



**Community
driven justice.**

Submission to the Social Housing Regulation Review

29 September 2021

Fitzroy Legal Service acknowledges that we work on the land of the Kulin Nations. We pay our respects to the Traditional Custodians of the land, and Elders past and present.

We are grateful to our clients, colleagues and community for trusting us with their stories and for granting us permission to use and share their experiences in this document.

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About FLS

Fitzroy Legal Service (FLS) was established in 1972 and is one of the oldest community legal centres in Australia. In 2019 we merged with the Darebin Community Legal Centre and now operate from three offices: Fitzroy, Reservoir and the Neighbourhood Justice Centre in Collingwood.

We also deliver legal services through a range of outreaches including alcohol and other drug services, needle and syringe programs and the Medically Supervised Injecting Room, St Vincents Hospital complex care services, specialist youth, mental health and LGBTIQ services. FLS also provides duty lawyer services at the Neighbourhood Justice Centre in Collingwood and the Heidelberg Magistrates Court, as well as running a state-wide prison advice line.

FLS provides criminal, family, family violence and generalist legal services to socially and economically disadvantaged clients. A key focus of our legal practice is people who are stigmatised and criminalised due to poverty, homelessness, childhood abuse, family violence, trauma, drug use, psycho-social disability, contact with the criminal justice system and incarceration.

FLS also operates a free legal advice service on weekday evenings, which provides legal advice and limited representation regarding a range of issues including employment, tenancy, debts and infringements

Our work in tenancy law often intersects with our clients' criminal law and family violence matters. As set out below, this submission focuses in particular on this intersection.

About this submission

We submitted, along with other community legal centres, a response to the release of Consultation Paper 1. We build on those submissions here with a focus on strengthening social housing regulation for people who are criminalised in order to minimise or eliminate barriers for our clients accessing and maintaining housing. We have chosen this focus because many of our clients are from criminalised and over-policed communities, have current or previous contact with the criminal legal system or are currently or formerly incarcerated. Effective and fair social housing regulation can promote access to safe and stable housing for our clients, which is a necessary component of breaking the cycle of criminalisation and incarceration.

This submission is broken down into the following parts:

1. The current social housing landscape: what this means for our clients
2. Accessing social housing: discrimination on the basis of criminal histories
3. Staying in social housing: temporary absences during incarceration
4. Staying in social housing: alternatives to eviction

Recommendations

1. That the Victorian Government:

- **capture and publish information about VHR allocations made according to:**
 - **provider**
 - **whether the person or family allocated is a member of a priority group and if so, which group**
 - **income source**
- **ensure social housing allocation policies and processes do not allow for discrimination on the basis of criminal histories.**
- **mandate that social housing providers to house a mix of tenants so that people or families with complex needs, including histories of criminalisation and incarceration, are not disadvantaged in the allocation process.**

2. That community housing providers be required to institute temporary absence policies that are at least commensurate with current public housing policies allowing a temporary absence for up to 6 months.

3. That, in the absence of a demonstrable and immediate threat to the safety of other people, social housing providers be:

- **required to adopt a harm minimisation approach to drug-related offending**
- **prohibited from evicting tenants for illegal purposes if the person has not yet been convicted or sentenced to a term of actual imprisonment of more than 6 months.**

4. That any Model Rules provide a prescriptive approach to evictions that:

- **ensures evictions are a genuine last resort by limiting evictions to circumstances in which there is a genuine and immediate threat to safety of others, and**
- **requires social housing providers to refer tenants to independent housing support workers and take the following steps before commencing eviction proceedings:**
 - **communicate with the tenant**
 - **identify and assess the appropriateness of all options short of eviction, including referring to support services or alternative dispute resolution**
 - **ensure the tenant has access to an independent housing support worker to help sustain the tenancy**
 - **transfer the tenant to an alternative housing worker, if that relationship is affecting the viability of the tenancy**
 - **where possible transfer the tenant to another property if that could help sustain the tenancy.**

5. That the implementation of the Model Rules be supported by adequate resourcing of independent social housing support services, including free legal assistance services.

