants Union would strongly oppose introducing option 11.26. There is no justifiable rationale for broadening the end of fixed-term notice in this manner. This option would give landlords greater eviction powers and would result in increased insecurity for tenants. If a landlord wishes to terminate a tenancy at the end of the fixed-term they have a multitude of options available to them. If the landlord misses their opportunity to use an end of fixed-term notice they can instead issue a no reason notice; or if they have a legitimate reason to terminate the tenancy they can issue notice to vacate for repair, demolition, premises to be used for business, premises to be occupied by landlord or landlord’s family, or sale. This option will not make rental housing fairer or safer, it will instead weaken protections to tenants against unnecessary eviction.

**Change of use notices**

**R118. Implement option 11.28** Require notice to vacate to be accompanied by evidence of change of use.

**R119. Implement option 11.29** Allow for greater VCAT discretion granting possession orders.

**R120. Implement option 11.30A** Extend notice periods to 90 days for change of use terminations.

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48 Consumer Affairs Victoria, 2015, In Facebook post *Landlords: what has prompted you to issue a ‘no specified reason’ Notice to vacate?,* Nov 18. [https://www.facebook.com/ConsumerAffairsVictoria/](https://www.facebook.com/ConsumerAffairsVictoria/)
R121. Implement option 11.30B Extend notice periods for long term tenancies.

R122. Amend the RTA to restrict all notices from being served in retaliation.

R123. Amend the RTA to include that a landlord would be liable to pay the tenant up to six months’ rent in compensation if it is found that their tenancy was wrongfully terminated.

R124. Amend or repeal the notice to vacate for sale.

Evidence for eviction
The current practice in Australia is highly favourable towards a landlord's ability to access their investment with as few barriers as possible, even though to the tenant the property is their home. In other jurisdictions the priority is given to the tenant's need for security and a home. For example in France and Germany if a landlord wants to evict a tenant so that their family member can move in they must provide proof of why their need is greater than the tenant’s need.

In Australia minimal evidence is required when issuing a notice to vacate. This means that there is very limited transparency between the tenant and the landlord and it is very difficult for the tenant to determine whether the notice being served is valid.

We know that landlords can serve notices to vacate under false pretences with high numbers of tenants contacting us each year with stories of notices not served in good faith.

It is recommended that evidence must be provided when issuing a notice to vacate. This will provide two purposes:

> It will allow a tenant/VCAT to assess the validity of the notice
> It will encourage a cultural shift away from swift and thoughtless evictions, as landlords would be required to spend more time preparing notices.

We recommend the following amendments:

> S255 Repairs: Landlord must detail the nature, extent and estimated time period required for the repairs. The landlord must attach any permits and a tradespersons quote for the planned works.
> S256 Demolition: Landlord must include permits required for demolition.
> S257 Premises used for business: Landlord must specify the nature of the business and provide any documentation.
> S258 Premises to be occupied by landlord or landlords’ family: Landlord must specify the name of the person to move in and their relationship to the landlord. A statutory declaration from the landlord AND dependent relative must be provided.
> S260 Public purpose: Landlord must specify and attach evidence of the public purpose that the property is required for, the basis for the public statutory authority to use the property for that purpose, and the time that the works will be commenced.
> S268 Notice by mortgagee: The Act should be amended to require the tenant to be given 60 days’ notice to vacate to standardise this with the other notice periods.

Section 259 (sale) has not been included in this recommendation because we propose that this notice should be amended.

Restrict notices from being served in retaliation
It is currently very difficult for tenants to prove if a notice has been given in retaliation and this is an area in which stronger protections are needed. Additional safeguards would ensure
that VCAT decisions about this issue adequately reflect the experience of many tenants who receive notices in response to exercising their rights.

Currently only a ‘no reason’ or ‘end of fixed-term’ notice can be challenged for retaliation when in reality tenants often raise concerns that other notices have been served on them because they have exercised their rights under the Act. Additionally the test for what constitutes ‘exercising a right’ needs to be amended to better reflect the realities experienced in the market.

The Tenants Union recommends amending section 266(2) of the Act to state:
A notice under Section 257 (premises used for business), 258 (premises to be occupied by landlord or family), 261 (end of fixed term), or 263 (no reason) is of no effect if it was given in response to the exercise, or proposed exercise by the tenant of a right under this Act. This should be an offence provision.

It is recognised that section 255 (repairs) and section 256 (demolition) may need to be excluded from this recommendation because of their direct link between a tenant exercising their right (seeking repairs) and the potential need to gain possession of the property in order to comply with the request.

Section 259 (sale) has not been included in this recommendation as we recommend that it be amended.

**Penalties for retaliatory eviction**

The Tenants Union contends that in order to encourage compliance the Act should provide strict penalties for the service of false notices to vacate. A good example of this are the ‘wrongful termination orders’ provided under Scottish law, whereby a landlord who is found to have wrongfully terminated a tenancy can be ordered to compensate the tenant up to six months’ rent.

