

Residential Tenancies Act Review

DISPUTE RESOLUTION ISSUES PAPER

To: Residential Tenancies Act Review, Consumer Affairs Victoria
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General Comments

Fairer Safer Housing is an initiative of the Victorian Government to ensure all Victorians have access to safe, affordable and secure housing.

A component of the Fairer Safer Housing work program is the review of the *Residential Tenancies Act 1997* ('RTA') ('the Review')

The Review examines how well Victoria's rental laws work in the modern rental market, and aims to balance the rights and responsibilities of tenants and landlords.

The Law Institute of Victoria ('LIV') has made several submissions to Consumer Affairs Victoria ('CAV') on previous issues paper as part of this Review: 13 May 2016 on the *Residential Tenancies Act Review - Rights and Responsibilities of Landlords and Tenants Issues Paper* and on 21 December 2015 on the *Residential Tenancies Act Review - Security of Tenure Issues Paper*.

The LIV welcomes the opportunity to continue its contributions to the Review, and notes that CAV will be releasing an options paper detailing the outcomes of the public consultation for further discussion.

In seeking LIV member feedback to contribute to the Review, the LIV established a Working Group consisting of representatives from the LIV Retail Leases Committee, the Administrative Law and Human Rights Executive Committee and the Human Rights/Charter of Rights Sub-Committee.

Given this broad representation, the LIV considers itself well placed to contribute to the Review on both matters of law and social justice issues.

The LIV has endeavoured to contribute to all of the questions in the *Residential Tenancies Act Review: Dispute Resolution Issues Paper* ('Issues Paper').

Introduction

As the Issues Paper notes, the residential rental market is different from markets for other goods and services. Housing is an essential commodity and access to adequate housing is a human right.¹ The rental market in Victoria at present is difficult for tenants, with a lack of access to affordable housing, long waiting lists for public and community housing and limited legal and non-legal tenancy and homelessness services.

These circumstances have led to an imbalance of power between landlords and tenants (particularly vulnerable or disadvantaged tenants), which is then exacerbated by the lack of awareness among tenants of their rights, and a shortage in advocacy services to assist them in informing them of their rights and advocating on their behalf.

It is in the best interests of all parties involved, and the community more generally, to avoid preventable evictions where possible, given the costs to individuals and the broader community where tenants face

¹ See art 11 of the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) to which Australia is a party.

homelessness.² The loss of housing that can lead from eviction can also put other human rights at risk, such as the right to privacy, the protection of families and children, and the right to liberty and security.³

Currently, the dispute resolution system for the RTA does not overcome the power imbalance between landlords and tenants and has very low rates of participation by tenants. All organisations involved in the dispute resolution process need to focus on ensuring that the process is accessible to tenants, and that tenants can see the benefits of being involved in the process.

Educating tenants about their rights is essential and should be done in an innovative way to reach different audiences. Information about tenancy rights should be clear, simple and include links to relevant resources and contacts for seeking further assistance.

Increased funding for advocacy services for tenants should be prioritised. Receiving independent legal advice early on in a dispute assists both parties to reach an early resolution and potentially avoids cases going to VCAT.

Once a dispute reaches VCAT, VCAT's services need to be equally accessible to tenants and landlords. VCAT's forms and notices need to be more accessible for tenants, drafted in plain English, and VCAT should take a more proactive role in ensuring that tenants are aware of and engaged in the process.

The establishment of an internal appeals process within VCAT for Residential Tenancy List ('RT List') matters would greatly improve the accessibility of VCAT's services for tenants and landlords, as well as encouraging more consistency in VCAT decisions.

Finally, orders made through VCAT need to be able to be easily enforced and breaches of the RTA need to be investigated and prosecuted to ensure confidence in the dispute resolution system (which in turn promotes engagement with the system). We support a simplified process of enforcing non-monetary orders, as well as an increased focus on investigations and enforcement by Consumer Affairs Victoria.

LIV's responses to the specific questions in the Issues Paper are below.

² See, e.g. Kaylene Zaretsky et al, *The cost of homelessness and the net benefit of homelessness programs: a national study*, AHURI Final Report No 205 (2013).

³ See Law Institute of Victoria, Submission to House of Representatives Standing Committee on Family, Community, Housing and Youth, *Inquiry into Homelessness Legislation*, 14 August 2009, <<http://www.liv.asn.au/getattachment/c6cf7086-adb3-4921-92c3-5e6543d68085/Inquiry-into-Homelessness-Legislation.aspx>>.