The current social housing landscape: what this means for our clients

More spending on community housing – the need to end the two-tier system

We understand that future growth in social housing is likely to be largely or entirely in community housing, as opposed to public housing. In particular, the Big Housing Build will focus predominantly on expanding the community housing sector. We share our colleagues' concerns that more community housing without stronger protections for community housing tenants will entrench the current troubling two-tier approach to social housing. We understand that it is more difficult for community housing tenants to sustain their tenancies compared to people living in public housing. Data from the Australian Institute of Health and Welfare shows that 32.6 per cent of community housing tenancies end before 1 year, compared with 17.4 per cent of public housing.¹

We have also heard from colleagues in the housing and community legal sectors that because of the lack of transparency and oversight, decisions about allocating tenants to properties and commencing eviction proceedings often appear arbitrary and unfair. We set out below a case study that shows what this means in practice for our clients. The particular implications of this for people who are criminalised and incarcerated are set out in more detail in this submission.

Case study: Jess

Jess is a woman in her mid-30s living in community housing. Jess grew up in care and had experienced significant trauma in her childhood. In her adulthood, she was navigating some acute health and mental health problems.

When she contacted us, Jess had been living with her grandfather in social housing for 2 years. Her grandfather had been living in that property for over 15 years. Given she moved around so much when she was a child, she felt this was the only home she ever really had. When her grandfather decided to move interstate to be with family, he asked to transfer the property to Jess. This request was refused.

Jess's housing support worker and FLS both advocated strongly on her behalf, but without success. Instead, the community housing provider commenced eviction proceedings against Jess on the basis that she was illegally occupying the property because she hadn't been formally registered as a tenant before the transfer request was made. This consideration wasn't part of the community housing providers publicly available policies, nor were any other attempts made to resolve the situation before eviction proceedings commenced.

The matter ultimately went before VCAT, who created a tenancy in favour of Jess under the Residential Tenancies Act.² This would not have been necessary had Jess lived in public housing, where there are fewer barriers to transfer requests. Jess likely would have been evicted without FLS's legal representation.

¹ Australian Institute of Health and Welfare, *Housing assistance in Australia 2020 – Length of household tenure*, online < <https://www.aihw.gov.au/reports/housing-assistance/housing-assistance-in-australia-2020/contents/occupants-and-households#length> > (accessed 29 September 2021).

² See *Residential Tenancies Act 1997* (Vic) s 91S.

Moreover, the major community housing providers in Victoria are getting larger. In the context of such acute scarcity of social housing, we have heard colleagues in the housing support sector describe feeling limited in their capacity to strongly advocate for their clients for an appropriate outcome. In other words, there is a fear that 'pushing too hard' to get the right outcome for one client could jeopardise a relationship with a community housing provider, and in turn, the housing prospects of other clients in need.

These broader structural shifts highlight the urgency of the Social Housing Regulation Review, and in particular the importance of greater transparency, fairness, protections and avenues for review than currently exist. We strongly support recommendations made by Justice Connect and Tenants Victoria that:

- all social housing providers be subject to the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including community housing providers (this is discussed briefly in more detail below).
- Promote renter empowerment
- Improve renters' access to information (noting that we agree with Tenants Victoria's observation that choice is currently a hollow concept in Victoria's social housing system)
- Promote adherence to appropriate performance standards, transparency and accountability
- Improve dispute resolution processes and access to specialised and integrated supports.

We support Tenants Victoria's recommendations regarding the Victorian Housing Register and allocations policy, and we make a more specific recommendation to ensure people who are criminalised, have histories of incarceration and/or who are marginalised on account of their drug use have equitable access to social housing.

We also support Tenants Victoria and Justice Connect's recommendations regarding the development of Model Rules. In this submission we recommend greater restrictions on evictions and a prescriptive approach to give substance to the concept of evictions as a genuine last resort.

While not perfect, public housing provides our communities with greater levels of transparency, fairness, tenant protections, and avenues for review than community housing. We urge the government to invest predominantly in public housing – or, at the least, to bring community housing policies and procedures up to the public housing standard.