**Inadequate protection from retaliatory eviction**

Current protections from retaliatory evictions are inadequate. This is because only ‘no reason’ and ‘end of fixed-term’ notices can be challenged for retaliation, but also because of the very narrow provisions detailed in section 266 of the RTA. Section 266 states: (2) A notice under section 261 or section 263 is of no effect if it was given in response to the exercise, or proposed exercise, by the tenant of a right under this Act.

This issue has been exemplified in recent Supreme Court decisions (Gillen v Zullaphella, Gregory v Datta) where it has been found that protections do not extend beyond specific rights under the Act, even if tenants are asserting ancillary rights. For example section 266 has been found to not apply where a tenant has filed an appeal to a VCAT decision, or has undertaken to repay rent arrears through a payment plan. It is our view that actions such as these should also have protection from retaliation. The Act should be amended to strengthen protections in this way.

**Mortgagee notices**

R125. Implement option 11.32 Require disclosure of any mortgagee repossession proceedings at point of lease.

R126. Implement option 11.33 Require mortgagee in possession to produce court judgment for possession order.

R127. Implement option 11.34 Require mortgagee in possession to give 60 days’ notice to vacate and compensate tenant.

R128. Implement option 11.35 Require mortgagee in possession to honour agreements where consent granted.
The Tenants Union supports all options that have been put forward with regard to mortgagee notices. Options 11.32, 11.33 and 11.34 will be particularly beneficial as it is our understanding that option 11.35 is a reflection of already existing law. For example section 87C of the *Transfer of Land Act 1958* states:

*Mortgagee or annuitant consent required for lease, easement or restrictive covenant*

The creation, variation or surrender of a lease or the creation or variation of an easement or restrictive covenant, in respect of land subject to a mortgage or charge, is not valid or binding against a mortgagee or annuitant unless the mortgagee or annuitant has consented in writing to (as the case requires)—

(a) the creation, variation or surrender of the lease; or

(b) the creation or variation of the easement or restrictive covenant.

**Terminations provisions and security of tenure**

R129. Implement all of Model 1 for security of tenure except for termination orders.

Model 1 is the only option that provides greater security of tenure to tenants. The other two models would significantly reduce security of tenure for all tenants, but particularly vulnerable and disadvantaged tenants. The Tenants Union supports the reform options put forward under model 1, but does not support the introduction of termination orders.

**Terminations instigated by the tenant: landlord not at fault**

Reduced period of notice of intention to vacate in certain circumstances

R130. Implement option 11.37 Enable tenant to give notice of intention to vacate at any time before the termination date specified by a notice to vacate under prescribed circumstances.

R131. Implement option 11.38 Enable tenant to give reduced period of notice where they have accepted offer of public or community housing.

The Tenants Union strongly supports options 11.37 and 11.38. These options will give tenants greater choice and flexibility where their housing circumstances have been influenced by external situations.
Family violence

Access to family violence protections in the RTA

R132. Implement option 12.1B Allow VCAT to also consider other evidence of family violence.

R133. Implement option 12.2 Family violence related applications to be heard by VCAT within a specified time.

R134. Implement option 12.3 An applicant may include a parent or guardian of a child who is a victim of family violence.

Evidence of family violence
The Tenants Union supports option 12.1B as this option appears to allow the broadest scope of evidence to be considered by VCAT. Under this option the Tribunal can consider a family violence safety notice, an interim or final intervention order, or other evidence of family violence including a statutory declaration or report from police, specialist family violence service, GP, psychologist/counsellor or maternal and child health nurse or worker. This option is preferred as it appears to have lower requirements than option 12.1C. This would allow the highest number of tenants who have been affected by family violence to access these provisions.

Option 12.1C seems to rely too heavily on the intervention order process, where the Tribunal would scrutinise the tenant as to where they are in the process, if they have an IVO or an application, or if the order is still in place. This appears to be a much higher test for a tenant to pass.

Not all family violence victims have IVOs and many will never obtain one for fear of repercussions. Tenants from particular cultural groups including those who are Aboriginal and Torres Strait Islander, are more likely to avoid these formal pathways and are likely not to apply for an IVO or for a safety order from the police. This is why it is vital that the broadest scope of evidence is permitted to be considered by the Tribunal.

Terminating a tenancy

R135. Implement option 12.4B Termination of tenancy by notice to vacate and amend option 12.11 to allow for the apportionment of liability in relation to utility charges.

Option 12.4B
The Tenants Union supports Option 12.4B as the better option for tenants needing to terminate their tenancy due to family violence. This option would provide for the quickest and most accessible avenue for victims of family violence to remove themselves from potentially dangerous situations.

The issue with this option is that it does not in itself provide a pathway for the apportionment of liability. If this option were introduced it would need to be in conjunction with options 12.11 and 12.12. Option 12.11 would need to be amended to allow for the apportionment of liability in relation to utility charges. If these measures were not also introduced then our preference would be option 12.4A.
**Option 12.4A**
Option 12.4A requires that VCAT considers the hardship of all parties to the agreement. This could mean considering the hardship of the excluded tenant. We recommend that the perpetrator’s hardship is not considered when terminating a tenancy. This could be achieved by maintaining the current wording used in section 233B(c) “the hardship suffered by the protected person would be greater than any hardship the landlord would suffer if the order were made.”