Responses to Questions for Consideration

Policy Goals

1. What characteristics of the residential tenancies sector (if any) are relevant to its dispute resolution system?

All of the characteristics in paragraph 1.2.1 of the Issues Paper.

2. What are the key outcomes that a residential tenancies dispute resolution system should aim to provide for?

See our response to question 4 below.

3. What features do you consider important for effective residential tenancies dispute resolution mechanisms?

All of the features listed in table 1.1. of the Issues Paper.

4. How would you rank the importance of these features?

The LIV would rank the importance of these features as follows:

- a. Accessible
- b. Fair
- c. Certain
- d. Low cost
- e. Fit for purpose
- f. Fast

The RTA recognises the obligations and rights of both landlords and tenants and any dispute resolution system needs to enable both parties to efficiently and effectively enforce their rights.

At present LIV members report that fast and efficient resolution of disputes may be taking higher precedence over accessibility and fairness for tenants. This imbalance needs to be addressed.

Information and advice services

5. How effective are the information and advice services provided by CAV, DSCV, TAAP and other agencies as tools for parties to independently resolve disputes?

The Tenancy Advice and Advocacy Program ('TAAP') is very important and useful for providing assistance, advice and information to support vulnerable and disadvantaged tenants.

CAV is an important source of information for landlords and tenants, however it could reach more people and be more innovative in its approach. The main focus of CAV should be on providing information rather than advice (which is the main focus of TAAP).

The services provided by the Dispute Settlement Centre Victoria ('DSCV') are not utilised to a large extent by tenants and landlords. It is a voluntary, opt-in service and LIV members report that landlords generally prefer to go straight to VCAT.

6. How could the existing services be improved?

CAV could investigate more innovative ways of providing information on tenancy, with a strong focus on reaching young people and people who are disadvantaged. The RentRight App is a good example of how this can be achieved and is a useful information tool with links to relevant forms. LIV members suggest that the App could be improved with links to the tenancy hub at VCAT as well as links to other services (such as TAAP services).

CAV should also focus on providing basic tenancy rights education to school-aged children to increase the general population's knowledge about their tenancy rights and responsibilities.

7. What alternative or additional tools or initiatives could assist parties, including vulnerable and disadvantaged tenants to independently resolve disputes?

See our response to question 6 above.

Independent third-party assistance

8. How effective are the third-party assistance mechanisms provided by CAV, TAAP agencies and DSCV in dealing with residential tenancies issues?

All of the services currently provided by these agencies are optional and voluntary, and therefore they do not have a high uptake, particularly for more serious issues such as eviction. Landlords generally prefer going to VCAT to get enforceable orders rather than agreeing to use these services.

Mediation or conciliation is unlikely to be used by tenants and landlords in great numbers unless it is mandatory for some disputes. Some disputes that may benefit from mandatory mediation include rent arrears and compliance notices. This would allow, for example, payment plans to be agreed upon before a dispute reaches VCAT.

However, dispute resolution services such as mediation and conciliation need to be aware of power imbalances between the parties, and where one party is disadvantaged and may not be aware of their rights, some guidance and advice needs to be provided to correct this imbalance. The most effective way of achieving this is greater funding for independent advocacy services to assist tenants through this process and inform them of their legal rights. VCAT could also potentially play a case-management role at the preliminary stage of a dispute by setting out the rights involved and providing a realistic indication of the relative merits of each party's case.

LIV members feel that TAAP is the most useful service as it provides direct advice and support to disadvantaged tenants. This service should receive greater funding to provide these services, rather than underutilised services such as the DSCV.

9. What other relevant services of this kind are available to assist with residential tenancies disputes?

The Department of Health and Human Services funds a Social Housing Advocacy and Support Program ('SHASP') which funds case management for public housing tenants. This is an important program that should continue to receive funding to support public housing tenants to avoid losing their housing and risking homelessness.

Victoria Legal Aid provides some funding to Community Legal Centres to provide assistance on tenancy issues as well as providing tenancy advice through its duty lawyer services and Legal Help telephone line. Again, this is an important service that should receive additional funding to deliver more services.

10. What aspects of the third party assistance mechanisms work well?

Many tenancy disputes are not legally complex and simply result from a lack of awareness about rights and responsibilities under the RTA.