The importance of housing to addressing the drivers of criminalisation and incarceration

There is a clear evidence-base that a lack of safe and stable housing is closely linked to criminalisation, incarceration and re-offending.³ Australian studies suggest that people in unstable accommodation after leaving prison were 3 times more likely to return to prison within 9 months of release. Similarly, a UK-based study found that nearly 80 per cent of people who

³ Matthew Willis (2018) *Supported Housing for Prisoners Returning to the Community: a review of the literature*, Australian Institute of Criminology for State of Victoria, Corrections Victoria, 11; Bethany Grows et al, 'A Systematic Review of Supported Accommodation Programs for People Released From Custody' (2018) 62(8) *International Journal of Offender Therapy and Comparative Criminology* 2174, 2175-6.

had been homelessness before their incarceration reoffended within 12 months of release, compared to less than half of those with stable housing at the time of their incarceration.⁴

This is hardly surprising. Stable and safe housing is the bedrock of physical and psychological safety, without which our society cannot expect people to address the underlying causes of their contact with the criminal justice system. According to a very recent AHURI study,

secure, affordable public housing is a steady 'hook for change' that a person exiting prison can hold onto as they make changes in their circumstances, and in themselves, to desist from offending. It is also a stable base from which to receive and engage with support services'.⁵

Our clients' experiences strongly support this assessment. For example, we know that addressing drug dependence – which features in so much criminalisation – often requires intensive counselling to heal complex trauma. It is unrealistic and unfair to expect someone to meaningfully engage in this kind of difficult and long-term psychological work while living in precarious accommodation, such as a rooming house. Similarly, we know that employment and financial security is important to breaking cycles of incarceration. It is unrealistic and unfair to expect someone sleeping on a friend's couch to find and keep a job.

Homelessness also makes it near impossible to comply with court and bail conditions, in particular police reporting requirements and keeping often mandatory appointments with corrections workers, parole officers or court-based case managers. This in turn leads to breaches of court orders, such as bail or community corrections orders, and sometimes reincarceration.

And yet our criminal legal system routinely requires this of people. People in prison are disproportionately likely to experience homelessness or housing instability when compared to the general population. About 25 per cent of people entering prison report being homeless in the four weeks prior. Consistent with the disruption caused by incarceration, about 50 per cent of people leaving prison expect to be homeless on release.⁶ These proportions are up from previous years – it is extremely concerning that the number of people exiting custody into homelessness in Victoria has increased by 148 per cent since 2011-12.⁷

The case study below highlights the inextricable links between family violence, housing instability and and criminalisation.

Case study: Layla

Layla became homeless in early 2020 in the context of family violence. Unable to access secure accommodation as the COVID-19 pandemic began, she couch-surfed for months in an area close to her children before identifying a nearby house where nobody had been residing. Layla and her partner moved into the premises, connecting utilities and taking care of the house for several

⁴ Matthew Willis (2018) *Supported Housing for Prisoners Returning to the Community: a review of the literature*, Australian Institute of Criminology for State of Victoria, Corrections Victoria, 7-8.

⁵ Chris Martin et al, (2021) *Exiting prison with complex support needs: the role of housing assistance*, AHURI Final Report No. 361, Australian Housing and Urban Research Institute Limited, Melbourne, 86.

⁶ Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (2019) online <<https://www.aihw.gov.au/reports/prisoners/health-australia-prisoners-2018/summary>> (accessed 29 September 2021).

⁷ Australian Institute of Health and Welfare, *Specialist Homelessness Services annual report 2018-19* (December 2019) online <<https://www.aihw.gov.au/reports/homelessness-services/shs-annual-report-18-19/data>> (accessed 22 September 2021).

weeks before police attended in numbers, arrested and charged her with trespass and related offences. The matter took more than a year to finalise. Only after Layla was able to leave the violent relationship and secure her own stable accommodation could she stabilise, and has not committed any further offences since. What Layla required was housing and support, not criminalisation.

