

To: Residential Tenancies Act Review

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The Hon Marlene Kairouz MP

Minister for Consumer Affairs, Gaming and Liquor Regulation
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Mr Simon Cohen

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CC: The Hon Martin Pakula MP

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By email

24 February 2017

Dear Minister, Mr Cohen and Review Team,

RTA Option 10.4A – Introduce re-hearing process for Residential Tenancies cases at VCAT

We, the undersigned organisations, as peak bodies and legal assistance providers representing landlords, tenants and solicitors working in the Residential Tenancies List of VCAT, welcome the inclusion of option 10.4A in the Residential Tenancies Act Review *Options Discussion Paper*.

Option 10.4A proposes the introduction of a re-hearing process for residential tenancies cases at VCAT, as we recommended in our previous joint letter and briefing paper proposing an internal appeals division.¹

Together we urge the Victorian Government to adopt the re-hearing option to address sector-wide concerns about the lack of consistency and predictability of RT List decision-making, the current inaccessible appeal rights and the lack of sufficient oversight of decision-making.

We represent the vast majority of users of the RT List, both landlords and tenants. Based on the experience of our members and clients, it is our view that a re-hearings process for the RT List would be the most effective way to address our concerns about the quality and accountability of decision-making in the List.

A re-hearings process for the RT List would uphold VCAT's purpose of resolving disputes quickly, effectively and finally. It would promote public confidence in the RT List and would enhance VCAT's accessibility.

Our joint response to the issues and questions outlined in the Options Paper is below.

¹ Community Housing Federation of Victoria, Tenants Union of Victoria, Justice Connect, Real Estate Institute of Victoria, Law Institute of Victoria and Victoria Legal Aid, Joint letter to the Minister for Consumer Affairs, Gaming and Liquor Regulation and the Attorney-General, *Re: An Internal Appeals Division for the Residential Tenancies List* (5 December 2016).

1. A peer process would not address stakeholder concerns about accountability

The Options Paper also proposes another option for addressing concerns about quality of RT List decision-making: peer-to-peer review of decisions of non-judicial members.

We do not believe that this option alone, without a re-hearings process, would address our concerns relating to the consistency, transparency and accountability of decision-making, and the current expense and complications of appealing to the Supreme Court.

However, we do support peer review as an additional measure as part of the training and performance management process for members.

2. Our members and clients' experience with RT List decision-making

The Options Paper asks whether further information is required to determine the extent to which there is a problem with the quality of VCAT decision-making.

The current manner of recording RT List decisions creates difficulties for undertaking a comprehensive survey of the quality of decision-making. Decisions are generally not provided in written form, and very few decisions are appealed due to the difficulty, expense and delay in appealing decisions to the Supreme Court, even where parties may feel that they have strong grounds for review. Introducing a re-hearing process would allow a body of jurisprudence to be developed that would guide future decision-making and allow inconsistent decisions to be identified and reviewed.

The strong perception of our members and clients, based on their experience as the main users of the RT List, is that there are clear concerns about the lack of consistency and fairness of decision-making, which it is currently very difficult to address due to inaccessible appeal rights. This practical experience should be recognised and given appropriate weight.

This perception is a serious issue that needs to be addressed and it has important consequences for the trust and confidence of users of the List, and the broader community, in the decision-making of the RT List. VCAT is the primary justice institution that the general public are aware of and interact with, and if confidence is lost in the RT List, this could have repercussions for the public's confidence and trust in the justice system more generally.

3. RT List decisions have a substantial impact on the parties involved

The Options Paper notes that an internal appeals process was not recommended for the civil claims list by the Access to Justice Review due to the cost involved being disproportionate to the value of a small claim.

The residential tenancies cases heard by the RT List have a much more substantial impact on the parties involved, and society more generally, than those heard in other lists, including the civil claims list. RT List decisions address issues such as insecure tenure and eviction, extensive property damage or unpaid rent.

These decisions often have consequences that flow beyond the parties involved. For example, if homelessness occurs as a result of an RT List decision, this has flow on costs and burdens for the community and support services more generally, as well as affecting the fundamental rights of the parties involved.

We believe that the extensive impacts of RT List decisions supports the need for a re-hearing process, similar to that which already exists under the *Guardianship and Administration Act 1986*, *Power of Attorney Act 2014* and the *Disability Act 2006*.

4. Features of a re-hearing process

We generally support the proposed key features of a re-hearing process, as set out in the Options Paper. However, further consultation would be required on the practical details of the process if it is adopted by the Victorian Government. In particular we note that there should be a requirement to demonstrate an arguable error at the point of requesting leave to re-hear. This will assist in ensuring that the re-hearings process is only accessed where necessary.

We suggest that a short hearing be held once a written application has been lodged requesting a re-hearing. At this hearing, the member could determine whether to grant leave for the re-hearing and, if leave is granted, decide whether to stay the final order before a separate final re-hearing on the merits. The first hearing should be held without delay to ensure that parties do not use the re-hearing process to defer a final outcome.

We support a small fee arrangement for re-hearings, provided that there are appropriate concession rate and fee waiver options.

5. Addressing cost and delay concerns

The Options Paper notes that a re-hearing process for the RT List may impose additional costs for VCAT and costs and time delays for the parties involved.

We note that the Residential Tenancies Fund, funded by the interest earned on tenants' bonds held by the Residential Tenancies Bond Authority, makes a substantial annual contribution to the cost of the RT list. This should be taken into consideration when deciding whether to support a relatively small increased cost for the List (looking at other jurisdictions) to provide enhanced accessibility and services for tenants and landlords using the List.

We acknowledge that a re-hearings process may involve some increased fees and time delays for the parties involved. However, our members and clients are willing to accept this in order to have a fairer, more accessible system. Unnecessary re-hearings and delays can be avoided through a leave requirement, ensuring that the re-hearings process is only available for meritorious cases. We also note that the costs and delays are likely to be substantially less compared to the current appeals process to the Supreme Court, while greatly improving accessibility.

Further, the development of jurisprudence through publication of review proceedings by more senior members would guide initial decision-making. This would lead to fewer errors in the first instance and ultimately assist parties to predict how potential disputes would be determined, leading to fewer applications to the Tribunal.

This review is an opportunity for Victoria to join other Australian jurisdictions in providing an accessible means of review of residential tenancy decisions that will enhance public confidence in the quality and consistency of RT List decision-makings.

We would welcome discussing the proposed re-hearing option with you further.

Please contact Damian Stock, Acting Project Manager – Social Inclusion, Victoria Legal Aid ((03) 9269 0698 or damian.stock@vla.vic.gov.au) or Kate Browne, Lawyer, Law Institute of Victoria on (03) 9607 9489 or kbrowne@liv.asn.au in relation to this letter and briefing paper.

Yours sincerely,



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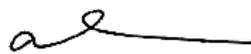
Fiona McLeay

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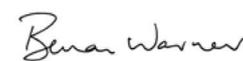
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