Third party assistance mechanisms can be a form of early intervention, by assisting in identifying and clarifying the real issues and rights in dispute and negotiating outcomes. This may lead to applying for orders by consent to VCAT, which can save valuable time. Third party assistance mechanisms and early intervention in tenancy disputes can assist in reducing eviction rates, which can reduce homelessness, and lessen the cost to the community that eviction can generate.⁴

However, it is important that these third party assistance mechanisms be informed by the law and that both parties receive information and advice about their rights. Access to an advocate early on can help resolve disputes earlier and on a fair basis for both parties.

11. What alternative or additional tools could assist parties, including vulnerable and disadvantaged tenants, to resolve disputes quickly and informally, and to prevent their escalation?

Access to support, information and dispute resolution services can be more of a challenge for tenants living in regional areas. It is important that tenants in regional areas have access to advice, education and information to allow them to exercise their rights.

It is also important to ensure that tenants are aware of where they can seek advice and information about their rights, particularly when they are facing eviction.

An obligation could be placed on real estate agents/landlords to provide information to tenants on their rights and where they can seek assistance when issues arise during the tenancy.

Under the *Retails Leases Act 2003* (Vic) most retail leasing disputes must be brought to the Victorian Small Business Commissioner ('VSBC') for mediation before they can be accepted by VCAT. The VSBC provides information to both parties about their rights and obligations as well as dispute resolution services. A similar system could be considered for residential tenancies, although it would need to be adapted to recognise the

⁴ Australian Housing and Urban Research Institute, *Evictions and Housing Management* (June 2006) <http://www.ahuri.edu.au/_data/assets/pdf_file/0010/2206/AHURI_Final_Report_No94_Evictions_and_Housing_Management.pdf?utm_source=website&utm_medium=report.PDF&utm_campaign=http://www.ahuri.edu.au/research/final-reports/94>.

greater imbalances of power in residential tenancies, as well the much greater number of disputes and the need for lower cost mediation (VSCB mediation costs \$195 per party per half day session).

CAV inspections

12. How effective are CAV's inspections activities in facilitating both independent resolution of disputes and resolution of disputes at VCAT?

LIV members report that CAV inspections are useful in assessing whether non-urgent repairs are necessary and that tenants benefit from having the independent 'circuit-breaker' of a CAV inspector attending. However, in examining the number of CAV reports for goods left behind, non-urgent repairs and rent increases it is clear that landlords are using CAV's investigations powers to a much greater extent than tenants. In particular, disputes around repairs are very common and the fact that there are fewer non-urgent repair reports indicates that tenants are not as aware of their rights and how to enforce them.

CAV's function to perform inspections to value the goods left behind after a tenancy has terminated is not mandatory. However, in LIV members' experience most landlords/agents use this mechanism to obtain a valuation that will protect them from subsequent compensation claims a tenant might choose to pursue if goods of value are disposed of.

There are ways in which CAV's inspections for Goods left behind could be improved to better protect the rights of tenants to recover their property (see our response to question 13 below).

13. How could CAV's inspections activities be improved?

Currently, there is no obligation on CAV inspectors to attempt to negotiate for a tenant to have a chance to access their goods left behind, prior to disposal, in circumstances where CAV have determined the goods' value will not satisfy the costs of 28 days storage (RTA s 385).

In LIV members' experience, a landlord seeking to obtain a CAV inspection will ordinarily need to wait at least 7 days for the inspection to occur, and then there may be a further period to arrange for removal of the goods if they are deemed of insufficient value to store.

It will often be in a landlord's interest if a previous tenant can remove the belongings themselves during this period. This would avoid the landlord incurring removal costs which would then need to be pursued from the tenant's bond, possibly through VCAT if an agreement cannot be reached.

The LIV suggests that CAV could be required to seek to negotiate for a tenant to remove their goods once CAV has received a request to inspect goods left behind and prior to conducting a valuation. This would be possible if the landlord was required to provide a tenant's contact details when making the application for an inspection of goods left behind.

A similar requirement could be placed on CAV to notify (or attempt to notify) a tenant of the outcome of the valuation where the goods have been deemed of insufficient value. CAV could then offer to negotiate a pick up time with the landlord within a short timeframe (e.g. 48 hours).

This would provide tenants with a greater opportunity to retain goods of personal value, and landlords could avoid additional costs in removing goods left behind.

14. How could CAV's inspections activities be of greater benefit to vulnerable and disadvantaged tenants?

For victims of family violence, removal of goods left behind is a frequent issue where a woman has been forced to flee a property and/or terminate a tenancy early due to family violence.