Accessing social housing: discrimination on the basis of criminal histories

The primary means for people to access social housing in Victoria is through the Victorian Housing Register (VHR). The VHR is divided into two broad categories:

- Priority Access – generally speaking this is for people who are homeless and receiving support, escaping or who have escaped family violence, disabled or with significant support needs or who need to move for health reasons
- Register of Interest – for people who are seeking to live in social housing but who otherwise do not meet the Priority Access criteria.⁸

We understand that there is no publicly available information about who gets access to social housing and why. However, we have heard anecdotally that some community housing providers are less likely to make a property available for prospective tenants who are considered ‘too complex’ or ‘too risky’. In addition, while criminal histories do not form part of the social housing application process, we have heard examples of information about histories of criminalisation being unnecessarily disclosed to community housing providers for the purposes of ‘risk assessment’. This is at odds with the Victorian Government’s recent introduction of a Spent Convictions scheme, which limits the circumstances in which people are required to disclose their criminal histories.⁹

These practices, in the absence of publicly available information to the contrary, suggest that our clients are likely to face particular barriers to accessing housing because they have been criminalised, incarcerated or have stigmatised health conditions such as drug dependence. In a social housing landscape with such an acute scarcity of housing, and minimal oversight, there are no incentives for community housing providers to house people with histories of criminalisation, incarceration or drug dependence.

We share the concerns of our colleagues at Justice Connect and Tenants Victoria that community housing providers rely on rent for financial viability and that this creates a strong disincentive for community housing providers to rent to people on very low incomes or in extreme poverty.

Recommendation:

1. That the Victorian Government:

- **capture and publish information about VHR allocations made according to:**
 - **provider**
 - **whether the person or family allocated is a member of a priority group and if so, which group**

⁸ Housing Victoria, *Social housing eligibility*, online < <https://www.housing.vic.gov.au/social-housing-eligibility>> (accessed 27 September 2021).

⁹ For general information see, Department of Justice and Community Safety, Spent Convictions Scheme, online < <https://www.justice.vic.gov.au/spent-conviction-scheme>> (accessed 29 September 2021). See also *Spent Convictions Act 2021* (Vic).

- **income source**
- **ensure social housing allocation policies and processes do not allow for discrimination on the basis of criminal histories.**
- **mandate that social housing providers to house a mix of tenants so that people or families with complex needs, including histories of criminalisation and incarceration, are not disadvantaged in the allocation process.**

Staying in social housing: temporary absences during incarceration

There is currently a discrepancy between the entitlement of public housing tenants and community housing tenants to temporary absences. This has particular implications for people in community housing who are incarcerated. Public housing tenants are permitted to maintain their tenancies during a period of incarceration by paying rent, provided their absence is for less than 6 months.¹⁰ However, we understand that the same protections are not afforded community housing tenants, who are subject to the policies of the particular community housing provider. We have not been able to find publicly available information about the policies various community housing providers have regarding temporary absences. Anecdotally, we are aware that at least one community housing provider allows temporary absences for up to 3 months. This is at the discretion of the community housing provider, with no real protection for tenants.

This distinction could have implications for many people. We note that in 2019-20, 3,288 men leaving prison (27.8 per cent) and 464 women leaving prison (26.4 per cent) spent between 3 and 6 months in prison.¹¹ It is likely that a sizeable proportion of these people would have been in community housing, and therefore not able to maintain their social housing for the period of their incarceration.

Recommendation:

- 2. That community housing providers be required to institute temporary absence policies that are at least commensurate with current public housing policies allowing a temporary absence for up to 6 months**

Staying in social housing: alternatives to eviction

Evictions triggered by criminal charges or convictions

The *Residential Tenancies Act 1997* (Vic) (RTA) allows for landlords to evict tenants for using properties for an illegal purpose.¹² In addition to this entitlement, the Director of Housing can also evict public housing tenants for 'drug-related conduct in public housing', which includes trafficking, supplying, possessing items used to make drugs or allowing another person to do any of those things in a public housing property.¹³

In our experience, these provisions can be used in punitive ways that are in profound conflict with health-based approaches to drug use and dependence and harm minimisation principles.

¹⁰ Department of Health and Human Services, *Temporary Absence Operational Guidelines* (September 2018): <https://providers.dffh.vic.gov.au/tenancy-management-manual-temporary-absence-operational-guidelines-word>

¹¹ Corrections Victoria, Prisoner and offender statistics, *Annual Prisoner Statistical Profile 2009-10 to 2019-20*, online <https://www.corrections.vic.gov.au/prisons/prisoner-and-offender-statistics> table 3.9.