There is some concern that restricting VCAT to specify a termination date that must not exceed a particular date may sometimes be detrimental to tenants who have been affected by family violence. Predominantly tenants seeking a reduction of a lease will want it reduced to the end of the day of the hearing. However, some tenants will require a bit longer, particularly if they are still securing alternative accommodation. It could be harmful to these tenants if VCAT is limited to provide for example only 2 weeks more time. At the moment, the discretion works well as it enables VCAT to specify any termination date that suits the parties. There is no detriment to a landlord as they are always given a termination date in the VCAT Order.

The apportionment of claims is very beneficial in this option and it provides a much needed addition to this part of the RTA. One of the main concerns for family violence victims is whether they will be liable for damages and utility bills all of which can be clearly dealt with under this option.

**Modifications to rented premises**

R136. Implement option 12.5A Landlord not to unreasonably withhold consent.

R137. Implement option 12.5B Non-structural modifications can be made without consent.

Both option 12.5A and 12.5B are important inclusions in the current provisions. Neither of these options precludes the other as they address different degrees of modification. Option 12.5B is a necessary inclusion as it enables family violence victims to make themselves safe in the quickest timeframe, without needing to get in contact with the landlord. This option relates only to non-structural modifications, and so option 12.5A is also thought to provide additional safeguards by ensuring that a landlord cannot unreasonably refuse the installation of other, potentially larger or more intrusive, modifications. The introduction of these options would encourage family violence victims to remain at home as they would be able to quickly make changes to the property that would enable them to feel safe remaining in the property. Landlords could also enjoy the benefits of longer lasting tenancies.

**Residential tenancy databases**

R138. Implement and amend option 12.6 Prohibit estate agents and landlords from making a listing on a tenancy database.

R139. Implement option 12.7 VCAT order to remove and prevent listings in tenancy databases.

R140. Implement option 12.8 VCAT order to remove or edit information from listings in tenancy databases.

The Tenants Union supports the introduction of a provision that prohibits estate agents and landlords from making certain listings on a tenancy database. The option put forward under option 12.6 does not adequately address the issue of victims of family violence being listed on residential tenancy databases however, although it does provide a pathway for a tenant to object to a listing. This provision would be more useful if it specifically prevented a landlord from listing a tenant if they have knowledge
that the issues are due to family violence, as well as enabling a tenant to challenge a listing on the basis of family violence. This would create a presumption that they aren’t allowed to list, rather than the family violence victim being listed and then having to challenge the listing. A lot of tenants don’t receive notice of their listing, particularly those affected by family violence who may have had to flee their home into crisis accommodation.

**Challenging notices to vacate**

R141. Implement option 12.9 Enable a notice to vacate to be challenged in the context of family violence.

The Tenants Union supports option 12.9. as it provides greater protections to victims of family violence, and works to allow victims to remain in their homes wherever possible. This option strikes an appropriate balance between protections for tenants affected by family violence and the risks to landlords. The options provides that VCAT would consider the relative impact and hardship of the parties and so enables VCAT to make appropriate decisions that strike the right balance.

This option could be improved by clarifying that tenants should also have a right to challenge on this basis at the Possession Order Hearing, even if they didn’t submit a pre-emptive challenge. Many family violence victims may not receive the notice to vacate due to the nature of the family violence that they are affected by. This would be even more relevant if termination orders were introduced.

**Compensation orders and claims against the bond**

R142. Implement and amend option 12.11 Apportioning liability in the context of family violence where a perpetrator is a co-tenant.

R143. Implement and amend option 12.12 Apportioning liability in the context of family violence where a perpetrator is not a co-tenant.

The Tenants Union strongly supports option 12.11 and option 12.12, however recommends amending option 12.12 to provide the same test for family violence as presented in the other family violence options. For option 12.12 VCAT can only be satisfied that family violence has occurred if there is an intervention order in place. It is not clear why there should be a higher test to access this provision than the family violence provisions. In these circumstances the loss or damage will have been caused by a third party during the act of a crime, the tenant should not be liable for this and should be able to present any form of evidence that satisfies the tribunal as provided in other sections of the Act.

The Tenants Union recommends allowing VCAT to also apportion liabilities for utility bills as has been provided in option 12.4A.

**Serving notices and documents**

R144. Implement option 12.13A Include an option for VCAT to serve notices and documents to the perpetrator of family violence.

The Tenants Union supports option 12.13A as this option provides the greatest level of flexibility to tenants affected by family violence. At times it may be simpler for tenants to send the notice themselves, or to do so with the aid of a support worker. However providing the option for VCAT to send the notice if the tenant is not able to would of benefit to those tenants, creating better access to justice pathways.
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