It can be difficult and expensive to arrange removal and storage of goods at short notice given the current shortage of accommodation options for many victims of family violence who are forced to flee rented premises.

CAV inspectors could play a role in assisting women in these circumstances. The suggestions made in our response to question 13 would provide victims of family violence with greater opportunity to regain personal belongings.

In addition, CAV inspectors could provide to tenants whose belongings were at risk of disposal details of local services that may be able to assist with brokerage for storage (noting that eligibility criteria and available services would need to be determined).

One example of a similar model is the Department of Justice and Regulation, Consumer Affairs Victoria (CAV) project in the South East Metropolitan region, which we understand is establishing a new initiative to assist women to recover their belongings after leaving a rental property when they escape family violence. Under the initiative, family violence services in the area can contact CAV directly when they become aware of a woman who needs to leave a rental property in order to escape family violence. Rather than simply undertaking the usual procedures to value the goods and issue a notice to store or destroy the items, CAV can also make arrangements with service providers to recover and store the belongings until they can be reclaimed by the woman.

Such a model could be evaluated, and if deemed successful, rolled out on a state-wide basis and possibly opened up to other categories of tenants experiencing hardship.

15. What (if any) alternative or additional areas of dispute would be appropriate for the Director of CAV (or another agency) to have powers to intervene?

The LIV does not currently hold a view on what additional areas of dispute would be appropriate for the Director of CAV to have powers to intervene.

Victorian Civil and Administrative Tribunal

16. How effective are the ADR, hearings and other services provided by VCAT?

As the Issues Paper highlights, landlords use the services provided by VCAT at a much higher rate than tenants, and tenant attendance at hearing is also very low. These low participation rates by tenants need to be recognised and addressed by VCAT and in our members' experience they indicate that tenants view VCAT as inaccessible and intimidating. It is also indicative of tenants' general lack of knowledge about rights and how to enforce them.

LIV members report that due to the low numbers of tenants who attend hearings, each hearing is only allocated 6-10 minutes with the presumption that the tenant will not attend. This can cause issues when a tenant does attend a hearing with a legal representative as the Tribunal is not prepared to accommodate more lengthy legal disputes within the allotted time.

The LIV feels that the RT List is too focused on efficiency rather than fairness and accessibility for tenants and that this power imbalance needs to be addressed. VCAT receives funding from interest on tenants' bonds held by the Residential Tenancies Bond Authority for the RT List, and the List needs to cater equally to both landlords and tenants.

17. How could VCAT's services be improved?

Internal Appeals Division

LIV's recent submission to the Access to Justice Review recommended that VCAT establish an internal appeal division for small civil claims.⁵ This reform is relevant to and would be particularly beneficial in the RT List as it would allow for a faster, cheaper and more accessible appeals process for landlords and tenants, as well as encouraging consistency in decision-making.

While Victoria led the way in creating an amalgamated tribunal, we have fallen behind in the development of internal appeals process with regards to other Australian jurisdictions. Currently, tenants and landlords are required to appeal decisions of the VCAT Residential Tenancies List to the Victorian Supreme Court. The Supreme Court is an intimidating venue for appeals, particularly for self-represented individuals. The process of appealing to the Supreme Court undermines the accessibility and low cost of VCAT and reduces the accountability of VCAT decision-makers.

The lack of an easily available appeals process has implications for the consistency of decisions of VCAT Members. LIV members have expressed concerns about the unpredictability of VCAT decisions in the RT List, which raises a rule of law issue, namely that the law must be both readily known and available, and certain and clear.⁶ While there can be legitimate areas of dispute and discretion, the scope of that discretion needs to be relatively certain so that tenants and landlords can rely on decisions and interpretations of the legislation.

As we note earlier in this submission, accessibility is of key importance in the RT List, and the current requirement for appeals to be taken to the Supreme Court fails to provide this access to justice. LIV members have reported that they have had many experiences where parties to a Residential Tenancies dispute have decided not to appeal a decision, despite grounds for appeal being present, because of the cost, delay and formality of an appeal to the Supreme Court.