¹² *Residential Tenancies Act 1997* (Vic) (RTA) ss 59, 91ZQ.

¹³ RTA, s 91ZR.

This is particularly the case for public housing tenants, whose landlord explicitly takes a 'zero-tolerance approach' to use of a property for illegal purposes or drug-related conduct.

A recent example from our practice involves a client charged with trafficking as a result of conduct engaged in by her daughter. Both our client and her daughter were charged with drug-related offences, which prompted eviction proceedings against our client.

Case Study – Anne

Anne was a public housing tenant. Her daughter was suffering multiple chronic physical and mental health issues, including trauma and drug dependence. Anne was scared for her daughter and to keep her from homelessness asked her daughter to stay with her.

Anne became aware that her daughter was selling drugs to fund her drug dependence. Anne was in an incredibly difficult situation. As a parent, she could not kick her daughter out into homelessness where she would be at risk of violence and where her health issues would only get worse. She was urging her daughter to stop and get help.

Eventually her daughter was arrested for selling drugs. The Director of Housing then issued Anne with an eviction notice alleging that Catherine was selling drugs and that she also permitted her daughter to use the premises to sell drugs, despite there being no evidence that Catherine was involved in selling drugs.

Ultimately, Anne was not evicted at VCAT. Following significant legal advocacy by FLS, the member found it would not have been reasonable and proportionate, and instead made a compliance order prohibited Anne's daughter from going to the rented premises. The process of defending a possession order at VCAT was an incredibly stressful experience for Anne.

We understand that Catherine's situation is not isolated. A recent peer reviewed study of social housing legal responses to tenant 'misconduct' conducted by the Australian Housing and Urban Research Institute found:

- almost half of the cases it reviewed (44 out of 95) involved the tenant disclosing alcohol or drug use
- nearly 30 per cent of the cases it reviewed (28 out of 95) involved eviction for drug-related illegal use of the property.¹⁴

It is telling that of the 28 cases involved eviction proceedings for drug-related illegal use of the property, 16 (57 per cent) resulted in eviction. This is despite only two of the case resulting in imprisonment for the tenant charged with offences. Notably, neither of these cases resulted in eviction. In other words, everyone who was evicted had been sentenced to a community-based disposition for their charges. This led the study's authors to conclude that:

public housing landlords have adopted a particularly active and uncompromising attitude to drug offences, typically taking illegal use termination proceedings wherever charges are laid against an occupier...In particular, in cases where the criminal justice system had seen fit to deal with an offence

¹⁴ Chris Martin et al., *Social housing legal responses to crime and anti-social behaviour: impacts on vulnerable families*, Australian Housing and Urban Research Institute (Final Report No. 314, 2019) 60.

*through a suspended sentence, good behaviour bond or a community service order that allowed a person to remain in the community, the tenancy legal system ordered the household to leave their housing.*¹⁵

We are particularly concerned that the current regulation of social housing allows people to be evicted when they have been charged but not convicted and when they have received a community-based sentence. Research suggests that the majority of people who are evicted end up homeless.¹⁶ For most people, eviction is ‘catastrophic’ – it leads to isolation, disconnection from family, community and supports and can result in job loss.¹⁷ In this way, the social housing system can promote very punitive outcomes; arguably more punitive than the those meted out by the criminal legal system.

It is illogical and counterproductive to have a social housing system that can result in eviction when a criminal court has opted to punish someone by way of a community-based order. This is particularly true for drug-related offending. Victorian courts have recognised that:

- drug dependence is often the ‘product of a complex interplay of economic disadvantage, familial dysfunction, poor or missed educational opportunities, sexual or other forms of abuse, and other social or psychosocial issues’,¹⁸
- addressing drug-related health issues takes time and involves a non-linear trajectory in which most people will go through periods where they use drugs,¹⁹
- the effectiveness of rehabilitative and therapeutic approaches is diminished when punitive steps involving custody are taken.²⁰