An internal appeals process for the Residential Tenancies List would:

- Provide both parties with a more accessible, affordable and timely right of appeal;
- Enhance the consistency, predictability and quality of decision-making in the RT List; and

⁵ Law Institute of Victoria, Submission to Department of Justice and Regulation, *Access to Justice Review*, 1 March 2016 <<http://www.liv.asn.au/getattachment/48178fb2-b3d7-4896-9df3-15844f3e5af4/Department-of-Justice-and-Regulation-Access-to-Jus.aspx>> 65-66; and Law Institute of Victoria, Submission to The Honourable Justice Bell, *President's Review of the Victorian Civil and Administrative Tribunal*, 22 June 2009 <<http://www.liv.asn.au/getattachment/bc3e6ad4-29bc-4238-a80e-76743cbaa1b6/Presidents-Review-of-the-Victorian-Civil-and-Admi.aspx>> 16-18.

⁶ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011 <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>>.

- Encourage the RT List to build up a bank of jurisprudence that could provide guidance to parties and to VCAT members.

These benefits were recognised by Justice Bell, previous President of VCAT in his 2009 'One VCAT' review, which recommended that an appeal tribunal be established within VCAT and suggested a number of important criteria to be considered.⁷

Justice Ross, the following VCAT President, considered Justice Bell's recommendations in his review, 'Transforming VCAT' and expressed reservations relating to increasing cost and delays to VCAT and how the appeals process would work in practice.⁸ These concerns can, however, be addressed.

Across Australia there are now a range of amalgamated tribunals, all of which, except for the Northern Territory Civil and Administrative Tribunal, include an internal appeals process for residential tenancy cases. As Victoria Legal Aid notes in its submission to this Issues Paper, internal appeals make up only a small proportion of the total matters heard at other amalgamated tribunals around Australia and there has been minimal impact on clearance rates.

While there will be some additional resources required for an internal appeals system, the costs should not be great and appeals are likely to be heard more quickly than when appeals are required to be listed with the Supreme Court.

There are a number of different models and mechanisms that can address the other issues raised by Justice Ross in his review.

We propose the following criteria be considered for an internal appeals division:

- Internal appeals should be available for error of law and fact or both.
- The threshold requirements for internal appeals should be clearly and expressly stated to assist self-represented parties and to guide VCAT Members when making primary decisions.
- A balance needs to be struck between allowing parties to access an accessible internal review through VCAT and also acknowledging the efficiency and resourcing constraints on VCAT. This balance could be achieved through a requirement to seek leave for all applications for internal review, or only for errors of fact.
- If there is a requirement to seek and obtain leave for the internal reviews process, then the decision to refuse leave for internal review should be appealable to the Supreme Court.
- Appeals to the Supreme Court should be retained, but only exercisable following an appeal within VCAT, or where an appeal is on a question of law (with both parties' consent).
- Parties to an appeal should have the right to be legally represented.

⁷ The Honourable Justice Bell, *One VCAT: President's Review of VCAT*, 30 November 2009, 55-61.

⁸ The Honourable Justice Ross, *Transforming VCAT: Towards a three year strategic plan - Discussion Paper*, May 2010, 22-23.

- Consideration should be given as to the appropriate Members to hear internal reviews. Members hearing reviews should generally be more senior or experienced members, as their decisions will provide guidance to other Members. Members hearing reviews on errors of law should be legally qualified.
- The appeal division should have the ability to develop its own jurisprudence and rules of precedent as appropriate to promote consistency among RT List Members.

The LIV is willing to participate in any further consultations on the most appropriate model for an internal review process, if this suggestion is taken up as a recommendation for the public options paper.

18. What are the obstacles (if any) to tenants or landlords in taking appropriate matters to VCAT?

LIV members report that tenants often perceive VCAT as intimidating and inaccessible and fear adverse action from their landlords if they take action through VCAT. As the Issues Paper notes, VCAT applications by tenants only make up 6.6% of the total amount of applications in the RT List and this is an issue that needs to be addressed.

Tenants need to be encouraged to see VCAT as an accessible venue that assists both parties. LIV members report that the outcomes are generally better for tenants when they attend a hearing – VCAT Members can be flexible and outcomes can be arrived at that suit both parties.

One way of encouraging tenants to see VCAT as accessible and relevant to them would be to include examples of how VCAT has assisted tenants (and landlords) on the VCAT website. The New South Wales Civil and Administrative Tribunal website includes tenancy case studies which demonstrate that decisions can assist both tenants and landlords.⁹ This could form part of a border review of VCAT’s website, called for by the LIV in our recent submission to the Access to Justice Review.¹⁰

19. What barriers or obstacles are there to enforcing VCAT orders, and how can these be improved to achieve compliance with orders?

LIV members are concerned about the difficulty their clients have in enforcing VCAT orders, particularly orders being received by tenants such as e.g. an order that a landlord allow a tenant back into premises from which they have been removed unlawfully.

The LIV supports Victoria Legal Aid and Justice Connects’ recommendations that a simpler process for the enforcement of non-monetary VCAT orders be introduced.

Currently there are three ways in which a tenant can try to have a non-monetary order enforced:

- Ask Victoria Police to enforce the order;
- Bring enforcement proceedings in the Supreme Court; or

⁹ See NSW Civil and Administrative Tribunal, *Tenancy Case Studies: Consumer and Commercial Division* (6 June 2016) <http://www.ncat.nsw.gov.au/Pages/cc/Divisions/Tenancy/tenancy_case_studies.aspx>.

¹⁰ Law Institute of Victoria, Submission to Department of Justice and Regulation, Access to Justice Review, 1 March 2016 <<http://www.liv.asn.au/getattachment/48178fb2-b3d7-4896-9df3-15844f3e5af4/Department-of-Justice-and-Regulation-Access-to-Jus.aspx>> Recommendation 53, 76-77.

- Bring VCAT proceedings for contempt.

LIV members report that Victoria Police are unlikely to play a role in enforcing an order under the RTA as they see it as a 'civil law' issue, and frequently are unaware of the powers they have in relation to the RTA.¹¹ This could be remedied through improved education of Victoria Police of their powers to assist in the enforcement of these orders.

Bringing enforcement proceedings in the Supreme Court is lengthy, expensive and inaccessible. It requires tenants to undertake a number of steps to get a certified copy of the order, prepare an affidavit and obtain a certificate from VCAT that the order is appropriate for filing at the Supreme Court (see s 122 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act')).

This is a long process that is not appropriate for the enforcement of non-monetary orders, which often require urgent enforcement to be effective. LIV members report that VCAT does not have a clear process for dealing with these requests for certificates to take to the Supreme Court.

A tenant also has the option of bringing contempt proceedings against the landlord for failing to comply with an order¹² (s 137 VCAT Act). However, the process for bringing contempt proceedings is quite lengthy and complex and VCAT notes it should be used as a last resort.¹³

LIV recommends that the process for enforcing non-monetary orders at VCAT be reviewed and simplified. The Magistrates' Court would be a more appropriate court for enforcing VCAT non-monetary orders and the process for applying for an enforcement should be streamlined (e.g. it should not be a requirement to obtain a certificate from VCAT that the matter is appropriate for filing). This could be similar to the process for enforcing monetary orders from VCAT through the Magistrates' Court.

20. What particular or additional barriers or obstacles are there for vulnerable and disadvantaged tenants in accessing or utilising VCAT's services, or defending cases that have been brought to VCAT against them, and how can these be addressed?

The LIV notes the very low attendance rates by tenants at VCAT hearings. As our response to question 16 above notes, VCAT needs to play a role in assisting all parties to the RT List to have equal access to VCAT's services, and that where there is a power imbalance, differential treatment may be necessary to ensure substantive equality. Encouraging more tenants to attend hearings could reduce the cost and delays associated with re-hearings and would benefit tenants and landlords.

These are some of the issues that LIV members have noted as barriers to tenants accessing VCAT services:

- The Notice of Hearing document sent out to parties is not user-friendly. The information on the Notice needs to be clearer (in plain English) and should include information on legal services available for tenants.

¹¹ These include, e.g. prosecutorial powers under s 508(1) RTA.

¹² See VCAT Act s 137.

¹³ Victorian Civil and Administrative Tribunal, *Bringing Contempt Proceedings Under Section 137 of the Victorian Civil and Administrative Tribunal Act 1998* (1 April 2004) <https://www.vcat.vic.gov.au/sites/default/files/guidelines_for_contempt_proceedings.pdf>.

- VCAT needs to be more flexible in its methods of contacting tenants. LIV members report that mobile numbers are generally the most effective way of reaching tenants and that they should be used where possible to send information (in addition to posting information by mail). LIV welcomes VCAT's introduction of hearing date notifications by text message. Landlords should be required to provide the tenant's mobile number on their application form.
- For tenants facing eviction, VCAT should be more proactive in contacting the tenant personally to encourage them to attend the hearing (e.g. a Community Engagement Officer could briefly call tenants facing eviction to explain the process and the potential benefits of them attending the hearing).