In addition, it is a well-established sentencing principle in Victoria that when offending, including trafficking, is connected to drug dependence, this is a significant mitigation factor.²¹ Victoria Police’s Drug Strategy also reflects this approach, recommending its members diver, refer to treatment and intervene early for people supplying drugs to fund their own dependence.²²

The current ‘zero-tolerance’ approach to drug-related offences and the use of premises for illegal purposes is in stark contrast the prevailing approach taken by Victoria’s criminal legal system to offending driven by drug use and dependence. We are concerned that evictions in these cases risk imposing a double punishment on people who have already been dealt with by the criminal legal system. Moreover, the likelihood that eviction will result in homelessness further undermines peoples’ prospects of rehabilitation, given that homelessness is a key factor driving further criminalisation and offending. Eviction into homelessness also creates and exacerbates a swathe of problems for the person evicted, increasing their need for help and support, and ultimately places a more significant burden on the state.²³

¹⁵ Chris Martin et al., *Social housing legal responses to crime and anti-social behaviour: impacts on vulnerable families*, Australian Housing and Urban Research Institute (Final Report No. 314, 2019) 60.

¹⁶ Andrew Beer et al., *Evictions and housing management*, Australian Housing and Urban Research Institute (Final Report No 94, June 2006) vi.

¹⁷ Andrew Beer et al., *Evictions and housing management*, Australian Housing and Urban Research Institute (Final Report No 94, June 2006) 23, 30, 41–42.

¹⁸ *Makrogiannis v Magistrates' Court of Victoria & Anor* [2021] VSC 190 (22 April 2021) [6].

¹⁹ *Ibid*, [20]

²⁰ *Ibid*, [101].

²¹ See for example, *R v Lacey* [2007] VSCA 196; *R v Bernath* [1997] 1 VR 271.

²² Victoria Police, *Prevent, Disrupt, Connect, Care: Drug Strategy 2020 – 2025* (2020) 13.

²³ Andrew Beer et al., *Evictions and housing management*, Australian Housing and Urban Research Institute (Final Report No 94, June 2006) 42–44.

Everyone, including people in community and public housing, has a right to feel safe in their own home. However, we consider that current legislative and regulatory settings do not strike an appropriate balance between this objective and the goal of supporting people to remain housed and address the drivers of their offending and criminalisation. In the absence of some compelling reason related to the immediate safety of other residents, we recommend the current ‘zero tolerance’ approach be abandoned and, where the conduct in question relates to drug use or dependence, a harm minimisation approach be taken instead. At a minimum, it should not be possible for landlords to evict people:

- before they have been convicted of an offence, and
- for offending that does not attract a term of six months or more of actual imprisonment.

In addition, alternatives to eviction should be pursued. These are discussed in more detail below.

Recommendation:

3. That, in the absence of a demonstrable and immediate threat to the safety of other people, social housing providers be:

- **required to adopt a harm minimisation approach to drug-related offending**
- **prohibited from evicting tenants for illegal purposes if the person has not yet been convicted or sentenced to a term of actual imprisonment of more than 6 months.**

Evictions triggered by other tenant conduct

The RTA allows landlords to evict people for a range of reasons in addition to drug-related conduct and using a property for illegal purposes. Some of these reasons include:

- a renter has repeatedly breached their obligations as tenants by, in particular:
 - ‘causing a nuisance or interference with the peace, comfort or privacy of neighbours’
 - keeping the property clean and not damaging the property.²⁴
- a renter or their visitor causing serious damage to property.²⁵
- the renter or their visitor(s) put people the rental provider or their agent or employees in danger.²⁶
- the renter or anyone else living at the property threatens or intimates the rental provider or their agent or employees in danger.²⁷

Many of our clients experience psycho-social disabilities related to mental health problems, histories of trauma and drug dependence, and will engage in conduct that could be considered a nuisance or cause damage to the property, or conduct for which neighbours will contact the police. In our experience, the consequences for our clients— and in particular whether eviction proceedings are commenced—often depends on a combination of the relationship that a renter has with their landlord and the availability of independent advocacy and support to sustain the tenancy.

For example, we have heard from colleagues in the housing support sector of neighbours calling the police on young people in community housing, and this leading to breach notices being issued and the risk of eviction proceedings. This is a particular risk for Aboriginal people

²⁴ RTA, ss59–60, 63.

²⁵ RTA, s91ZI.

²⁶ RTA, s. 91ZJ.

²⁷ RTA, s. 91ZK.

and people from other racialised and over-policed communities who are disproportionately the subjects of police attention.

A colleague we spoke to in the housing support sector noted that it can sometimes feel like people working for community housing providers are not well-equipped to respond to the complex needs of some community housing tenants. We have also acted for multiple clients who have struggled to maintain positive and working relationships with their landlord's employees, and that this has had the effect of jeopardising the tenancy. The case study set out below highlights how current regulation allows landlords to commence eviction proceedings when the more appropriate outcome requires support and a problem-solving approach to the conduct in question.

Case study: Andrew

Andrew is in his mid-40s and living in community housing. He grew up in an abusive environment and now experiences a number of significant health and mental health problems. He has also navigated long periods of homelessness.

Andrew's community housing provider commenced eviction proceedings against him after he damaged a common area at his rental property. This happened because Andrew lost his key at the start of a long weekend. He was told by his community housing provider that he would have to wait days to get his key replaced. In effect, this left Andrew confined to his room for several days, which was traumatic and difficult for him, particularly in light of his acute mental health problems. It also meant he was unable to see people, buy groceries or get his medication.

Despite numerous attempts by Andrew's housing worker to negotiate a solution that avoided eviction, including offering compensation to the community housing provider, they proceeded with the eviction proceedings.

Following considerable legal advocacy, VCAT ultimately found that it would not be reasonable and proportionate to evict Andrew. Although he was not evicted in the end, the proceedings were incredibly stressful and highlight the importance of social housing regulation requiring landlords to genuinely consider alternatives to eviction in all cases and independent legal representation to ensure people's rights as tenants are protected.

A recent study of legal responses to misconduct by social housing providers makes the following highly relevant observations:

where problematic behaviour continues, the usual course of action—a combination of escalating threats to the tenancy and pushing the tenant to 'engage' with the landlord and support services—does not work for many. Escalating threats often drive 'engagement' that is last-minute and short-lived, and sometimes so unsatisfactory that it can drive an escalation in threats. In many cases, social housing landlords' legal responses frustrate other more ameliorative and preventative ways of addressing misconduct and related support needs, and result in the eviction and homelessness of vulnerable persons and families.²⁸

²⁸ Chris Martin et al., *Social housing legal responses to crime and anti-social behaviour: impacts on vulnerable families*, Australian Housing and Urban Research Institute (Final Report No. 314, 2019) 2.

Alternatives to eviction

In this submission we have outlined the ways in which people who are criminalised, incarcerated and/or marginalised on account of their drug use and dependence are more vulnerable to eviction.

Generally speaking, FLS believes no one should be evicted into homelessness. Ideally, we would have a social housing sector that could accommodate the complex needs of our clients without having to balance one person's eviction into homelessness against another person's safety. However, given the current scarcity of social housing the unacceptable yet unavoidable reality is that there will be occasions in which there will be no viable options other than eviction. We consider this is particularly likely to be the case in circumstances where there is a very real threat to the safety of others.

To ensure evictions are a genuine last resort and confined to the narrowest set of circumstances, we consider a prescriptive approach is necessary that:

- limits evictions to circumstances in which there is a genuine and immediate threat to safety of others, and
- requires social housing landlords to pursue a range of options to sustain a tenancy, before commencing eviction proceedings.

We consider that a prescriptive approach is necessary to give substance to the concept of 'last resort'. There are a number of examples of the legal concept of 'last resort' losing meaning. In particular, it is a longstanding principle in Australian and international law that children must only ever be detained as a last resort. Despite this, the Australian Human Rights Commission has found that in the context of non-citizen children, 'in practice the detention of children is the first action of the Australian Government'.²⁹ Similarly, in the youth justice context, a recent report by the Sentencing Advisory Council found that the number of children held on remand in Victoria's youth justice system more than doubled between 2010 and 2019.³⁰

There are a range of options available to sustain a tenancy and avoid eviction. The most appropriate options will depend on the particular circumstances and the tenants needs. For example, where the tenancy is in jeopardy due to drug use, there should be a mechanism to connect the tenant with drug treatment and support. Similarly, if the basis of the proposed eviction is conflict with neighbours, alternative dispute resolution options could be explored. The Neighbourhood Justice Centre operates a Peacemaking-conflict resolution service, which has been considered in some tenancy disputes. In addition, transferring tenants to different accommodation, or a new housing worker if that relationship is not constructive, should always be considered before eviction.