The LIV has also previously advocated for amendments to the Victorian *Charter of Human Rights and Responsibilities* ('Charter') to provide VCAT with the original jurisdiction to consider breaches of s 38 of the Charter by a public authority.¹⁴ This would allow tenants of public authorities such as the Director of Housing to have a direct cause of action to VCAT for breaches of the Charter and would assist in providing for accessible, just and timely remedies for infringements of vulnerable and disadvantaged tenants' basic human rights. This recommendation is supported by Recommendation 27 of the Independent Reviewer's *Final Report*.¹⁵ A separate and direct cause of action to VCAT for breaches of the Charter would avoid the difficulties that have developed through cases such as the Director of *Housing v Sudi*¹⁶ and *Burgess v Director of Housing*.¹⁷

LIV's submission to the Charter Review also contained a number of recommendations aimed at clarifying the definition of 'public authority' under the Charter and the application of the Charter to non-State entities when they provide State-funded services.¹⁸ Clarification is particularly necessary for community housing providers, as LIV members have identified that some service providers currently take the position that they are not public authorities under the Charter and thus make it difficult for tenants to determine whether they can bring Charter arguments relating to that provider. The *Final Report* by the Independent Reviewer includes three recommendations to clarify the Charter's coverage of functional public authorities:

Recommendation 12: Section 4 of the Charter be amended to set out a non-exhaustive list of functions of a public nature under section 4(1)(c), including: ...

(d) the provision of public housing, including by registered housing providers

Recommendation 13: The Victorian Government use the Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013 (Vic) to prescribe entities to be or not be public authorities—including entities that provide services under national schemes—where necessary to resolve doubt.

¹⁴ Law Institute of Victoria, Submission to Independent Reviewer Michael Brett Young, *2015 Review of the Victorian Charter of Human Rights and Responsibilities*, Recommendations 18-19.

¹⁵ Independent Reviewer Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, September 2015, 133 ('*Final Report*').

¹⁶ (2011) 33 VR 559.

¹⁷ [2014] VSC 648.

¹⁸ Law Institute of Victoria, Submission to Independent Reviewer Michael Brett Young, *2015 Review of the Victorian Charter of Human Rights and Responsibilities*, Recommendations 13-17.

Recommendation 14: A whole-of-government policy be developed for relevant State contracts to include terms that contracted service providers will have public authority obligations when performing particular functions under the contract and a provision be included in the Charter to authorise this.

Sector-wide compliance and enforcement

21. How effective are the compliance and enforcement functions provided by CAV?

LIV members report that CAV's voluntary compliance functions are relatively easy to access and efficient. The CAV will often conduct voluntary discussions over the phone in an effort to seek compliance. It is unclear as to how effective this method is for resolving disputes or ensuring that a party complies with the relevant provisions of the RTA.

The effectiveness of CAV's education and information services is discussed earlier in our response to questions 5 and 6.

22. How could CAV's compliance and enforcement functions be improved?

LIV members are concerned that the number of investigations and prosecutions undertaken by CAV are quite low with only 24 investigations and 2 prosecutions commenced in 2014-15. To enhance confidence in the system and increase accountability, LIV suggests that this situation needs to be examined with a view to increasing the amount of resources for these functions.

LIV members have suggested that a specific offence for landlords who refuse to engage with CAV in the investigation of a potential breach of the RTA might assist in ensuring that more landlords engage with CAV when a breach is reported, which may lead to greater enforcement and enhanced accountability.

How effective is the current system for residential tenancies dispute resolution?

23. What are the problems, issues and gaps (if any) that impact the effectiveness (comprehensiveness, coherence and efficiency) of the overall system for dispute resolution in residential tenancies?

Many of the issues and gaps have been previously discussed in our responses.

In summary they are:

- The low participation of tenants in the dispute resolution process. Any dispute resolution process needs to be accessible and useful to all users. All organisations involved in the process need to work to encourage tenants to engage with the process and highlight the benefits they can gain from using these services (see our response to question 16 above).
- Education of tenants about their rights is also crucial so that they feel empowered to participate in the system and enforce their rights. In time, increased knowledge of rights of all parties will assist in reducing the amounts of unmeritorious cases and will increase the likelihood that meritorious cases will be brought by both tenants and landlords (see our responses to questions 6, 8, 10, 11 above).

- There needs to be greater funding of tenant-focused advocacy and support services, to assist tenants in recognising and enforcing their rights under the RTA (see our response to question 25 below).
- VCAT's procedures and forms need to be made more accessible, with simple forms and notices drafted in plain English that highlight time-critical events and include details of where tenants can go to seek advice. VCAT also needs to take a more proactive approach in ensuring that tenants are engaged in the process, particularly where tenants are facing eviction (see our response to question 20 above).
- VCAT decisions are currently unaccountable due to the difficulty in taking appeals to the Supreme Court – this affects the coherence and consistency of VCAT decision-making. We propose that an internal appeals process be established (see our response to question 17 above).
- Enforcement of orders and investigation of breaches needs to be enhanced. If orders cannot be enforced in a simple and cost-effective manner, this will reduce confidence in the system and the likelihood of tenants participating in the system in the future. We propose a simplified process of enforcing non-monetary orders above (see our response to question 19 above) and also a stronger focus on investigations and enforcement by CAV (see our response to question 22 above).

24. What additional information or data would assist in evaluating the effectiveness of the residential tenancies dispute resolution mechanisms and the system as a whole?

Further information about the enforcement activities of CAV would be helpful in identifying the barriers to enforcement which could then be addressed to ensure that there is a meaningful deterrent for non-compliance with provisions of the RTA. This could include e.g. the number of matters referred to CAV for investigation, as opposed to the number of investigations actually conducted and explanations of how CAV decides which cases to prosecute.

We have noted in our response to previous questions that tenant attendance rates at VCAT are quite low. It would be useful to monitor these rates to assist in analysing how effective strategies are to increase this attendance.

In relation to education and information services, users of services, such as the RentRight app, could be asked whether the information provided to them answered their questions and was of assistance (in the form of a short survey).

25. What changes or improvements to the residential tenancies dispute resolution system would better enable vulnerable and disadvantaged tenants to engage in the processes and have their disputes resolved?

As discussed above, greater funding of direct tenant advocacy services is needed, including SHASP, Community Legal Centres, TAAP and Victoria Legal Aid civil law legal services.

Vulnerable and disadvantaged tenants are not equipped to negotiate or participate in dispute resolution processes independently. The presence of a legal advocate early on in the process can inform parties of the law and can facilitate an outcome that benefits all parties involved, which can then lead to resource savings for VCAT and the broader community where adverse outcomes such as evictions take place.

Other dispute resolution models and mechanisms

26. What alternative or additional mechanisms used by other jurisdictions or sectors (or aspects thereof) would be suitable for residential tenancies dispute resolution in Victoria?

As we discussed above in our response to question 17, the LIV supports the establishment of an internal appeals division in VCAT for the RT List. An internal appeals process currently exists in a range of other Australian jurisdictions, including NSW and Queensland.

27. What would be the advantages and disadvantages of adopting any of the dispute resolution models or mechanisms described in this section for residential tenancies disputes resolution in Victoria?

An internal appeals process in VCAT for RTA matters would enhance the consistency of VCAT decisions, allow VCAT to develop a bank of jurisprudence in the RT List, be more accessible for both parties to appeal decisions and would save time and money in comparison to taking appeals to the Supreme Court.

The New Zealand model for facilitated self-resolution may work well for facilitating agreement where there are rent arrears. Again, advocacy services for tenants early on in the process would be necessary to ensure that tenants were aware of the options for repayment plans and their relevant legal rights.

28. What features and considerations would be important for a compulsory mediation or conciliation step to be effective in resolving residential tenancies disputes?

Tenants generally have far less knowledge of their rights under the RTA than landlords and agents. This creates an imbalance of power between the parties that would need to be addressed to ensure substantive equality in the process if compulsory mediation or conciliation were to be introduced. Tenants (particularly vulnerable or disadvantaged tenants) would need to be provided with an advocate to inform them of their rights and to assist them to mediate an outcome that would be fair for both parties. Alternatively, the mediator/conciliator would need to take an active role to ensure that the less powerful party was properly informed of their rights and the implications of any decision.

To be efficient and effective, it would be good to have a mechanism for narrowing the facts in dispute and the relevant law prior to commencement of mediation, however, this would also depend on the tenant having access to a legal advocate prior to mediation to receive legal advice about the issues in dispute.

It is the LIV's position that focusing on increasing access to advocacy for tenants would be more effective in resolving disputes early, narrowing the issues in dispute and ensuring a fairer outcome for all parties, rather than a focus on compulsory mediation (which would need to include advocacy services for tenants anyway to address the power imbalance that currently exists).