There is strong evidence that early intervention and support being provided by a service or person independent from the landlord is important in avoiding evictions.³¹ Given the catastrophic consequences of evictions it is vital that social housing providers explore all options short of evictions, with the tenant supported by an independent housing support worker and/or legal representation. At a minimum social housing providers should be obliged

²⁹ <https://humanrights.gov.au/our-work/5-what-does-law-say-about-detaining-children>.

³⁰ Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes* (September 2020) ix.

³¹ Chris Martin et al., *Social housing legal responses to crime and anti-social behaviour: impacts on vulnerable families*, Australian Housing and Urban Research Institute (Final Report No. 314, 2019) 4.

to refer tenants to independent housing support workers and consider, and where appropriate pursue, the following steps before commencing eviction proceedings:

- communicate with the tenant
- identify and assess the appropriateness of all options short of eviction, including referring to support services or alternative dispute resolution
- ensure the tenant has access to an independent housing support worker to help sustain the tenancy
- transfer the tenant to an alternative housing worker, if that relationship is affecting the viability of the tenancy
- where possible transfer the tenant to another property if that could help sustain the tenancy.

We note evidence from Scotland that a ‘pre-eviction checklist’ reduced evictions from social housing by about one-third.³² Regulations could establish that these prescribed steps are relevant to whether making a possession order is reasonable and proportionate in accordance with the RTA.³³ It is also relevant to whether a social housing provider has acted in a manner consistent with the Charter. In the future, Charter compliance could encompass the proposed right to housing recommended by the recent Parliamentary Inquiry into Homelessness in Victoria.

Genuinely promoting alternatives to eviction also requires better resourcing of legal and social support services that are independent of housing providers and skilled at sustaining tenancies.³⁴ We note that when independent support and advocacy is available to tenants, for example through community legal centres integrated with support services, this significantly increases the likelihood that tenancies will be sustained. For example, Justice Connect delivers integrated legal and social support through its:

- Closing the Revolving Door project, which between 2018-2019 helped 29 people – a significant portion of its clients – avoid eviction into homelessness after their release from prison.³⁵
- Women’s Homelessness Prevention project, which in its first two years supported 62 women experiencing family violence to avoid evictions.³⁶

Recommendation:

4. That any Model Rules provide a prescriptive approach to evictions that:

- **ensures evictions are a genuine last resort by limiting evictions to circumstances in which there is a genuine and immediate threat to safety of others, and**
- **requires social housing providers to refer tenants to independent housing support workers and take the following steps before commencing eviction proceedings:**
 - **communicate with the tenant**

³² Lucy Adams, Keeping women and children housed: Women’s Homelessness Prevention Project (Justice Connect, 2017) 9 citing Shelter, *Research Report: Evictions by Social Landlords in Scotland 2009–10* (December 2010)

³³ RTA, s 330A.

³⁴ Andrew Beer et al, *Evictions and housing management* (AHURI Final Report No 94, June 2006) 46

³⁵ Justice Connect, *Closing the revolving Door: 12 months of stopping the cycle between imprisonment and homelessness* (January 2020).

³⁶ Lucy Adams, Keeping women and children housed: Women’s Homelessness Prevention Project (Justice Connect, 2017) 7.

- *identify and assess the appropriateness of all options short of eviction, including referring to support services or alternative dispute resolution*
- *ensure the tenant has access to an independent housing support worker to help sustain the tenancy*
- *transfer the tenant to an alternative housing worker, if that relationship is affecting the viability of the tenancy*
- *where possible transfer the tenant to another property if that could help sustain the tenancy.*

5. That the implementation of the Model Rules be supported by adequate resourcing of independent social housing support services, including free legal assistance services.